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INDIAN CASES

[CONTAINING
FULL REPORTS OF DECISIONS

OF
The Privy Council, the High Courts of Allahabad,
Bombay, Calcutta, Madras and Patna, the Chief
Courts of Lower Burma and the Punjab,
the Courts of the Judicial Commissioners of
Central Provinces, Oudh,
Sind and Upper Burma

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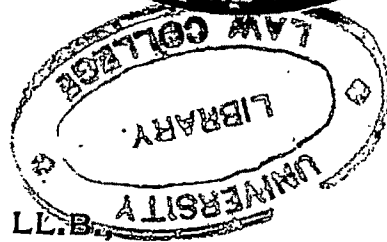
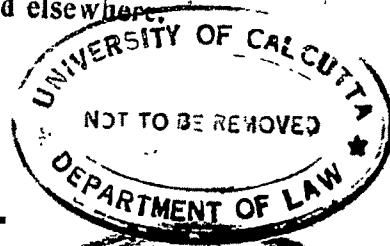
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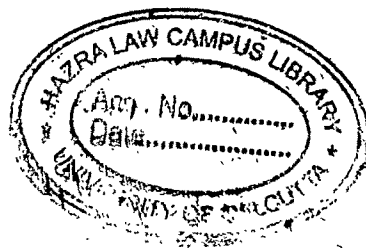
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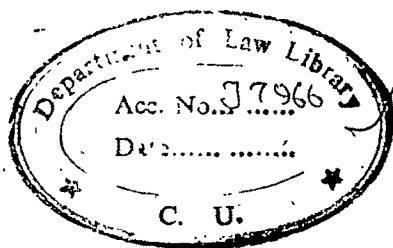
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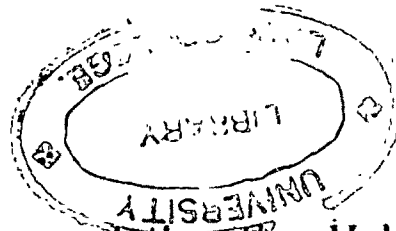


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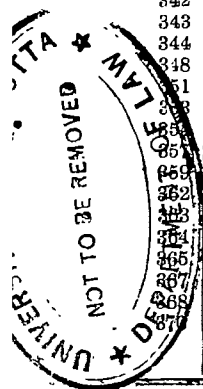
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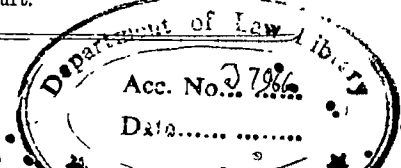
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PRIVY COUNCIL.

APPEAL FROM PUNJAB CHIEF COURT.

July 5, 1918.

Present:—Lord Atkinson, Lord Phillimore and
Sir John Edge.

Lala BALLA MAL AND ANOTHER—

PLAINTIFFS—APPELLANTS

versus

AHAD SHAH AND ANOTHER—DEFENDANTS—

RESPONDENTS.

Contract Act (IX of 1872), s. 16—Undue influence—Unconscionable bargain—Expectant heir, bargain with, validity of—English equitable rules, applicability of, to India—interest, compounding of, whether oppressive—Interpretation of Statutes—Illustrations to Statutes, value of.

Questions as to undue influence, unconscionable bargains and dealings with expectant heirs must be decided on the provisions of the Indian Contract Act, 1872, as amended by the Indian Contract Amendment Act, 1899, and these alone. The principles on which English Courts of Equity deal with similar questions are entirely inapplicable to India [p. 2, col. 2.]

Dhanipal Das v. Maneshar Bakhsh Singh, 33 L. A. 118 at p. 127; 4 C. L. J. 1; 1 M. L. T. 205; 3 A. L. J. 495; 9 O. C. 188; 8 Bom. L. R. 491; 10 C. W. N. 849; 16 M. L. J. 292; 28 A. 570 (P. C.) and *Sundar Koer v. Rai Sham Krishen*, 34 L. A. 9 at p. 16; 17 M. L. J. 43; 11 C. W. N. 249; 9 Bom. L. R. 804; 2 M. L. T. 75; 34 C. 150; 4 A. L. J. 109; 5 C. L. J. 106 (P. C.), followed.

In money-lending transactions the mere fact that the sum ultimately claimed exceeds enormously the amount originally advanced is no ground for holding the transaction to be unconscionable. It must also appear that there is something unconscionable, either in the original dealings or in the subsequent stages of the transaction. [p. 3, col. 2.]

By making short term loans and insisting on capitalising the interest immediately it falls due, a money-lender may pile up compound interest at an oppressive and unconscionable rate. But there is nothing inherently wrong or oppressive in his securing interest upon interest after the interest has been due and unpaid for a considerable time. [p. 3, col. 2.]

The Indian Contract Act throws upon the person dealing with an expectant heir and in a position to

dominate the latter's will the burden of showing that he has not used his position to obtain an unfair advantage [p. 7, col. 1.]

The illustrations to an Indian Statute are to be taken as part of the Statute. [p. 3, col. 1.]

Appeal from a decree of the Chief Court of the Punjab, dated the 13th January 1914, varying a decree of the District Judge, Amritsar, dated the 31st July 1911.

FACTS appear from the judgment.

The question in this appeal was whether certain loan transactions between plaintiffs and defendant were unconscionable bargains within the meaning of section 16 of the Indian Contract Act. The trial Judge held they were not, and decreed plaintiffs' claim in full: the Chief Court (Reid, C. J., and Kensington, J.) considered they were, and modified the decree by allowing plaintiffs only the original principal and eighteen per cent. simple interest. Plaintiffs appealed.

Mr. DeGruyther, K. O. (with him Colonel Arthur Grey), for the Appellants.—The doctrines of the English Courts of Equity are not to be considered: Section 16 of the Contract Act must be construed by itself. *Dhanipal Das v. Maneshar Bakhsh Singh* (1), *Sundar Koer v. Rai-Sham Krishen* (2).

The circumstances under which the section applies may be summed up as fraud or coercion: there is no proof of either here.

The lower Courts have treated defendant as an expectant heir: he was only so in the sense in which every Muhammadan is an expectant heir, and when these transactions commenced he had no substantial

(1) 33 L. A. 118 at p. 127; 4 C. L. J. 1; 1 M. L. T. 205; 3 A. L. J. 495; 9 O. C. 188; 8 Bom. L. R. 491; 10 C. W. N. 849; 16 M. L. J. 292; 28 A. 570 (P. C.).

(2) 34 L. A. 9 at p. 16; 17 M. L. J. 43; 11 C. W. N. 249; 9 Bom. L. R. 804; 2 M. L. T. 75; 34 C. 150; 4 A. L. J. 109; 5 C. L. J. 106 (P. C.).

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expectations. To get relief defendant must show that there was undue influence in the period 1872—1897 over which the transactions of purchases and borrowing extended. There was nothing harsh or unconscionable either in the original bargains or in any of the renewals, and one at least of these two things must be shown. The renewals were renewals at the old rates and at long periods.

[Reference was made to *Nevill v. Snelling* (3), *Beynon v. Cook* (4).]

Respondents did not appear.

JUDGMENT.

LORD ATKINSON.—This is an appeal from a judgment and decree of the Chief Court of the Panjab, dated the 13th January 1914, varying a decree of the District Judge of Amritsar, dated the 31st July 1911, and decreeing in part the claim of the present appellants.

The plaintiff Balla Mal is the father of the plaintiff Ibharr Das. They carry on the business of sellers of gold lace in the city of Amritsar, and are in addition money lenders. They are members of a joint Hindu family.

The deceased defendant was a Muham-madan. He was born in the year 1863, and was, therefore, in the year 1892, 29 years of age. At the latter date he had been employed for six years as permanent copying clerk in the office of the Divisional Judge of Amritsar at a salary of Rs. 40 per mensem. The defendant's father was head man of the Kunjar or prostitute caste.

The action out of which this appeal arises was brought by the plaintiffs upon certain promissory notes admittedly drawn up and executed by the deceased defendant to recover the sum of Rs. 61,800 alleged to be due for principal, and Rs. 40,489 3-0 alleged to be due for interest at the rate of Rs. 30 per cent. per annum, according to the tenor of these notes. The plaint, which was filed on the 25th April 1909, set forth the particulars of the several notes sued upon, which it is not disputed were respectively presented to the deceased defendant at maturity and payment demanded without effect.

(3) (1860) 15 Ch. D. 679; 49 L. J. Ch. 777; 43 L. T. 244; 29 W. R. 375.

(4) (1875) 10 Ch. 389; 32 L. T. 353; 23 W. R. 531.

The deceased defendant on the 15th May 1909 filed a written statement admitting the execution of the several promissory notes sued upon, but alleging—

1. That he did not receive any consideration for the making of them;

2. That the notes sued upon and all promissory notes and acknowledgment made or given by him leading up to the making of the former were procured from him by the exercise by the plaintiffs of undue influence upon him; and

3. That the whole transaction of which the promissory notes sued upon were the outcome was an unconscionable bargain made with him as an expectant heir, and, therefore, liable to cancellation.

It has been decided by this Board in two cases, namely, *Dhanipal Das v. Maneshwar Bakhsh Singh* (1) and *Sundar Koer v. Rai Sham Krishen* (2), that questions such as those raised by this written statement must be decided on the provisions of the Indian Contract Act of 1872, as amended by the Indian Contract Amendment Act of 1899, and on those alone. The principles upon which English Courts of Equity deal with similar questions are, therefore, entirely inapplicable.

The 16th section of the Contract Act of 1872, as amended by the later Act, runs as follows:—

"1. A contract is said to be induced by undue influence where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.

"2. In particular and without prejudice to the generality of the foregoing principle, a person is deemed to be in a position to dominate the will of another:—

"(a) Where he holds a real or apparent authority over the other, or where he stands in a fiduciary relation to the other; or

"(b) Where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress.

"3. Where a person who is in a position to dominate the will of another

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enters into a contract with him, and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other."

Four illustrations are given. These are to be taken as part of the Statute. Two of them, namely, (c) and (d), appear to be applicable to the present case, (c) provides if "A, being in debt to B, the money-lender of his village, contracts a fresh loan on terms which appear to be unconscionable. It lies on B to prove that the contract was not induced by undue influence." (d) Provides that if "A applies to a banker for a loan at a time when there is stringency in the money market. The banker declines to make the loan except at...high rate of interest, A accepts the loan on these terms. This is a transaction in the ordinary course of business, and the contract is not induced by undue influence." Now both Courts have held that the averment in the plaint that the deceased defendant did not receive any consideration for the making of the notes sued on was untrue, and that consideration in fact amounting to the sum of Rs. 4,471-5-9 was received by him for the making of them. The deceased defendant himself deposed that about Rs. 3,000 of this sum represented money actually advanced to him by the plaintiffs.

The balance was proved to be the price of goods, such as gold lace, by the plaintiffs actually sold to him, or of clothing by them actually procured for him.

The District Judge, in delivering his judgment, most truly remarked that one "cannot avoid being struck by the fact that an original principal of Rs. 4,471-5-9 had expanded to a principal sum of no less than Rs. 61,800 . . . and that such a result certainly impressed one at first sight as distinctly harsh and unconscionable." "But" (he continues) "I doubt whether—

"on examination it can be held really to be so, for what we have to look at, primarily at any rate, are the circumstances existing at the time of the original dealings, and not the ultimate result of these dealings, unless

the intermediate stages whereby that ultimate result has been arrived at have themselves been harsh or unconscionable. In other words, the mere fact that the principal sum now claimed exceeds enormously the amount originally advanced will be no ground for holding the transaction unconscionable. It must also appear that there was something unconscionable either in the original dealings or in the subsequent stages of the transaction."—See *Ganga Baksh v. Jagat Bahadur Singh* (5), and he then proceeds to examine the original dealings between the parties.

The learned Judge has, in their Lordships' view, in this passage laid down the true principle upon which this extreme augmentation of the deceased defendant's indebtedness should be regarded and dealt with. It is not enough—indeed, it is misleading—to look at the result alone.

This is, in their Lordships' view, the error into which the Chief Court have, to some degree apparently, fallen. A borrower who obtains a loan secured by a promissory note on quite reasonable terms, by neglecting to pay the note at maturity, further neglecting to pay the accruing interest for the several years following, and then giving a renewal note for the original debt *plus* the capitalised interest, could produce a result which might at first sight appear oppressive, and yet there would be nothing harsh or unconscionable in the creditor's demand, since the added interest only accumulated while he forebore to enforce the payment of the sums from time to time due to him.

On the other hand, it would be quite possible for a money-lender, by making loans for short periods on apparently fair terms, and then insisting on capitalising the interest immediately on its becoming payable, to pile up compound interest on the initial debt at such a rate as would make the result after a few years most oppressive and unconscionable. But there is nothing inherently wrong or oppressive in a lender's securing for himself compound interest after the borrower has for a considerable time neglected to pay the debt he owes or the interest accruing due

(5) 23 C. 15; 22 L. A. 153; 6 Sar. P. C. J. 643; 12 Ind. Dec. (N. S.) 10 (P. C.).

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upon it which he has contracted to pay. The borrower cannot acquire merit simply by breaking his contract. Bankers are, in fact, in this country in the habit, in the ordinary course of their business, of capitalising the interest accruing on overdrawn current accounts every six months, as long as a debit balance against the customer remains due. [*Yarell v. Hibernian Bank, Limited* (6)].

The District Judge examined exhaustively and with the greatest care all the dealings which took place between the plaintiffs and the deceased defendant from their initiation in the year 1892 down to the making of the notes sued upon, tracing backwards from the latter to their first beginnings. And at the end of his judgment will be found under his hand a genealogical tree, as it were, of these several groups of *hundis*. The Chief Court did not suggest that there was any inaccuracy in the dates and figures so set out. It differed merely as to the conclusions to be drawn from them. The first transaction between the parties took place on the 18th November 1892. On that day the deceased defendant purchased on credit in the shop of Balla Mal, from the Munib in charge, lace at the price of Rs. 252-10-9. The details of this purchase have been entered in the plaintiffs' books by the deceased defendant, and by the latter signed. On the 29th of the same month he purchased from the plaintiffs goods of various character at the price of Rs. 627-15-0, which together with the earlier purchase brought his indebtedness to the plaintiffs up to the sum of Rs. 880-9-9.

As on the previous occasion the particulars of this transaction were entered by the purchaser in the appellants' books and the entries duly signed by him. From the 3rd to the 27th December 1892 the deceased defendant purchased in the like manner from the plaintiffs clothes and other articles, raising his indebtedness to them to the sum of Rs. 1,653-14-3. This account is signed by him on the 28th January 1893. No interest whatever appears up to this to have been charged upon it. On the 30th January, two days after the correctness

of the account was thus acknowledged, two bonds were executed by the deceased defendant in favour of Lala Balla Mal. The first for a sum of Rs. 1,753-14-5, stated to be due under a *bahi* account entered in the deceased's handwriting on leaves Nos. 215 to 281, commencing from the 18th November 1892 to the 28th January 1893, the deceased agreeing to pay this sum on the 1st August following with interest at the rate of Rs. 2 per cent. (per mensem presumably), and in default of payment on that date interest to be charged at Rs. 2-8-0 per mensem, i.e., Rs. 30 per cent. per annum.

The second bond contained a recital that the obligor had received from Lala Balla Mal Rs. 450 in cash and also a clause agreeing to pay this money with interest at the rate of Rs. 2-8-0 per cent. (per mensem presumably) on the 1st September then following. The bond then sets forth the fact that he had on that day executed another bond for Rs. 1,753-14-3, and provides that on the deceased's default in paying both bonds the creditor was authorised to recover in any way he liked the entire money due with interest from the obligor's personal property. In the plaintiffs' books, under date the 30th January 1892, appear two entries signed by deceased defendant setting forth accurately these two transactions.

There is not a particle of evidence in the case to show that the plaintiffs ever made any threat to or put any pressure upon the deceased defendant to induce him to execute these securities or either of them.

The deceased defendant himself never so stated, and Balla Mal, who was examined as a witness on his opponent's behalf, stated that he never made any complaint to the father of Nasir-ud-Din; that the latter was in debt to him and had omitted to pay; that he, the witness, looked upon Nasir-ud-Din as an honourable man; that the things the latter bought in his shops were for Nasir-ud-Din's family purposes, as was also the cash he borrowed; that he, the witness, never practised any fraud or undue influence upon the deceased defendant; that every time the latter executed a *hundi* he was in the habit of going through the accounts carefully; that all

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the *hundis* were in the deceased's own handwriting; and that whenever a *hundi* was renewed Nasir-ud-Din used to note on the back of the old one the fact of renewal, etc. The deceased defendant relied much in this action on his own dissolute and licentious habits, which were probably exaggerated to suit the case; but if this evidence of the plaintiff be true, and it is practically uncontradicted, he was one of the most careful, accurate, and business-like drunkards and debauchees that could be well imagined. The principal plaintiff frankly admitted that he refrained from pressing the deceased defendant for payment of the *hundis* given him from time to time by the latter in order that his interest might accumulate. If the deceased was solvent, or nearly solvent, and the payment of his debt was at all secure, it was a good investment of the plaintiffs' capital. There does not to their Lordships appear to have been anything rapacious or exacting in the plaintiff's procuring the execution of these bonds on the 30th January 1893 to secure the repayment of his shop debt and the sum of Rs. 450 money advanced, unless it is to be found in the rate of interest charged, Rs. 30 per cent. per annum, Rs. $2\frac{1}{2}$ per mensem. Well, the interest allowed by the Chief Court in the decree is Rs. 18 per cent. per annum, Rs. $1\frac{1}{2}$ per mensem. It only exceeds that rate by Rs. 1 per mensem; Rs. 2 per mensem is by no means an unusual rate of interest in cases from India coming before this Board. And their Lordships think that Mr. DeGruyther was fully justified in contending that if a suit had been brought immediately or some months after the 30th January 1893 to have these bonds of that date set aside on any of the grounds mentioned in the above-mentioned written statement it would have failed.

Now, as appears from the table at the end of the judgment of the District Judge and from the documents in the case, neither the principal nor interest secured by these bonds was ever paid; but on the 23rd May 1896, two years and nine months after the day by it named for payment, the 1st August 1893, the arrears of interest then due were capitalised, and a new bond as of that date for the sum of Rs. 362-9-2, bear-

ing interest at the same rate, was executed by the deceased.

Similarly nothing was paid on foot of either the principal or interest secured by the second bond of the 30th January 1893 till the 31st July 1896. Two years and ten months after the day named for payment the interest then due, amounting to Rs. 472-8-0, was capitalised, added to the principal, and a new bond executed by Nasir-ud-Din to the principal debt, Rs. 450 and interest, making together Rs. 922-8-0, bearing interest at the same rate, Rs. 2-8-0 per cent. per mensem. This affords a fair illustration of the manner in which interest was capitalised and the debt augmented. The District Judge has found that taking the various groups of *hundis* as he has grouped them, that after the initial *hundi* for Rs. 1,000, dated the 24th January 1897, due on a book account then, first renewal was not given till the 3rd May 1900, three and a quarter years, and the second renewal now in suit was not given till the 7th October 1904, nearly four and a half years after its predecessor became due, when no doubt the overdue interest was capitalised.

The correctness of the table framed by the District Judge cannot be questioned. The documents in the case establish its correctness. It clearly shows that, so far from *hundis* being renewed with undue frequency, they were frequently allowed to remain overdue for periods of from two and a half to four and a half years, before a renewal was taken and the overdue interest capitalised. In some instances the period of limitation of suits on *hundis* was allowed to run out before any renewal was given, the debtor being thus in a position, if disposed, to refuse to renew. The District Judge having regard to these facts found that the numerous transactions, which took place between the plaintiff and the deceased defendant, including the making of the notes sued on, were not on the face of them unconscionable contracts within the meaning of section 16, sub-section (3), of the Indian Contract Act of 1872 as amended. Their Lordships concur with the learned District Judge in that conclusion. In their opinion neither the rate of interest reserved, Rs. 30 per cent. per annum, nor the capitalisation of overdue interest at intervals so lengthy

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as those proved by the dates of the securities themselves, nor the two combined, are sufficient to lead to a contrary conclusion.

They also concur with the learned District Judge in the second conclusion at which he has arrived, namely, that the evidence does not establish that these contracts were of an unconscionable character. The deceased defendant was undoubtedly a spendthrift of depraved and licentious habits. He undoubtedly became heavily indebted to several creditors during the years covered by the transactions dealt with in this appeal. It was legitimate to prove these facts in order to establish that he was a person of weak and debauched character, unable to resist the pressure of creditors if applied, or to resist the temptation to borrow money recklessly to gratify his lusts; but it was wholly illegitimate to give any evidence as to the terms on which he succeeded in compromising with creditors other than the plaintiffs. From what appears, it may well have been that these other creditors were rather tricked into making easy settlements by their belief in the representations made that the father of the deceased was either a less wealthy man than, in fact, he was, or that he had disposed of his property, as he was entitled to do, by gift *inter vivos*. The plaintiff, Balla Mal, heard that the defendant's father had done this, but he considered that it was a mere fictitious thing, done to defraud creditors, and paid no attention to it.

It has already been pointed out that there is no evidence, whatever that the plaintiffs ever sought, by threat or otherwise, to induce or coerce the deceased defendant to give them any of the securities which he actually gave. Nor is there any satisfactory proof that, though the deceased defendant may have been extravagant and have spent more than he should have done, he was in necessitous circumstances when he commenced dealing with the plaintiff Balla Mal, or that he was in pecuniary distress in consequence of the importunities or pressure of creditors, or that it was to meet the claims of such creditors he borrowed money or bought goods on credit from the plaintiff. On the contrary, it would rather appear from the deceased defendant's own evidence that he borrowed this money from, and incurred these debts to, the

plaintiff in order to procure the means of feeding his own vices.

The learned District Judge accordingly held that, even on the assumption that the plaintiff Balla Mal was in a position to dominate the will of the deceased defendant, he did not, to use the words of section 16 of the Contract Act as amended, use that position to obtain an unfair advantage over the deceased by extorting from him unconscionable bargains or otherwise, and that the deceased defendant had utterly failed to prove, as he was bound to do, that the plaintiff Balla Mal had in fact exercised undue influence upon him in any of the transactions out of which his liability for the debt sued for ultimately resulted.

Their Lordships concur with the learned District Judge as to all these conclusions, and, therefore, it is for the purpose of this appeal unnecessary for them to determine whether the plaintiff Balla Mal in fact occupied a position to dominate the will of the deceased defendant at all within the meaning of the Statute. The District Judge did not hold that the plaintiff had acquired that position by reason of his being the latter's creditor to a large amount, holding various negotiable securities given by the defendant which almost at any time he might have put in suit. On the contrary, the learned Judge expressly held that there was nothing to suggest that the plaintiff Balla Mal and the deceased defendant as to all the aforesaid transactions did not in this regard contract with one another on perfectly equal terms, in which latter conclusion their Lordships concur. But the learned Judge went on to decide—

1. That the deceased defendant was in the position of an expectant heir within the meaning of the decision in *Earl of Chesterfield v. Janssen* (7) and the authorities following it;
2. That the said plaintiff dealt with him on the strength of that expectancy;
3. That a person so doing would be in a position to dominate the will of the expectant heir within the meaning of section 16, sub-section 1, of the Indian Contract Act of 1872 as amended; and

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4. As their Lordships understand his judgment, that the burden is by this Statute thrown upon the person occupying this position to show that he has not used it to obtain an unfair advantage over the expectant heir with whom he so deals.

The Chief Court concur with the learned District Judge on each of these points. Where they differ from him is apparently in this: that while he holds that the plaintiff Balla Mal has discharged this burden, else he should have pronounced a decree against the plaintiff's claim instead of in its favour as he has done, the Chief Court hold that Balla Mal has failed to discharge the burden. That Court, however, appears to base its decision mainly, if not entirely, on the high rate of the interest received by the notes, Rs. 30 per cent, coupled with the great augmentation of the deceased defendant's debt due to the capitalisation of interest. For the reasons already given, their Lordships disagree with the conclusion of the Chief Court on this latter point and concur with the District Judge. So that whether their Lordships concur with the District Judge on these points (1), (2) and (3) or not, since they concur with him upon point (4), the result of the appeal would be the same.

On the whole, therefore, their Lordships are of opinion, for the reasons already given, that the judgment appealed from was erroneous and should be reversed, that the judgment of the Judge of the District Court was right and should be restored, and that this appeal should be allowed, and they will humbly advise His Majesty accordingly. The respondents must pay the costs of the appellants in the Chief Court, and the costs of this appeal.

Solicitors for the Appellants.—Messrs. Lewis & Uglesius.

Appeal allowed.

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL No. 20 OF 1916.

January 28, 1918.

Present:—Justice Sir William Ayling, Kt.,
and Mr. Justice Seshagiri Aiyar.

As CUNNIAH MUDALI—PLAINTIFF

—APPELLANT

versus

A. RANGASWAMI MUDALI AND OTHERS

—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1909), s. 97—Preliminary decree, appeal against—Decree reversed or modified—Final decree passed before result of appeal, effect of.

If a preliminary decree passed under section 97 of the Civil Procedure Code is reversed or substantially modified in appeal, the final decree passed on the footing of that preliminary decree before the decision in appeal ceases to be operative. [p. 8, cols. 1 & 2.]

Appeal from the judgment and revised decree of Mr. Justice Bakewell, dated the 22nd December 1915, in the exercise of the Ordinary Original Civil Jurisdiction of the High Court, in Civil Suit No. 144 of 1907.

Messrs C. P. Ramaswami Aiyar and A. Duraisami Aiyar, for the Appellant.

Mr. O. Padmanabha Aiyangir, for the Respondents.

JUDGMENT.—This is a suit for partition. The plaintiff and the 1st defendant are the sons of one Cunniah Mudali and the 2nd and 3rd defendants are the sons of the 1st defendant. When the suit first came on for hearing, the learned Judge referred the question regarding the extent of the family property to a Commissioner. The Commissioner sent in his report in April. Mr. Justice Wallis, as he then was, differed from the Commissioner on one point, namely, that the Royapettah garden which was held to belong to the wife of the 1st defendant by the Commissioner was family property. The learned Judge passed a preliminary decree to the effect that the Royapettah garden should go to the plaintiff on his paying Rs. 600 to defendants Nos. 1 to 3 and that items Nos. 1 to 3 should go to the 1st to 3rd defendants, who were ordered to pay to the plaintiff a sum of Rs 3,800 and odd within a month. There was a further direction that if the said sum of Rs. 3,800 and odd was not paid in a month, the plaintiff was to become absolute owner of items Nos. 1

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3. There was an appeal against this preliminary decree, which was not decided until two years after. In the meantime a final decree in pursuance of the preliminary decree was passed. As the defendants Nos. 1 to 3 did not pay the money within the time stipulated, the plaintiff was put in possession of items Nos. 1 to 3 as absolute owner thereof.

The appeal against the preliminary decree was disposed of on the 9th of September 1912. The appellate decree varied the preliminary decree by declaring that the Royapettah garden was the property of the 1st defendant's wife and that it was not part of the family property. As a result of this pronouncement, application was made by the 1st defendant for restitution of the garden to the wife. Thereupon Mr. Justice Bakewell, before whom the application was made, came to the conclusion that the original final decree passed on the footing of the preliminary decree should be revised and that a fresh final decree should be passed. It is against this direction of the learned Judge that this appeal has been preferred.

We think the course adopted by the learned Judge is right. Section 97 of the Civil Procedure Code makes it incumbent upon the parties to appeal against the preliminary decree. Under what circumstances such an appeal should be preferred has been pointed out by the Judicial Committee in *Ahmed Musaji Saleji v. Hashim Ebrahim Saleji* (1). In the present case, by the passing of the decree in appeal, the original partition has become infructuous. The equalisation as to value was dependent upon the view that the Royapettah garden belonged to the family. When that view was upset in appeal, it became necessary that there should be a fresh partition. Consequently the final decree passed by Mr. Justice Wallis can no longer remain in force. It was pointed out in *Lakshmi v. Marudevi* (2) and in *Ramien v. Veerappudian* (3) that, if a preliminary decree is revers-

ed on appeal, the final decree passed on the footing of that preliminary decree ceased to be operative. We think the same result would follow in cases of modifications of the preliminary decree which imperilled the original final decree. In our opinion, the result of the appeal was to imperil the final decree based on the preliminary decree. The principle of the decisions of *Jenkins, C. J.*, and *Mookerjee, J.*, in *Nistarinee Dabee v. Rai Mohun Biswas* (4) and *Abdul Jalil v. Amar Chand Paul* (5) and of the decision in *Wahidunnissa v. Dip Narain Pershad* (6) are applicable to the present case. We must, therefore, uphold the order of Mr. Justice Bakewell. There has been great delay on the part of the respondents Nos. 1 to 3. We do not think they are entitled to their costs in this appeal. The other costs have been provided for by the learned Judge and we agree with his directions. We dismiss the appeal.

Appeal dismissed.

M. C. P.

(4) 20 Ind. Cas. 576; 18 C. L. J. 214.

(5) 21 Ind. Cas. 510; 18 C. L. J. 223.

(6) 35 Ind. Cas. 873; 20 C. W. N. 1174; 11 P. L. J. 406; 1 P. L. W. 13.

PUNJAB CHIEF COURT.
FULL BENCH.

CIVIL REFERENCE NO. 36 OF 1917.

March 28, April 2 and 6, 1918.

Present:—Mr. Justice Shah Din, Mr. Justice Chevis and Mr. Justice LeRossignol.

AKBAR HUSSAIN—PLAINTIFF—

PETITIONER

versus

KARM DAD AND OTHERS—DEFENDANTS

—RESPONDENTS.

Punjab Tenancy Act (XVI of 1887), ss. 14, 50, 77
(3) (g)—Landlord and tenant—Tenant, wrongful dis-
possession of—Suit for possession and compensation—
Limitation—Jurisdiction of Civil and Revenue Courts.

A tenant who has been wrongfully dispossessed of his tenancy by his landlord, can institute a suit for recovery of possession or for compensation or for both only in a Revenue Court under section 77 (3) (g) of the Punjab Tenancy Act, and the period of limitation within which such a suit can be brought is, as laid down in section 50 of the Act, one year from the date of his dispossession. If he

(1) 28 Ind. Cas. 710; 42 C. 914; 19 C. W. N. 449; 17 M. L. T. 312; 2 L. W. 377; 21 C. L. J. 419; 13 A. L. J. 540; 17 Bom. L. R. 432; 29 M. L. J. 70; (1915) M. W. N. 485; 42 L. A. 91 (P. C.).

(2) 12 Ind. Cas. 664; 37 M. 29; 21 M. L. J. 1063; 10 M. L. T. 437.

(3) 14 Ind. Cas. 394; 37 M. 455; 22 M. L. J. 217; 11 M. L. T. 69; (1912) M. W. N. 117 and 530.

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allows that period to expire without bringing a suit in the Revenue Court, he loses his remedy altogether and is debarred from bringing a suit for recovery of possession or for compensation or for both in a Civil Court. [p. 12, col. 2; p. 13, col. 2.]

Imam Din v. Feroz Khan, 64 P. R. 1898, overruled.

Case referred by the Commissioner, Lahore, under section 100 of the Tenancy Act for orders of the Chief Court.

Mr. C. L. Gulati, for the Respondents.

JUDGMENT.

CHEVIS, J. (March 28, 1918.)—The facts of this case are as follows:—The plaintiff is the tenant, the defendants are the landlords. In May or June 1915 the defendants dispossessed the plaintiff, who sued to recover possession and obtained a decree on 8th May 1916. Later on, more than a year after his dispossession, he brought the present claim, which is one for compensation in the Civil Court. The Civil Court held that the suit was one falling under sections 14 and 77 (3) (n) of the Tenancy Act, and returned the plaint for presentation to the Revenue Court. The Revenue Court dismissed the suit as barred by limitation, it having been brought after the expiry of the period of one year from the date of dispossession, see section 50 of the Tenancy Act. The plaintiff appealed to the Collector, who remarked that the issue whether the case was cognizable by the Revenue Court had not been decided, and that the suit did not fall under section 77 (3) (g), as it had not been brought within one year of dispossession as required by section 50. So the Collector referred the case to the Chief Court through the Commissioner.

In the first place I would note that, the reference being under section 100 of the Act, and not under section 99, the Collector could have made the reference to this Court direct, and not through the Commissioner.

Next I would note that in my opinion the Civil Court erred in holding that the suit was one falling under section 14. This is not a suit for payment for the use or occupation of land, but for compensation for dispossession. Further, though in certain cases it may be said that the person immediately entitled to the use and occupation of the land is the "landlord" with respect to the person occupying land without his consent, [*vide Ghuna Mal v. Jhanda Singh* (1)],

(1) 82 P. R. 1894.

I do not think that in a suit where the plaintiff is the tenant and the landlord is the defendant, we can possibly twist matters round so as to regard the claim as one by the landlord against mere trespassers.

But the real question in this case is whether after the expiry of the one year within which a dispossessed tenant can bring a suit under section 50 he can still bring a suit in the Civil Court. His remedy in the Revenue Court is time-barred; what we have to decide is whether he has any other remedy left. According to *Imam Din v. Feroz Khan* (2), he can still sue in the Civil Court within the period of limitation laid down by the Limitation Act (12 years in the case of a suit to recover possession of the land, 3 years in the case of a suit for compensation). If this be the correct view, then the Civil Court was wrong in returning the plaint to the Revenue Court and the Revenue Court should have detected the error of the Civil Court and should have followed the course laid down in *Kure v. Ghisa* (3), i.e., it should have made a reference to this Court under section 99 with a view to obtaining a final decision on the question of jurisdiction. The plaintiff's remedy is obviously barred, so far as the Revenue Courts are concerned, but if he still has a remedy open to him in the Civil Courts, I do not think any Court should dismiss his claim as time-barred; all that should be done is to refer him to the proper Court. In my opinion there can only be one period of limitation for any particular suit, and if it be correct law to say that for one year the Revenue Court has jurisdiction and after that jurisdiction is transferred to the Civil Court, I would hold that the proper course for a Revenue Court, on finding that the case before it has been brought after the expiry of the one year, is to refuse to exercise jurisdiction, and not to decide the legal issue of limitation. If a Court never had jurisdiction or has ceased to have jurisdiction, I do not see how it can decide any issues.

Turning now to *Imam Din v. Feroz Khan* (2), I think the reasons there given for

(2) 64 P. R. 1898.

(3) 63 P. R. 1904.

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holding that after the year allowed by section 50 for bringing a suit in the Revenue Court has expired the dispossessed tenant may still bring a suit in the Civil Court, may briefly be said to be that a tenant is still regarded as a tenant for the period of one year from the date of his dispossession and no longer, and that after the expiry of the year the late tenant being no longer a tenant the suit cannot be regarded as a suit between tenant and landlord, and so the cognizance of the Civil Courts is no longer excluded. The learned Judges quote from the opinion expressed by Sir Meredyth Plowden in *Kesar Singh v. Nihal Singh* (4), viz., "Ordinarily, then, a tenant is a person who has a right to hold, and does hold, and the person described in section 50 is a tenant only by an exceptional use of the term tenant, and only, as it seems to me during the period prescribed for bringing the special suit granted to him by section 50, and for the purpose of exercising this right to sue." So the right to sue in the Civil Court after the expiry of the year is allowed on the ground that after the expiry of the year the claimant is no longer a tenant. It seems to me obvious that this line of argument cannot apply to the present suit, for the plaintiff before us has actually recovered possession of the land and was undoubtedly a tenant at the time when the present suit was instituted. If the tenant is to be regarded as still a tenant for the period of one year from the date of his dispossession then, since the plaintiff recovered possession within the year, he never ceased to be tenant, and the present suit must, in my opinion, be regarded as one between tenant and landlord. Thus the present case seems to me clearly distinguishable from the cases dealt with in the Full Bench ruling in *Kesar Singh v. Nihal Singh* (4) and in *Imam Din v. Feroz Khan* (2), and I would hold that the present suit being one between landlord and tenant the cognizance of the Civil Courts is barred by section 77 of the Act, and the suit has rightly been entertained by the Revenue Court.

I regret, however, that I cannot express my assent to the proposition that a tenant

is still to be regarded as a tenant for the space of one year and no more from the date of his dispossession, and that after the year mentioned in section 50 a dispossessed tenant can still sue in the Civil Court. I am aware that in writing this I am disagreeing with what has been held in a Bench ruling in *Imam Din v. Feroz Khan* (2), but at the same time I note that all that was then decided was that a suit brought after the year by an *ex* tenant who had not sued within the year allowed by section 50 was not a suit falling under section 77 (3) (i) of the Tenancy Act and was not cognizable by a Revenue Court. The Bench refrained from deciding whether a man who had lost his remedy in the Revenue Court had still a remedy left, viz., a right to sue in a Civil Court. With all due respect I wish to express my opinion as to the position of a tenant who has been dispossessed.

Section 4 of the Act defines a tenant as a person who holds land under another, but the definition is subject to the reservation "unless there is something repugnant in the subject or context." In section 50 we read of tenants who have been dispossessed or ejected from their tenancy. It seems to me that in this section we must regard the word "tenant" as meaning a person who formerly held land under another, in other words, an *ex* tenant. Now why an *ex* tenant should cease to be regarded as such at the end of one year I cannot understand. In my opinion the expiry of the year simply stops his right to bring a suit, but in no way changes his status; from the very date of his dispossession his status is simply that of a person formerly holding land who has been dispossessed, and I cannot see that this description became inapplicable to him after the expiry of the year. Sir Meredyth Plowden speaks of the tenant as being "regarded by the Act as continuing to hold the land of his tenancy after dispossession." I should, however, prefer to say that, though the word "tenant" generally means a person holding land, the word as used in section 50 merely means a person who formerly held it. The same learned Judge also refers to section 51 of the Act, and reading it jointly with section 50, is of opinion that the latter section

(4) 45 P. R. 1891 (F. B.).

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gives a summary remedy to the dispossessed tenant instead of that given by section 9 of the Specific Relief Act, but that if the ex-tenant does not avail himself of this remedy, he can still later on bring a regular suit in the Civil Court. But in a suit to recover possession under section 50 the plaintiff has to prove more than in a suit under section 9 of the Specific Relief Act; it is not enough merely to prove dispossession, he must also prove a right to recover possession, just as he would have to prove in a regular suit in the Civil Court, and so I fail to see how section 50 can be said to provide a "summary" remedy..

Either section 50 combined with section 77 lays down the sole remedies open to a dispossessed tenant excluding the cognizance of the Civil Courts, and laying down a period of limitation, or else it lays down a remedy excluding the cognizance of the Civil Courts for one year only leaving it open to the plaintiff to sue in the Civil Court after the expiry of that year. Now reading the Tenancy Act as a whole, that Act seems to me, when dealing with suits and applications, to mark off certain classes of suits and applications as cognizable only by Revenue Officers or Revenue Courts. The cognizance of Civil Courts in all such cases is jealously excluded, see sections 76 (1) and 77 (3) of the Act. Certain matters are to be dealt with by Revenue Officers, and no Court is to take cognizance of any dispute or matter with respect to which any such application or proceeding might be made or had. Certain suits are to be heard and determined by Revenue Courts, and no other Court is to take cognizance of any dispute or matter with respect to which any such suit might be instituted. Thus certain suits, including suits under section 50, are carefully fenced off from the Civil Courts. It seems to me most unlikely that in such circumstances the Legislature could ever have contemplated that because section 50 provides for institution of suits within one year, a suit which would otherwise have fallen under section 50 should at the end of a year become entertainable by a Civil Court. What I think was intended by section 50 was that the remedy was provided and the period of limitation also laid down. If a tenant is

to get the full period of limitation allowed by the Limitation Act, what possible object can there be in giving jurisdiction to one class of Courts for the first year only and after that shifting the cognizance to another class of Courts? If the subject is one which is to be excluded from the cognizance of the Civil Courts at all, why not keep jurisdiction with the Revenue Courts for the full period of limitation? If the Revenue Court is for any reason better fitted to deal with the case than the Civil Court during the first year, what change occurs at the end of that year which renders it necessary or advisable to take away the jurisdiction of the Revenue Court and restore that of the Civil Courts? Surely the question of jurisdiction should ordinarily depend on the nature of the suit, and not on the length of time that has elapsed since the cause of action arose. And to hold that after the first year cognizance changes from the Revenue to the Civil Court means that the plaintiff is at liberty to choose his *forum*. This too can surely not have been intended. It appears to me that the Legislature intended that certain classes of suits should be heard by Revenue Courts, presided over by officers who had training and experience of revenue matters; this intention would be entirely frustrated if simply by waiting for a year the plaintiff could bring his suit in a Civil Court presided over by an officer who had possibly never had any experience in all his service of revenue matters, thus evading the jurisdiction of the Revenue Courts presided over by revenue experts.

It may be argued that the Legislature could not have intended thus to curtail the ordinary period of limitation in the case of dispossessed tenants. But there are similar provisions in other Tenancy Acts. The C. P. Tenancy Act allows only two years for a dispossessed tenant-at-will to recover possession. The Bengal Tenancy Act allows the same period in the case of dispossessed occupancy *raiyats*. In *Ramdhan Bhadra v. Ramkumar Dey* (5) we read: "It may seem somewhat remarkable that...the Legislature intended to curtail greatly to the disadvantage of

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the *raiyat* the period of limitation from 12 years to 2 years.....but what we have to do is simply to administer the law as we find it." The same judgment also refers to the proceedings of the Select Committee to which the Bengal Tenancy Bill was referred for consideration, and from those proceedings it would appear that the C. P. Tenancy Act was followed and limitation was intentionally cut down.

Then turning to the N.-W. P. Rent Act we find a period of six months laid down within which a dispossessed tenant must apply to the Revenue Courts for recovery of possession or for compensation for wrongful dispossession, the jurisdiction of the Civil Courts being barred (see sections 95 and 96 of the Act). A case occurred in which a dispossessed tenant who had not applied to the Revenue Court within the prescribed period subsequently took forcible possession. On a suit by the landlords to eject him as a trespasser it was held that he had lost his right to plead his *status* as a tenant. See *Dalip Rai v. Deoki Rai* (6), upheld on appeal in *Dalip Rai v. Deoki Rai* (7). In these judgments it seems to have been taken as a matter beyond dispute that at the end of the six months the defendant had no remedy by suit in a Civil Court. On page 205* of the latter judgment we read, "the position of the defendant when he obtained possession in 1895 was this. On the one hand he had clearly no remedy by legal proceedings. By virtue of the opening words of section 95 of the Rent Act he never had any remedy in a Civil Court. His only remedy in a Revenue Court, namely, an application under section 95 (a) was barred by section 96 (e)." It is pointed out by Blair, J., in his judgment in *Dalip Rai v. Deoki Rai* (6) that to allow the defendant to plead his title as a tenant would be to allow him by his own laches to oust the jurisdiction of the Revenue Court and set up the jurisdiction of the Civil Court in relation to a matter which, if the subject of contention, could have been brought only in the Revenue

Court within a period of six months."

In conclusion I would express my indebtedness to the able commentary to be found on pages 74 to 77 of the late Rai Bahadur Sukh Dyal's Punjab Tenancy Act, 4th Edition. The learned commentator is of opinion that if Sir Meredyth Plowden's opinion be correct, there is nothing to prevent a tenant who has sued unsuccessfully within the year in the Revenue Court from bringing another suit after the expiry of the year in the Civil Court. But whether a second suit would be barred by the law of *res judicata* is, I think, an arguable point.

I would hold that such a suit as the present, whether brought within or after the year of limitation laid down in section 50, falls under section 77 (3) (g) and is cognizable only by the Revenue Courts, and that the present suit has rightly been entertained by the Revenue Court. I think the case should be returned to the Collector for decision of the appeal in due course.

LE ROSSIGNOL, J.—(April 2, 1918.)—I agree generally with what my learned brother Chevis has written. With all respect, I hold that the attempt to establish an analogy between the provisions of section 9 of the Specific Relief Act and section 50 of the Punjab Tenancy Act fails.

The period of limitation for a suit under section 9 of the Specific Relief Act is six months only, a period which in the opinion of many should suffer curtailment, and no appeal lies from a decree passed in such a suit. The period for a suit by an alleged improperly dispossessed tenant on the other hand is one whole year and the decree is subject to appeal and revision. There appears to me to be nothing common in the nature of the two suits.

I agree with my learned brother that it is absurd to suppose that the Legislature intended to give an *ex-tenant* a remedy in the Revenue Courts for one year and to permit him after the expiry of that period to have recourse to the Civil Courts.

Section 77 (3) of the Tenancy Act seems to me to be quite clear and imperative and to decide this question, we have no need to look outside it.

It runs:—"The following suits shall be... heard and determined by Revenue Courts

(6) 20 A. 471; A. W. N. (1898) 116; 9 Ind. Dec. (N. S.) 662.

(7) 21 A. 204; A. W. N. (1899) 36; 9 Ind. Dec. (N. S.) 840.

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and, no other Court shall take cognizance of any *dispute* or *matter* with respect to which any such suit *might be instituted*." In other words, if the evicted tenant has a remedy in the Revenue Courts and neglects to avail himself of that remedy, he shall have none in any other Court. Section 77 (3) (g) and (i) appear to me to cover all conceivable causes of litigation between a landlord and his tenant *qua* tenant. My conclusion is that an *ex-tenant* in that capacity can look for no relief outside the Revenue Courts and that the Civil Courts can hear his plaint only if he sets forth a claim to relief in a capacity other than that of *ex-tenant*.

I concur that the suit was correctly entertained and heard by the Revenue Court.

SHAH DIN, J.—(April 6, 1918).—The question involved in this reference is not free from difficulty, and there is much force in the reasoning employed by Sir Meredyth Plowden in his referring order in the Full Bench case reported as *Kesar Singh v. Nihal Singh* (4), in support of the opinion tentatively expressed by him that if a wrongfully dispossessed tenant does not sue in a Revenue Court for recovery of possession within the period of one year prescribed by section 50 read with section 77 (3) (g) of the Punjab Tenancy Act, he can still avail himself of his ordinary remedy in a Civil Court and can bring a suit for recovery of possession within 12 years of the date of his dispossession (pages 243 and 244 of the report). But regard being had to the general scheme of the Punjab Tenancy Act and to the policy underlying section 77 of it, I think that it was the intention of the Legislature to take away the jurisdiction of a Civil Court in regard to a suit contemplated by section 50 and section 77 (3) (g) aforesaid and also to cut down the period of limitation which, had the dispossessed tenant been allowed to sue in a Civil Court for recovery of possession of his tenancy or for compensation for wrongful ejection, would have been available to him under the provisions of the Indian Limitation Act. Any opinion even tentatively expressed by that eminent Judge, Sir Meredyth Plowden, is entitled to very great weight, but with all due deference I find myself unable to subscribe to his view that the real object of section 50

was "to substitute a summary remedy to the wrongfully dispossessed tenant for recovery of possession instead of that given with a shorter period of limitation by section 9 of the Specific Relief Act." Section 51 of the Act expressly takes away, in the case of a dispossessed tenant, the remedy given by section 9 of the Specific Relief Act; but it does not follow that because the summary remedy provided by section 9 of the Specific Relief Act is so taken away by section 51, the object of section 50 is to substitute another "summary remedy" to the wrongfully dispossessed tenant with a *longer* period of limitation than would have been available to him under section 9 aforesaid.

After a careful consideration of the provisions of sections 50, 51 and 77 (3) (g) of the Punjab Tenancy Act by the light of the general policy underlying them as regards the substitution of the jurisdiction of the Revenue Courts for that of the Civil Courts in matters which fall peculiarly within the cognizance of the former, I am of opinion that a tenant who has been wrongfully dispossessed of his tenancy, in the circumstances mentioned in section 50 of the Act, can institute a suit for recovery of possession or for compensation or for both only in a Revenue Court under section 77 (3) (g), and that the period of limitation within which such a suit can be brought is, as laid down in section 50, one year from the date of his dispossession. If he allows the period of one year prescribed by section 50 to expire without bringing a suit in the Revenue Court he loses his remedy altogether, and by the combined operation of section 50 and section 77 (3) (g) is debarred from bringing a suit for recovery of possession or for compensation or for both in a Civil Court. In other words, a Civil Court has no jurisdiction at all to hear and determine a suit instituted by a tenant who has been wrongfully dispossessed of his tenancy, and the sole remedy open to such tenant for recovery of possession or for compensation for wrongful dispossession or for both is a suit in a Revenue Court which he must institute within one year from the date of his ejection.

For the foregoing reasons my answer to the reference is that the plaintiff's suit

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was cognizable only by a Revenue Court, and not by a Civil Court, and that the Revenue Court had full jurisdiction to hear and determine it. In my opinion *Ghuna Mal v. Jhanda Singh* (1) was wrongly decided and should be overruled.

Answer accordingly.

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 50 OF 1918.

June 29, 1918.

Present:—Mr. Justice Ryves.

BEHARI LAL—JUDGMENT-DEBTOR—
APPLICANT

versus

BALDEO NARAIN AND OTHERS—

DECEEN-HOLDERS—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 115, O. III, r. 4, O. XXI, r. 89, O. XXXII, r. 5—Revision—High Court, power of interference of—Execution—Application to set aside sale on behalf of minor—Pleader, appointment of—Vakalatnama, defect in, effect of.

Under section 115 of the Civil Procedure Code the High Court is competent to revise a conclusion of law or of fact which bears on a question of jurisdiction. [p. 15, col. 2.]

In execution of a simple money decree passed against a minor, a house belonging to the minor was attached and advertised for sale. An application asking for an adjournment of the sale was put in by a Vakil appointed by the guardian of the minor, but the *vakalatnama* did not state that the guardian was executing it as such. An affidavit was filed by the guardian along with the application. The Court adjourned the sale and on the adjourned date the property was sold to a stranger. Thereupon the same Vakil purporting to act on behalf of the minor filed an application under Order XXI, rule 89, of the Civil Procedure Code to set aside the sale. The Court rejected the application on the ground that it was not filed by the guardian or by a properly appointed Vakil:

Held, (1) that the application was in order inasmuch as it had been filed by a Vakil appointed by the guardian of the minor; [p. 16, col. 2.]

(2) that the refusal of the Court to entertain the application amounted to a refusal to exercise a jurisdiction vested in it and that, therefore, the High Court was entitled to interfere in revision under section 115 of the Civil Procedure Code. [p. 15, col. 2; p. 16, col. 1.]

Civil revision from an order of the District Judge, Allahabad.

Messrs. Motilal Nehru and Radha Kant Malaviya, for the Applicant.

Mr. W. Wallach, Dr. S. M. Sulaiman, Mr. Ibn Ahmad, the Hon'ble Dr. Tej Bahadur Sapru and Mr. Sital Prasad Ghosh, for the Opposite Party.

JUDGMENT.—The facts out of which this application arises are admitted. A suit was filed against a minor, Behari Lal, under the guardianship of his brother, Gaya Prasad, and a simple money decree was passed against him for a sum of Rs. 238-15-0. In execution of that decree, house property belonging to the minor was attached and advertised for sale. The sale was fixed for the 14th April 1917. On the 18th of April 1917, an application was made by Gaya Prasad, as guardian of the minor, asking for the adjournment of the sale. The application was put in by a Vakil of the Court under a *vakalatnama* executed by Gaya Prasad. In the body of the *vakalatnama* which is a printed document, and which is usually filed in by the Vakil himself or his clerk, the name of Gaya Prasad was not entered. The document reads "I appoint" so and so. It was executed by Gaya Prasad. Of this there is no question, but he did not add that he was executing it as the guardian of the minor. Along with this application there was filed an affidavit by Gaya Prasad. Taking the two together it was quite obvious that the application for adjournment was being made by him as guardian of the minor through the Vakil whom he had appointed to act for him. The Court accepted the application to this extent that it granted an adjournment of the sale for six days and the 20th of April 1917 was fixed. On that date the sale was held and the property was knocked down to an outsider, i. e., to a person who was no party to the suit, for a sum of Rs. 180, the opposite party here. It is admitted that the property was worth a very great deal more than what it was knocked down for. On the 4th May 1917, an application was made under Order XXI, rule 89, by the same Vakil. It purported to be tendered on behalf of the minor. The proper amount had been paid into Court within the time allowed and the application must have been accepted by the Court and the sale set aside unless the application was not in order. The Court of first instance rejected the application in these terms:—"This application under rule 89, Order XXI, of the Code of Civil Procedure has been presented by the applicant who is a

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minor and it is not presented by a next friend. The minor's application was filed through a Pleader who does not appear to have been retained by him, *vide* the *vakalatnama*. The application is against the provisions of rule 5 (1), Order XXXII, of the Code of Civil Procedure and is also vague. No order can legally be passed on it without the minor being represented by a next friend. I, therefore, reject this application with costs." That is the order really in question here. The lower Court found, and rightly found, that the application in itself was not vague and that it entirely complied with Order XXI, rule 89, but it held substantially for the same reason as the first Court that the application had not been properly presented on behalf of the minor, and rejected the application. From this order no appeal lies to this Court; hence an application in revision.

Two arguments are raised against my interfering. First of all it is said, on the authority of *Balakrishna Udayar v. Vasudeva Aiyar* (1), and three recent rulings of this Court, reported as *Fazal Rab v. Manzur Ahmad* (2), *Jhunku Lal v. Bisheshar Das* (3) and *Jwala Prasad v. East Indian Railway Co.* (4), that this Court has no power to interfere. It is said that the lower Court had jurisdiction to go wrong and assuming it did go wrong, that decision is final. Secondly, it is argued on the merits that the decision on the point of law is correct. It seems to me that, put in plain language, the Court declined to hear the applicant. It declined to hear the minor himself because of his minority, and declined to hear the Pleader because of a supposed defect in his *vakalanama*. It seems to me that if the Court was wrong in its reasons for not hearing the Pleader and, therefore, not accepting the application, it declined to exercise a jurisdiction vested in it, or at least acted with material irregularity in the exercise of its jurisdiction. There is one passage in the judgment of the Privy Council report [*Balakrishna Udayar v. Vasudeva*

Aiyar (1)] which, read by itself, and separated from the context and read without consideration of the facts of that case, does support the objection of the opposite party. It is the sentence which is reported at page 799* and runs as follows:—"It will be observed that the section (115) applies to jurisdiction alone, the irregular exercise or non-exercise of it or the illegal assumption of it." But the judgment does not end there, it goes on to say:—"The section is not directed against conclusions of law or fact in which the question of jurisdiction is not involved, and if the appellant's contention be correct, then, if the Civil Court should absolutely and whimsically decline to exercise its jurisdiction and refuse to make any orders as to the filling up of vacancies, no matter how many existed, there would not, in a case such as the present, be any remedy available under this section and no appeal would lie." In that case the District Judge, purporting to act under a particular section of a particular Act, construing the section as he did, held that he had jurisdiction to pass a particular order, and passed it. Objection was taken to this order before the successor of the District Judge on the ground that the former District Judge had no jurisdiction to pass it. The Court held that he had. An application was then made to the High Court of Madras in revision, and it was argued that the High Court had no power to interfere, one argument being that the decision of the Court below was at the most a wrong decision on a point of law. The High Court repelled this objection and did interfere in revision, and the Privy Council upheld its decision. It seems to me what the Privy Council case decided was that the section (115 of the Code of Civil Procedure) is not directed against conclusions of law or fact *in which the question of jurisdiction is not involved*. (I think the words which I have italicised are most important.) It seems to me to follow from this that where a question of jurisdiction is involved, this Court is competent to revise a conclusion of law or fact which bears on a question of jurisdiction. In the case before me it seems to me that on the point of law decided, a question of jurisdiction is

(1) 40 Ind. Cas. 650; 40 M. 793; 15 A. L. J. 645; 2 P. L. W. 101; 33 M. L. J. 69; 26 C. L. J. 143; 19 Bom. L. R. 715; (1917) M. W. N. 628; 6 L. W. 501; 22 C. W. N. 60; 11 Bur. L. T. 48 (P. C.).

(2) 45 Ind. Cas. 773; 16 A. L. J. 433; 40 A. 425.

(3) 46 Ind. Cas. 71; 16 A. L. J. 495.

(4) 46 Ind. Cas. 99; 16 A. L. J. 535.

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involved, therefore, I think I have jurisdiction to consider that point on the merits.

Three recent cases of this Court, however, are quoted in support of the objection. The first case is that of *Fazal Rab v. Manzur Ahmad* (2). On the face of it, that case looks very like the present case, but there the only point decided was that payment of money into the Treasury was not a payment into Court within the meaning of rule 89, Order XXI, and this Court held that, if that decision was a wrong one, it could not be set aside in revision. There no question of jurisdiction was involved. In the next case, at page 499* of the same Volume, also no question of jurisdiction was involved. In the last case, to which I was a party, a question of jurisdiction was involved. The case was decided only a very short time ago and I remember perfectly well that we did go into the merits and were satisfied that the order of the Courts below, in returning the plaint, was a proper order and one which the Courts had jurisdiction to pass and should have passed. That case, therefore, in my opinion is not a helping guide. In that case no authorities were cited. I must confess that I had not then studied the Privy Council case in *Balakrishna Udayar v. Vasudeva Aiyar* (1) as carefully as I have since done, and I am inclined to think that perhaps the judgment was expressed unnecessarily broadly. It seems to me on full consideration that the Privy Council case gives me jurisdiction to go into the merits of the decision in this case on the point of law involved.

There is one other aspect of the case which I think should not be lost sight of. The defects, if any, in the application or the power-of-attorney were purely technical, and seeing that the property of a minor was at stake, I think that if the Court had doubts, it would have been well advised to have called evidence and ascertained whether the guardian had in fact authorized the Vakil to make the application. I do not, however, base my judgment on this consideration, though in my opinion it has weight.

On the merits—the application of the 4th of May 1917 purported, as I have said, to be made by the Vakil on behalf of the minor. There was no fresh *vakalatnama*, it is admit-

ted, executed by the guardian of the minor authorizing the vakil specifically to file this application. It seems to me that no new *vakalatnama* was required for this particular application. The Vakil had been appointed by Gaya Prasad to appear for the minor in a former stage of the litigation and also to put in the application of the 13th of April, asking for an adjournment of the sale in these very execution proceedings. If that appointment was a good appointment, then it seems to me that it was still in force under Order III, rule 4 of the Code of Civil Procedure. But it is argued that the *vakalatnama* executed by Gaya Prasad was not valid for two reasons. One that the clerk of the Vakil or somebody should have recorded in the body of the application, for a second time, the statement that it was Gaya Prasad who was making the appointment, and as guardian of the minor. As the *vakalatnama* runs, Gaya Prasad and no one else was making the appointment. It says so. "I.....appoint", and although that *vakalatnama* was executed by Gaya Prasad, it is said to be invalid as there was no statement in it to the effect that Gaya Prasad executed it as "guardian of the minor" or some such words. This seems to me a very technical objection. Except as guardian of the minor he had nothing whatever to do with the suit or the proceedings in execution. I have already said, he himself came into Court and made the application for the stay of the sale on the 13th April, and put in an affidavit. The application showed that he had appointed the Vakil to act for the minor of whom he, Gaya Prasad, was the guardian. It seems to me, therefore, that the application of the 4th of May was in order, and that the Court has failed to exercise its jurisdiction in not accepting it because it came to a wrong decision on a point of law. Undoubtedly if it had decided as, I think, it should have decided, it should have accepted the application. I, therefore, setting aside the order of the Court below, pass the order which, I think, it should have passed, *i. e.*, I direct that the money paid into Court be made over to the purchaser and the sale be set aside. The applicant will have his costs throughout.

*Page of 16 A. L. J.—Ed.

Revision allowed.

DALPAT SINGH v. AHMAD SHAH.

OUDH JUDICIAL COMMISSIONER'S
COURT.

FIRST CIVIL APPEALS NOS. 102 AND 131 OF 1916.

May 30, 1918.

Present:—Mr. Lindsay, J. C., and Mr.

Daniels, A. J. C.

DALPAT SINGH AND OTHERS—PLAINTIFFS

—APPELLANTS—

versus

AHMAD SHAH AND OTHERS—DEFENDANTS

—RESPONDENTS.

Contract Act (IX of 1872), s. 16—Undue influence—Karinda, whether dominates will of employer—Interest, high rate of—Court, power of, to reduce rate.

Apart from the Usurious Loans Act the mere fact that a bargain is unconscionable, in the sense that the rate of interest charged is excessive, is not in itself a sufficient ground for interference by the Court. [p. 17, cols. 1 & 2.]

A *karinda* is as a rule a servant of very minor status, who cannot be presumed without very distinct evidence on the point to be in a position to dominate the will of his employer. [p. 18, col. 1.]

Appeals from the decree of the Subordinate Judge, Sitapur, dated the 1st July 1916.

Mr. John Jackson and Babu Ohhote Lal, for the Appellants.

Mr. H. C. Dutt, for the Respondents.

JUDGMENT.—These two cross-appeals arise out of a suit brought by the plaintiffs Dalpat Singh, Mathura Singh and Mangli on the basis of three deeds of simple mortgage executed by Haidar Ali Beg, the father of the first four defendants. The rate of interest in each case was 2 per cent. per mensem compound interest with six monthly rests. The learned Subordinate Judge has reduced this to 24 per cent. per annum simple interest on two grounds:—

(1) that the debtor was in the hands of the plaintiffs who could dominate his will and that the plaintiffs, therefore, imposed their own terms, and

(2) that compound interest at 2 per cent. per mensem is a monstrous rate and is by itself sufficient evidence of the fact that the contract is hard and unconscionable and cannot be enforced.

The plaintiffs appeal against reduction of interest. The defendants have filed a cross-appeal asking that the interest should be still further reduced.

It is now well established that apart from the recent Usurious Loans Act the mere fact that a bargain is unconscionable,

in the sense that the rate of interest charged is excessive, is not in itself a sufficient ground for interference. Here the rate of interest though high is by no means unprecedented, and it is admitted that the same rate of interest has been charged in previous transactions between the parties. The bonds in suit were executed partly in lieu of previous bonds bearing the same rate of interest.

The learned Subordinate Judge's finding as to undue influence is difficult to follow. In view of the fact that in the course of the proceedings it was distinctly admitted by the first defendant through his Pleader that he did not plead that execution of the deeds in suit was procured by undue influence and in fact no issue of undue influence was framed (The other representatives of the mortgagor were absent and put in no defence.) The first defendant had put forward certain pleas in his written statement, paragraphs 12 and 13, which look like a plea of undue influence under section 16 of the Contract Act. He was asked by the predecessor in-office of the Subordinate Judge who decided the suit to clear up this pleading and did so as stated above. Immediately afterwards on the same date the issues were framed and no issue under section 16 of the Contract Act was drawn up. The issues were:—

1. Whether the mortgage-deeds were genuine and for consideration?
2. Whether the terms relating to interest were hard and unconscionable; and
3. Whether the plaintiffs were entitled to all the interest claimed.

There was a fourth issue relating to certain prior mortgagees with which we are not now concerned. It is clear that the Court treated the question whether the terms as regards interest were hard and unconscionable as distinct from the question whether the execution of the documents had been procured by undue influence. The learned Subordinate Judge who decided the case has done the same, where he holds that the rate of interest charged is by itself sufficient to render the contract unenforceable.

In view of the fact that the plea of undue influence had been withdrawn and

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that no issue had been framed upon it, it was not open to the learned Subordinate Judge to set aside the terms of the contract on this ground. Even if it had been open to him, the evidence falls very far short of establishing undue influence within the meaning of section 16 of the Contract Act. The defendants adduced no evidence whatever on this point. The only evidence on which the Subordinate Judge relies is a statement of the principal defendant Ahmad Shah, who was called as a witness for the plaintiffs on another matter, and statements of two attesting witnesses Maiku Lal and Girja Dayal, whom the plaintiffs were obliged to call but who, being for obvious reasons on the side of the defendants, were desirous of doing the plaintiffs' case as much harm as they could. The two latter declared that the deceased debtor used to take opium and that Dalpat Singh was a *karinda* of the deceased who used to repose great confidence in him. A *karinda* is as a rule a servant of very minor status, who could not be presumed without very distinct evidence on the point to be in a position to dominate the will of his employer. As for the statements of the defendant the stamp of falsehood is written large upon them. He would have us believe that the plaintiffs had full control over his father's estate, could make him do what they liked and were practically *talukdars*. They are said to have the sole charge of the books of account and it is stated that the deceased never saw them. When challenged, the defendant could not produce a lease or account or a single scrap of paper relating to the estate in the handwriting of the plaintiffs. Two of the plaintiffs were examined as witnesses and they emphatically denied the defendant's story and there was hardly any cross-examination directed to show that they were in a position to, far less that they ever did, dominate the will of Haidar Ali Beg.

The lower Court's finding cannot be supported. We allow the plaintiffs' appeal and restore the contractual rate of interest up to the date fixed for payment, though in view of the very large sum claimed as interest we think it equitable to direct that the parties should bear their own costs in his Court. In the lower Court the plaintiffs will have their costs. For the reasons

already given the defendants' cross-appeal fails and it is accordingly dismissed with costs.

Appeal No. 102 allowed;
Appeal No. 131 dismissed.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 57 of 1916.

April 15, 1918.

Present:—Mr. Justice Piggott and Mr.
Justice Walsh.

RAM DULARI—DEFENDANT—APPELLANT
versus

HARDWARI LAL AND OTHERS—

PLAINTIFFS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 116—Construction of document—Sale-deed—Covenant, of indemnity, breach of—Suit for damages—Limitation.

A sale-deed recited that the property was sold free from all debts or liabilities, and contained a covenant that in the event of the vendees having to pay some excess amount, that is to say, some further charge over and above the sale consideration set forth in the deed, the estate of the vendor would be liable to make it good together with damages and costs. It subsequently transpired that the property was subject to a mortgage and on the basis of that mortgage a decree was passed against the vendees along with the original mortgagor. In order to save the property from sale under that decree, the vendees had to pay up the mortgage money along with interest and costs. They then sued their vendor to recover the sum paid by them under the mortgage decree:

Held, that the plaintiffs were entitled to rely upon the covenant contained in the deed as a covenant of indemnity and to bring a suit upon it, the limitation for which began to run from the date on which they suffered actual loss by reason of their being compelled to pay off the prior mortgage charge. [p. 20, col. 1.]

First appeal from a decree of the Subordinate Judge, Shahjahanpur.

The Hon'ble Dr. Tej Bahadur Sapru (with him Mr. Sarat Chandra Chaudhri), for the Appellant.

Mr. Baldev Ram Dave, for the Respondents.

JUDGMENT.

PIGGOTT, J.—This is an appeal by the defendant in a suit which, as brought, was a suit for damages on account of the breach of a covenant of indemnity contained in a sale-deed of the 4th of July 1901. That deed in itself arose out of and formed the completion of a trans-

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action embodied in a previous deed of 9th of January 1899. The plaintiffs in this case represent the transferees of the vendees under these two deeds and the defendant the vendor in each of these deeds. The vendor purports to convey certain property free of all encumbrances, and in each of them there is a covenant setting forth what is to happen in the event of its being found that the property is in fact encumbered, and in the event of the vendees being disturbed in possession or having to make any payment on account of some previously existing encumbrance. The matter is clearer in the earlier of the two deeds, but no doubt the point has to be decided with reference to the agreement as embodied at the end of the deed of July the 4th, 1901, on page 8 R. of the book before us. We have only referred to the previous document in order to explain the nature of the transaction as throwing light on the intention of the parties and the footing on which they were dealing with one another. Unfortunately in the deed of July the 4th, 1901, there has been a clerical error on the part of the scribe in that very portion of the document which is most material for our purpose. We are not sure that this error is really vital to the decision of the question argued before us, but the error is there and it is as well that attention should be called to it. A certain word in the deed may have been intended to be written as "Maqabal" or as "Fazil". As the document stands it is actually written "Faqabal," which is nonsense, but it must be intended to be read as one or other of these two words. Now, on the one reading the expression is correctly translated in our paper book by the words "or if any excess amount is charged against them," on the other reading, we may translate "or if they are held chargeable with any prior encumbrance." The latter of these two readings would be less favourable to the appellant's case and for the purposes of argument we may adopt the former. The covenant then is that, in the event of the vendees having to pay some excess amount, that is to say, some further charge over and above the sale consideration set forth in the deed, the estate of the vendor will be liable to make it good, together with

damages and costs. Immediately before the words above set forth there is a recital that the property is conveyed to the vendees free from all debts and liabilities or claims. Then follows the agreement that if any portion of the property passes out of the possession of the vendees, or they fail to obtain possession or finally, in the alternative, if any excess amount is charged against them, the other property of the vendor will be liable for damages. It subsequently transpired that there was a prior encumbrance on the property conveyed in the shape of a mortgage in favour of one Chattri Lal. A suit was brought on this mortgage in which the present plaintiffs, the vendees, were impleaded along with the original mortgagor. The claim was contested, but resulted finally in a decree in favour of Chattri Lal, and in order to save the property from sale under that decree the present plaintiffs, the vendees under the deed of July the 4th, 1901, had to pay up the sum now claimed by them, consisting of the mortgage money due to Chattri Lal along with interest and costs. In the Court below this claim was resisted upon a variety of pleas, some of which are repeated in the memorandum of appeal now before us, but the appeal has been argued upon one ground only, namely, on the plea of limitation.

There was an issue on this point in the Court below (issue No. 5), and the learned Subordinate Judge disposed of it very briefly, by pointing out that in his opinion the cause of action accrued to the plaintiffs in the month of May, 1915, when they had to pay the money to Chattri Lal, and that this plaint had been filed with great promptitude in the month of July 1915. He held, therefore, that it was clearly within time. Curiously enough, in the memorandum of appeal before us this finding on the question of limitation is not in express terms challenged. We have been told, however, that there has been some error or oversight about the drafting of the memorandum of appeal and that the plea taken in the first paragraph was intended to read, "that the plaintiffs had no subsisting cause of action," and so raised the question of limitation. At any rate we have heard the appellant on this point, and it was

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within our discretion to do so. The plea is based upon the contention that the agreement embodied in the last paragraph of the deed of July the 4th, 1901, was simply a covenant of title, that there was a breach of this covenant the moment the deed itself was executed, that a cause of action accrued to the plaintiffs on that very date and that consequently the present suit is barred under the six years' rule of limitation. As subsidiary arguments on this point our attention has been drawn to the fact that the mortgage in favour of Chatri Lal was a registered document, of which it might be said that the plaintiffs had constructive notice, and that in any event they had actual notice of it when Chatri Lal instituted his suit, which was as long ago as the year 1902. The argument before us has proceeded upon lines which evidently were not followed in the Court below. Our attention has been drawn to a number of rulings, of which the decision most in point is that in *Hari Tiwari v. Raghunath Tiwari* (1). What that case seems to us to lay down is that, if the plaintiffs in a suit like the present were bound to rely solely upon a covenant of title, whether express or implied, it might be held that limitation ran against them from the date of the execution of the deed; but in that suit itself a distinction was drawn, and the plaintiffs were held to be within time, because they were not suing upon a mere covenant of title, and it was held that their cause of action arose long subsequently when they were dispossessed of a portion of land then in question.

Similarly in the present case, it seems to us that the plaintiffs are entitled to rely upon the words already set forth as a covenant of indemnity and to bring a suit upon them from the date on which they suffered actual loss by reason of their being compelled to pay off the prior mortgage charge. The decision of the Court below on the issue of limitation, therefore, appears to be substantially correct on the ground on which it proceeds, although the point was not fully argued. The appeal, therefore, fails and we dismiss it with costs.

Appeal dismissed.

(1) 11 A. 27; A. W. N. (1888) 254; 6 Ind. Dec. (N. S.) 440 (F. B.).

UDH JUDICIAL COMMISSIONER'S
COURT.

FIRST CIVIL APPEALS NOS. 5 AND 137 OF 1916
AND NO. 12 OF 1917.

June 27, 1918.

Present:—Pandit Kanhaiya Lal, J. C., and
Mr. Daniels, A. J. C.

Seth BISHESHWAR NATH—PLAINTIFF
—APPELLANT

versus

HAMID MIRZA BEG AND OTHERS—
DEFENDANTS—RESPONDENTS.

Construction of document—Taluqa, succession to, settled by agreement—Agreement, deed of, interpretation of—Transferable interest, whether acquired.

A dispute regarding succession to a taluqa belonging to a Muhammadan gentleman A in respect of which proceedings under section 145, Criminal Procedure Code, had been taken against its three claimants, B, C and D, was settled by mutual agreement, the relevant terms of which were as follows:—

1. The taluqa will not for the present be divided.
 2. The taluqa will be released in favour of all the three claimants and the evidence adduced in the proceedings under section 145, Criminal Procedure Code, will be regarded as proof of possession of all of them.
 3. Mutation of names in respect of the taluqa will be made in favour of all the three claimants subject to the conditions laid down in the agreement.
 4. Each of the three claimants will take a few villages for his personal expenses.
 5. Each of the three claimants will in succession hold the office of the taluqdar of the entire taluqa without the power of alienation.
 6. All the debts due from A will be a charge on the taluqa and the taluqdar for the time being will utilize the net income of the taluqa in payment of those debts.
 7. After payment of the entire debts the net profits will be divided equally between the three claimants.
 8. If the taluqdar for the time being neglects the payment of debts or commits any breach of trust, the man next after him may get him ousted and may himself assume that office.
 9. In case of urgent necessity, prior to the payment of the debts due by A, if the writing of a deed of alienation or hypothecation becomes necessary, then the deed will be valid only when it is signed and executed by all the three claimants.
 10. The male children of B by non-biradari wife will get maintenance, and if C and D happen to have no male children by biradari wives, the former will have such heritable interest as may be permitted to them under the Muhammadan Law.
- Held*, that under the above agreement C and D took a transferable interest in the villages assigned to them as well as in their shares in the taluqa, which they were competent to transfer even during the time when B was the taluqdar. [p. 25, col. 1; p. 26, col. 1.]

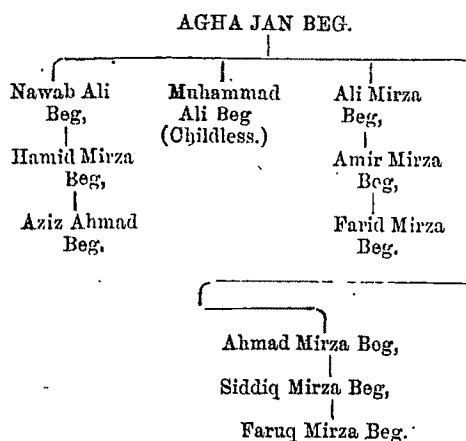
Appeal from the decree of the Subordinate Judge, Sitapur, dated 30th October 1916.

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Babu Ram Chandra, for the Appellant.

Mr. Mumtaz Husain and Pandit Tara Shankar Sharma, for the Respondents.

JUDGMENT.—These three appeals have been argued together, as the principal issue in each is the same and depends on the construction of an agreement, dated the 12th July 1909, entered into between Ahmad Mirza Beg, Hamid Mirza Beg and Amir Mirza Beg. The following pedigree given in the plaint in Suit No. 45 of 1916, out of which First Appeal No. 137 of 1916 arises, is necessary to explain the position:—



The dispute relates to Taluqa Anrangabad, which belonged to Agha Jan Beg. His name was entered in List I at No. 77 and List II, at No. 26 appended to Act I of 1869. His eldest son, Nawab Ali Beg, died during his lifetime. Agha Jan Beg died on the 18th June 1875, and was succeeded by his second son, Muhammad Ali Beg, by virtue of a bequest, the effect of which was to vest the estate in his eldest surviving son. Muhammad Ali Beg died childless on the 18th October 1908. On his death disputes arose between his sole surviving brother Ahmad Mirza Beg, and his two nephews Hamid Mirza Beg, and Amir Mirza Beg, as to their rights in the Taluqa and proceedings were taken against them under section 145 of the Code of Criminal Procedure to prevent a breach of the peace. These disputes were subsequently settled by mutual agreement on the 12th July 1909,

The effect of this agreement was that mutation was to be effected in respect of the Taluqa in favour of all the three claimants, that the Magistrate, before whom the proceedings under section 145 of the Code of Criminal Procedure were pending, was to release the property in their favour, treating all of them as in possession, and that subject to the conditions laid down in the agreement Ahmad Mirza Beg and after him Hamid Mirza Beg and after the latter Amir Mirza Beg were to hold the office of Taluqdar in succession without any power to transfer the property, except in certain contingencies therein specified. The agreement made a provision for the personal expenses of each of the said persons and for the division of the remainder of the profits of the estate after the debts due by the late Taluqdar Muhammad Ali Beg were paid up, and further declared that after the expiry of the tenure of office of Amir Mirza Beg, who was to be the last Taluqdar, the son or sons of Hamid Mirza Beg, born of a *biradari* wife, would take a moiety and the son or sons of Amir Mirza Beg, born of a *biradari* wife, would take the remainder as absolute proprietors to the exclusion of the male descendants of Ahmad Mirza Beg, who in the presence of such sons were to get maintenance (Exhibit 1).

In pursuance of the said agreement, mutation of names was effected in favour of Ahmad Mirza Beg, Hamid Mirza Beg and Amir Mirza Beg (Exhibit 10).

On the 29th May 1912 Hamid Mirza Beg and Amir Mirza Beg borrowed Rs. 93,000 from the Allahabad Bank, Limited, by means of two promissory notes, for the re-payment of which Lachhmi Narain, the defendant-appellant in First Appeal No. 137 of 1916, stood surety. On the same date these persons executed an agreement in favour of Lachhmi Narain, promising to re-pay him what he might have to pay to the Allahabad Bank, Limited, on their account with interest at 1 per cent. per mensem. As these persons subsequently failed to pay the money due to the Allahabad Bank, Limited, the latter realized Rs. 93,120-6-0 from Lachhmi Narain on the 8th October 1912,

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On the 16th November 1912 Hamid Mirza Beg and Amir Mirza Beg executed a deed of simple mortgage in favour of Lachhmi Narain for a lac of rupees in consideration of the amount paid by the latter to the Allahabad Bank, Limited, on their account with the interest due thereon and a sum of Rs. 5,824.4-0 due by them on another account. By the said deed they mortgaged a 6-annas share out of Taluqa Aurangabad including the *guzara* villages assigned to them for their personal expenses, and agreed to pay the mortgage-money within ten years with interest at 1 per cent. per mensem, compoundable half yearly (Exhibit C 1).

On the 14th May 1913 they made another mortgage of a 4-annas 8-pies share of Taluqa Aurangabad inclusive of the said *guzara* villages in favour of Lachhmi Narain for Rs. 40,000, agreeing similarly to re-pay the same within ten years with interest at 1 per cent. per mensem, compoundable half-yearly (Exhibit C 3).

On the 2nd January 1914 they made a mortgage of what they described as their entire 10-annas 8-pies share in favour of Lachhmi Narain for Rs. 79,450, agreeing similarly to re-pay the same within ten years with interest at the same rate (Exhibit C 4).

The contention of Ahmad Mirza Beg is that the said mortgages were invalid, inasmuch as the mortgagors had no right to transfer the mortgaged property. The relief claimed by him in Suit No. 45 of 1916, out of which First Appeal No. 137 of 1916 arises, is, however, confined to the mortgage of the 16th November 1912 and that of the 14th May 1913. No relief is claimed in regard to the third mortgage. The learned Subordinate Judge found that the mortgagors had no right to mortgage the property in question.

On the 24th February 1914 Hamid Mirza Beg effected a simple mortgage of the entire village Rampur, which was assigned to him for his personal expenses by way of maintenance, in favour of Seth Bisheshwar Nath and Hafiz Muhammad Faruq in lieu of Rs. 16,000, and on the same date he executed a lease of the said village in favour of the mortgagees for 14 years beginning from 1321 Fasli on the rental of Rs. 2,700 per year, agreeing

that the said rent might be credited by the mortgagees year after year towards the principal and interest due on their simple mortgage till the entire mortgage-money was liquidated. On the lessees' attempting to get mutation of names effected in their favour Ahmad Mirza Beg objected that the lessors had no right to mortgage the village or grant a lease thereof and he was successful. Seth Bisheshwar Nath accordingly sued for possession of the leasehold village with mesne profits for Rabi 1321 Fasli or in the alternative for the recovery of money due on his mortgage by sale of the mortgaged property. This suit, being No. 233 of 1915, is the subject of First Appeal No. 5 of 1916. The learned Subordinate Judge found that the mortgage and the lease were both invalid and he gave the plaintiff a simple decree for money subject to the right of Hafiz Muhammad Faruq to get such portion of the consideration as he might have advanced.

There was a third Suit No. 96 of 1916, forming the subject of First Appeal No. 12 of 1917, arising out of an attachment of a 5-annas 4-pies share in the villages Nimkhar and Pataunja, forming part of Taluqa Aurangabad, obtained by Kedar Nath and Gauri Nath in execution of a decree for money held by them against Amir Mirza Beg. An objection filed by Ahmad Mirza Beg to the said attachment was unsuccessful, and the present suit was filed for a declaration that the judgment-debtor had no saleable interest in the property attached. The learned Subordinate Judge found in his favour.

The first question to be decided is whether Hamid Mirza Beg and Amir Mirza Beg had acquired a transferable interest by virtue of the agreement, of the 12th July 1909. The agreement so far as it is material for the determination of the above issue, runs as follows:—

"We are Ahmad Mirza Beg, son of Agha Jan Beg, and Hamid Mirza Beg, son of Nawab Ali Beg, and Muhammad Amir Mirza Beg, son of Ali Mirza Beg, caste Moghal, residents of Aurangabad, district Sitapur.

"A compromise has been arrived at amicably between all the three parties as given below:—

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"1. The Taluqa Aurangabad in Sitapur will not for the present be divided.

"2. The office of Taluqdar of the entire Taluqa Aurangabad, left by Mirza Muhammad Ali Beg, will be held by Ahmad Mirza Beg, and after him by Hamid Mirza Beg, and after the latter by Amir Mirza Beg, and none will have the power to transfer the said property. During the time of one, the others will not have the power to interfere with the work of collections in the Taluqa and other administrative works, contrary to the terms of the compromise, but they will have the right to inspect the accounts. But if the Taluqdar for the time being neglects the payment of debts or commits any breach of trust, the man next after him may get him ousted and may himself assume that office. But the Taluqdar, who is ousted, will get his fixed maintenance. But in case of urgent necessity, prior to the payment of the debts of Mirza Muhammad Ali Beg deceased, if the writing of a deed of alienation or hypothecation becomes necessary, then the deed will be valid only when it is signed and executed by all the three persons.

"3. Every one of the three parties will take for his personal expenses villages yielding Rs. 10,000 a year. The rent of such villages will mostly be in cash. In order to determine the gross rental of a village, the village papers for 1208 to 1310 will be consulted. The Taluqdar for the time being will pay with the entire Taluqa the dues of the Government in respect of such villages."

After providing for the maintenance of Siddiq Mirza Beg, the son of Ahmad Mirza Beg by a non-*biradari* wife, and his male descendants, the agreement continues:—

"5. After the expiry of the tenure of office of Amir Mirza Beg as Taluqdar, i.e., when this chain of Taluqdars will be finished, the son or sons of Hamid Mirza Beg, born of a *biradari* wife, to the extent of one moiety, and the son or sons of Muhammad Amir Mirza Beg, born of a *biradari* wife, to the extent of one moiety, will divide the estate and hold proprietary possession thereof, subject to the right of maintenance of Siddiq Mirza Beg and his heirs, as mentioned in clause 4 of this compromise. If Hamid Mirza Beg died before getting

the office of Taluqdar, the deceased's male issue, born of a *biradari* wife, will get, so long as the Taluqdari system lasts, the same maintenance and profits which his or their ancestor would have received, if alive.

"6. The moveables left by Mirza Muhammad Ali Beg will be divided in equal shares between the three parties, except the elephants, horses and conveyances given below, the costs of whose maintenance has been fixed and which the members of the family will be entitled to use with the Taluqdar's permission."

The agreement then proceeds to provide for the payment of the debts and the distribution of the profits in the following manner:—

"8. All the debts due from Mirza Muhammad Ali Beg will be a charge on the estate and the Taluqdar for the time being will utilise the income of the villages of the estate, other than the maintenance villages, after deducting therefrom the Government revenue and defraying the costs of collection and the estate expenses described below, in payment of the aforesaid debts. No amount can possibly be fixed for the expenses of litigation, it is, therefore, left to the discretion of the Taluqdar to spend a reasonable amount on cases between the landlord and the tenants, under-proprietors or other *raiya* out of the income of the estate other than the maintenance villages. The costs of other litigation will be determined in consultation with all the three parties. After payment of the entire debt which is against the estate, the net profits of the estate will be divided equally between the three persons, i.e., each person will get a third during the lifetime of Ahmad Mirza Beg. If, God forbid, Amir Mirza Beg or Hamid Mirza Beg do not live till then, their male children will receive the same. After Ahmad Mirza Beg's death, Siddiq Mirza Beg and his male issue and other heirs, mentioned in clause 4 of this compromise, will get only the aforesaid maintenance and Hamid Mirza Beg and Muhammad Amir Mirza Beg or their aforesaid issue will take the property in equal shares."

The agreement winds up by describing interest which each was to get as follows:—

"12. In conformity with the compromise mutation of names in respect of the *ilaga* will be made in favour of Ahmad Mirza

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Beg, Hamid Mirza Beg and Muhammad Amir Mirza Beg, subject to the conditions laid down in this deed. Ahmad Mirza Beg will receive possession subject to the conditions of this document. In the case under section 145, Criminal Procedure Code, a separate application will be filed to the effect that a compromise has been effected between the parties and that now there is no danger of a breach of peace, and that the evidence which has been produced may be regarded as proof of possession of all the three parties and the *ilaqa* be released in favour of all the three parties."

The Court below construes the deed as giving to Hamid Mirza Beg and Amir Mirza Beg nothing more than a right to share in the usufruct; but such a construction is inconsistent with the entire tenor of the deed. In the first place, the agreement states that the *ilaqa* shall be released in favour of all the three parties and the evidence adduced in the proceedings under section 145 of the Code of Criminal Procedure shall be regarded as proof of the possession of all of them. In the second place, it provides that in conformity with the compromise mutation of names in respect of the *ilaqa* shall be made in favour of Ahmad Mirza Beg, Hamid Mirza Beg and Amir Mirza Beg, subject to the conditions laid down in this deed. It concedes to Ahmad Mirza Beg and after him to Hamid Mirza Beg and Amir Mirza Beg in succession the *mansab* or the office, dignity or position of the Taluqdar for such time as he may act in that capacity, maintaining "for the present" its indivisibility as recognised by List II of Act I of 1869. But it describes each of them as acting Taluqdars or Taluqdars for the time being (Taluqdar *waqt*), and expressly states that if any of them neglects the payment of debts or commits any breach of trust, the man next after him may get him ousted and may himself assume the office. If the intention was to recognise Ahmad Mirza Beg as the sole proprietor of the estate without any power of alienation and to allow Hamid Mirza Beg and Amir Mirza Beg only a share in the usufruct so long as they were alive, the suggestion that Ahmad Mirza Beg could be ousted from his position of Taluqdar, if he neglected the payment of debts or com-

mitted any breach of trust, would be out of place. A breach of trust can only be committed by a trustee and not by a proprietor. Ahmad Mirza Beg held by virtue of the agreement the management of the property on behalf of himself and his nephews, Hamid Mirza Beg and Amir Mirza Beg, and the male children of these two born of *biradari* wives who were to succeed after the death of all the three. By assigning the position or office of Taluqdar to one man and maintaining indivisibility "for the present", the object was that the dignity or status of the family should not ostensibly be reduced.

In the third place, in the case of urgent necessity prior to the payment of the debts due by Muhammad Ali Beg, the late Taluqdar, if the writing of a deed of alienation or hypothecation became necessary, all the three persons were authorised to sign or execute such a deed jointly. If each of these persons was entitled only to a life interest, they would not have transferred more than the interest they possessed. If, on the other hand, Hamid Mirza Beg and Amir Mirza Beg were entitled to a share in the usufruct, the authority given to them to join in a sale or mortgage in certain circumstances and to obtain a release of the property in proceedings under section 145 of the Code of Criminal Procedure and to get mutation of names effected in their favour jointly with Ahmad Mirza Beg, would be without any significance. In the fourth place, even the male children of Ahmad Mirza Beg were not absolutely deprived of all possible interest in the disputed property. If Hamid Mirza Beg and Amir Mirza Beg happened to have no more children by *biradari* wives, the former were to have such heritable interest as might be permitted to them under the Muhammadan Law.

The position of Ahmad Mirza Beg, Hamid Mirza Beg and Amir Mirza Beg was exactly similar in regard to the assignment of villages for their personal expenses and the distribution of the profits, except in so far that each of them was to act in succession or in a particular order as the Taluqdar or, in other words, as the custodian of the dignity of the family and the manager of the estate. Their rights

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in other respects were equal. Each was to be treated as holding possession and entitled to get mutation of names in his favour and if their rights were greater than those of a person holding a share in the usufruct or a mere life-estate, they could not but be proprietary. In the latter instance the restriction on alienation imposed by the agreement would be void under section 10 of the Transfer of Property Act.

On the death of Muhammad Ali Beg it was disputed whether the property would devolve according to the Muhammadan Law or according to the rule of primogeniture laid down in the Sanad or family custom. The parties to the agreement were in any case uncertain as to their rights. Under section 22 of Act I of 1869 Hamid Mirza Beg was the person entitled to succeed, but by virtue of the bequest Muhammad Ali Beg was held entitled to the estate (Exhibit 20). If the estate went out of the statutory rule of succession laid down under section 15 of that Act, the property could still remain indivisible if the family custom or Sanad was to be applied, but would become divisible, if the Muhammadan Law was to be held applicable uncontrolled by the Sanad or the custom of the family. The claimants to the estate apparently agreed that all the three should hold the property together, that each of them shall in succession hold the office of Taluqdar and manage the estate on behalf of himself and the rest subject to the conditions laid down in the agreement and that on the death of all of them, the property shall devolve in a certain manner. The compromise was in the nature of a settlement of disputed claims, and as held in *Faiyaz Husain Khan v. Nilkanth* (1), *Gaya Din Singh v. Syed Mumtaz Husain* (2), *Bhairo v. Parmeshri Dayal* (3) and *Ram Chandra v. Gopi Nath* (4), it may be regarded as a transfer to which the provisions of section 10 of the Transfer of Property Act are applicable. The corpus of the estate passed jointly to Ahmad

Mirza Beg, Hamid Mirza Beg and Amir Mirza Beg by virtue of the agreement; and the restraint of alienation being void, each of them got an absolute estate, subject to the conditions as to the management and the like contained therein. In *Faiz Muhammad Khan v. Muhammad Said Khan* (5) their Lordships of the Privy Council pointed out that in order to show that an ultimate gift of the profits was less than a gift of the corpus, some evidence should be found in the context or in the circumstances affecting the property, tending to show a restriction of the interest given. The agreement in question contains only two restrictions, one against alienation or mortgage except in certain circumstances and the other deducible from the ulterior disposition mentioned therein. But if an absolute estate was given to Ahmad Mirza Beg, Hamid Mirza Beg and Amir Mirza Beg, the restraint on alienation being void, the ulterior disposition would necessarily fail.

There is nothing to show that any sons of Hamid Mirza Beg or Amir Mirza Beg born of *biradari* wives were alive or in existence on the date of the agreement. A gift in favour of persons unborn is not valid under the Muhammadan Law and a restriction of the gift to the life of the donee is not allowed by the Hanafi Law by which the parties to the agreement are governed (*Tyabji's Muhammadan Law*, pages 274 and 341, and *Ameer Ali's Muhammadan Law*, Volume I, 4th Edition, pages 64 and 140).

Even a life-interest can, moreover, be attached, sold or mortgaged for the lifetime of the holder of such interest, unless such interest is restricted in its enjoyment to the holder personally. Such is not the case here. The assignment of certain villages for personal expenses was only a method of enabling the persons concerned to recover money for those expenses directly without the intervention of the manager. The life-interest is as much saleable or transferable as any other interest, though such interest cannot last for more than a limited duration.

The learned Counsel for Ahmad Mirza Beg contends that if the interest of Hamid Mirza Beg and Amir Mirza Beg be sold, his client will not be able to carry out

(1) 4 O. C. 163.

(2) 10 O. C. 136.

(3) 7 A. 516; A. W. N. (1885) 136; 4 Ind. Dec. (N. S.) 500.

(4) 29 Ind. Cas. 251.

(5) 25 G. 816; 25 I. A. 77; 2 C. W. N. 355; 7 Sar. P. C. J. 320; 13 Ind. Dec. (N. S.) 532 (P. C.).

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the trust reposed in him, namely, the discharge of the debts due by Muhammad Ali Beg and the preservation of the property for the benefit of his grand nephews. But the payment of the debts due by Muhammad Ali Beg has been declared by paragraph 8 of the agreement to be a charge on the estate and will follow the property in whatsoever hands it goes. The agreement creates no other charge and so far as it gives a vested remainder to persons not shown to have been in existence on the date of the agreement, it is invalid. If the restriction on alienation is void, the gift over will, moreover, fail.

The appeals are, therefore, allowed and the claims of Ahmad Mirza Beg dismissed and that of Seth Bisheshwar Nath allowed, a decree being granted to the latter for possession of the leasehold property subject to the rights, if any, of his co-lessee Hafiz Muhammad Faruq. The appellants will, in the circumstances, get their costs here and hitherto in each case from the contesting respondents, who will bear their own costs throughout.

Appeals allowed.

ALLAHABAD HIGH COURT.
EXECUTION FIRST APPEAL No. 112
OF 1918.

May 30, 1918.

Present:—Justice Sir P. C. Banerji, Kt,
and Mr. Justice Ryves.

Goswami GORDHANLALJI AND OTHERS—
JUDGMENT-DEBTORS—APPELLANTS

versus

Goswami MAKSUDAN BALLABH—
DECREE-HOLDER—RESPONDENT.

Civil Procedure Code (Act V of 1909), O. XXI, r. 32—Injunction, decree for, mode of execution of—Execution, whether can be effected through Police—Hereditary office, decree passed with regard to, whether binds legal representatives of parties—Civil Court, power of—Procedure.

A decree for a perpetual injunction was passed in favour of the plaintiffs and the defendants third party, restraining the defendants second party from interfering with the right of the plaintiffs and of the defendants third party to perform the "Singar Arti" ceremony in a temple. The legal representatives

of the defendants second party caused an obstruction to the performance of the ceremony by the defendants third party, and the latter applied for execution of the decree through the Police:

Held, (1) that the decree having been passed both in favour of the plaintiffs and of the defendants third party, the latter were entitled to execute it; [p. 27, col. 1.]

(2) that if the defendants second party disobeyed the order of the Court, they were liable to the penalties mentioned in Order XXI, rule 32 of the Civil Procedure Code, which prescribed the manner for the execution of a decree for injunction and that the Court had no power to order the Police to see that the decree-holders performed the ceremony without obstruction by the defendants second party; [p. 27, col. 2; p. 28, col. 1.]

(3) that as the suit was brought by the plaintiffs on the basis of a right which they claimed as the descendants of the founder of the temple, the injunction was granted against the defendants not as individuals but as persons claiming a right as descendants of the original founder and that therefore the decree could be enforced against their legal representatives also. [p. 27, cols. 1 & 2.]

Execution first appeal from a decree of the Subordinate Judge, Muttra.

Mr. *Shyam Krishna Dar*, for the Appellants.

Mr. *Narain Prasad Asthana*, for the Respondent.

JUDGMENT.—This appeal arises out of an application for the execution of a decree passed on the 17th of December 1906, in a suit brought by one Goswami Manohar Lal against a number of defendants of whom the appellant Pearey Lal is one. Certain persons who were alleged to have the same rights as the plaintiffs were made defendants of the third party, one of these defendants being the present applicant for execution Goswami Maksudan Ballabh. A decree was made by the Court against all the defendants of the first and second party with the exception of one Kishori Lal, declaring that the plaintiff and the defendants of the third party were entitled to perform the "Singar Arti" ceremony in a certain temple both on ordinary and festive occasions. The decree also ordered a perpetual injunction to issue restraining the defendants of the first and second parties from obstructing the plaintiff and the defendants third party from performing the duties of the office claimed by them. The present application was made by Goswami Maksudan Ballabh, who is one of the defendants of the third party, against Goswami Gotardhar Lalji, the grandson of

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Prem Lal, who was defendant No. 1, and Goshain Girdhar Lalji and Goshain Gourdhan Lalji, the sons of Goshain Munna Lal, who was one of the defendants of the second party, and Pearey Lalji who, as we have said above, was also a defendant of the second party. It is stated on behalf of the decree-holder that these defendants are now interfering with the performance of the duties appertaining to the office which was claimed in the suit and which was decreed to the plaintiff and the defendants of the third party. Their prayer, as contained in the application, is that the decree may be enforced through the Superintendent of Police of Muttra in this way, that on the dates mentioned in the application he (the Superintendent of Police) may have the "Arti" performed by the decree-holders-applicants, and that the defendants may be directed not to interfere with the performance of those duties. The application was opposed on several grounds, but the objections were disallowed and the application as made was granted by the Court below. In this appeal which has been preferred by the judgment-debtors, the first contention raised is that Goswami Maksudan Ballabh is not entitled to apply for execution as he was not one of the plaintiffs to the suit. This objection was raised in the Court below and was, we think, rightly disallowed. The decree was made in favour not only of Manohar Lal but also of the defendants of the third party, declaring their right to perform the duties of the office claimed by them at certain hours every day and also on festive occasions. The decree thus declared the right of, amongst others, the present applicant Maksudan Ballabh and the injunction decreed was also an injunction in his favour. He is, therefore, entitled to maintain the present application.

The next contention put forward on behalf of the appellants is that the decree was personal to the persons in whose favour it was made and could only be enforced against the individuals who were defendants to the suit, and not against persons who are their legal representatives. This contention also is, in our opinion, without force. It appears that the suit was brought on the basis of a right which the plaintiffs claimed as descendants of one of the

founders of the temple and that the defendants were also made parties as such descendants. The plaintiffs claimed to have the right to perform certain offices which, the defendants contended, they themselves had a right to perform. So that the decree related to a hereditary office which the plaintiffs claimed, and in regard to which their claim was resisted by the defendants. The injunction was also granted against them not as individuals but as persons who claimed a right as descendants of the original founder of the temple. The appellants, who after the death of some of the defendants in the former suit, have taken their place—or claim to have taken their place—are thus persons against whom the decree may properly be executed so far as the injunction goes. We may mention that this plea was not put forward in the Court below and it, therefore, did not become necessary for that Court to consider it.

The third contention is that the application is time-barred. As the decree was one for a perpetual injunction limitation would run from the date of breach of the injunction, that is, from the date on which the defendants disobeyed the injunction—that date was within three years of the present application. Consequently no question of limitation arises in the present case, as held by the Court below.

It is lastly urged that the Court below was wrong in ordering the Superintendent of Police of Muttra to see that the "Arti" was performed by Goswami Maksudan Ballabh and that the defendants offered no obstruction. So far as this part of the prayer in the application for execution is concerned, we do not think that the Court below ought to have granted it. It had no power under the Code of Civil Procedure to order the Police to interfere in the matter. There being a decree for a perpetual injunction against the defendants or those whom they represented, it was the duty of the defendants to carry out the injunction, that is to say, to refrain from offering any obstruction to the performance of the office which was decreed to the decree-holder. If they disobeyed the order of the Court they were liable to the penalties mentioned in Order XXI, rule 32, of the Code, but the Court could not order

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the Police to see that the decree-holders performed the duties of their office without interference on the part of the defendants. If a breach of the peace was apprehended, that was a matter for the Magistrate and the Police, and not for the Civil Court. We accordingly set aside that portion of the lower Court's order which directs the Superintendent of Police to order the Sub-Inspector of Bindraban to have the applicant Maksudan Ballabh perform "Singar Arti" in the temple.

We are also of opinion that the Court had no power to appoint a Commissioner to see that the decree-holder performed without obstruction the duties appertaining to his office. This portion of the lower Court's order, which was passed on a subsequent date, should also be set aside. In our opinion clause (5) of rule 32 does not authorize the Court to make these orders and provides for a different state of things.

We accordingly vary the order of the Court below by directing that an order do issue to the defendants-appellants forbidding them to interfere with the performance of the duties of the decree-holder, namely, "Singar Arti" every day and on festive days in the temple of Radha Ballabhji. If the defendants-appellants fail to obey the injunction, it will be time for the decree-holder to make a proper application in the terms of Order XXI, rule 32. We direct the parties to bear their own costs of this appeal.

Decree varied.

PUNJAB CHIEF COURT.
MISCELLANEOUS FIRST CIVIL APPEAL NO. 3133
OF 1917.

April 19, 1918.

Present:—Mr. Justice Broadway.

DIWAN CHAND—DEFENDANT—
APPELLANT

versus

Musammât PARBATI—PLAINTIFF AND
Musammât JIWANI DEFENDANT—

RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. V, r. 17

—*Summons, service of, modes of—Copy of summons delivered to defendant—Refusal to sign acknowledgment—Failure to affix copy to door—Service, whether effected.*

The object of serving a summons is that the defendant may be informed of the institution of the suit in sufficient time before the date fixed for the hearing, and the procedure laid down for the service of summonses is intended to guard against fraud and ensure that the proper person has been served. [p. 30, col. 1.]

There are three modes of serving a summons on a defendant: (1) by delivery of a copy of the summons to the defendant personally or to an agent or some one on his behalf and by obtaining the signature of the person to whom the said copy is delivered to an acknowledgment of service endorsed on the original summons;

(2) by affixing a copy of the summons on the door of the defendant's residence or place of business;

(3) by effecting substituted service as laid down in rule 20 of Order V of the Civil Procedure Code. [p. 30, col. 1.]

Where a copy of the summons was delivered to the defendant who refused to sign the required acknowledgment, but no copy of the summons was affixed to the door of his house:

Held, that the summons was not duly served. [p. 30, col. 1.]

Miscellaneous first appeal from the order of the Senior Subordinate Judge, Lahore, dated the 31st August 1917.

Lala Tirath Ram, for the Appellant.

Lala Dhanpat Rai, for the Respondents.

JUDGMENT.—One Lachhman Das, a Brahmin of Lahore, died leaving him surviving a widow Musammât Jiwani and three sons Karm Chand, Diwan Chand and Gobind Ram. Somewhere about the year 1906 Gobind Ram became of unsound mind, and as the remaining members of the family could not get on amicably an agreement was entered into, and executed on the 10th November 1912 by Karm Chand, Diwan Chand and Musammât Jiwani referring their dispute to one Pandit Hari Chand who, as arbitrator, was empowered to effect a partition, and to appoint one of the executants to manage the share that should be allotted to Gobind Ram. The said Hari Chand was brother to Musammât Jiwani and consequently the maternal uncle of the others.

For some reason or other no award was made till the 2nd December 1915.

On the 8th June 1916 Musammât Parbati filed an application in Court under paragraph

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20 of the 2nd Schedule to the Civil Procedure Code, 1908, in which she recited the fact of the reference to arbitration and stated that she was the widow of Karm Chand who had died some 5 months before and that she had come to know of the existence of the award after her husband had died. She asked that the award should be filed and a decree passed in accordance with its terms.

It appears that Gobind Ram had also died by the time this application was filed.

The usual summonses were issued to Diwan Chand and Musammat Jiwani, the 6th July 1916 being fixed for hearing.

On the 27th June 1916 a report was made by the process-server to the effect that a copy of the summons had been delivered to Diwan Chand, who had taken it but refused to give any acknowledgment for it.

Fresh summonses were then issued for the 25th July 1916, and on the 22nd July 1916 the process-server again reported that he had given a copy to Diwan Chand, who had been pointed out by the plaintiff, but that he had refused to acknowledge its receipt.

On the 25th July 1916 the process-server was examined by the Court and supported the report made by him, but stated that Diwan Chand was known to him personally.

The case proceeded against him *ex parte* and on the 31st August 1916 it was ordered that the award be filed and a decree be passed in accordance with its terms. It should be mentioned that Musammat Jiwani also made no appearance and the order and decree was *ex parte* against her as well.

On the 16th October 1916 Musammat Parbati applied to have the decree executed and asked to be put in possession of the house in suit which had been allotted to her husband, and on the 31st October 1916 a warrant for the delivery of possession was issued for the 21st November 1916.

On the 13th November 1916 one Ghulam Dastgir, Civil Nazir (now dead), is said to have made a report to the effect that when he was going to the spot with the

decree-holder, Diwan Chand had met him in the bazar and had told him that Musammat Jiwani was in possession of the house and that it was she from whom possession should be taken, and that Musammat Jiwani had refused to surrender possession.

On the 21st November 1916 notices were issued to both the judgment-debtors for the 2nd December 1916 and then again for the 11th December 1916.

On the 8th December 1916 a report was made that a copy of the notice had been affixed to the open door of Diwan Chand's house as he had refused to accept service. A fresh notice was issued for the 2nd December 1916, and on the 19th December 1916 it was reported that it had been affixed to his door as he had gone away on hearing of the notice.

On the 21st December 1916 another notice was issued to him for the 11th January 1917, and on the 8th January 1917 the process-server again reported that as Diwan Chand refused to accept it the notice had been affixed to his door.

On the 11th January 1917 a Mukhtar appeared in Court on Diwan Chand's behalf and asked for time as he wished to raise objections, and on the 3rd February 1917 an application was filed by him in which it was sought to get the *ex parte* decree set aside, on the ground that he had never been duly served and had only come to know of the state of affairs on the 14th January 1917 through Musammat Jiwani.

This application having been dismissed on the 31st August 1917, Diwan Chand has preferred this appeal through Lala Tirath Ram. Lala Dhanpat Rai has addressed me on behalf of Musammat Parbati.

The Court below has dismissed the application holding that it was time-barred, both because the summons had been duly served in the first instance, and because in any event he had had knowledge of the decree in November 1916.

Mr. Tirath Ram contended that the summons had not been duly served. He referred to Order V, rule 17, Civil Procedure Code, and contended that the provisions of that rule had not been complied with, inasmuch as a copy of the summons had not been

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affixed to the door of Diwan Chand's house.

Now there are three modes of serving a summons on a defendant:—

(1) by delivery of a copy of the summons to the defendant personally or to an agent or some one on his behalf and by obtaining the signature of the person to whom the said copy is delivered to an acknowledgment of service endorsed on the original summons (*vide* Order V, rules 10—16 and 18, Civil Procedure Code, 1908);

(2) as laid down in rule 17, by affixing a copy of the summons on the defendant's residence or place of business.

When this method is adopted, the provisions of rule 19 have to be complied with and the Court concerned has to decide whether the summons has or has not been duly "served;" and

(3) by effecting substituted service as laid down in rule 20.

In the present case rule 17 has clearly not been complied with, inasmuch as no copy of the summons was affixed to the door of Diwan Chand's house—the report in each instance being that a copy had been given to Diwan Chand who had refused to sign the required acknowledgment. Mr. Dhanpat Rai contended that in the circumstances it was impossible to comply with the provisions of rule 17 as the process-server, having delivered a copy of the summons to Diwan Chand, had none which he could affix to his house.

This, no doubt, is correct, but does this fact do away with the necessity of complying with the provisions of the law?

I think the answer must be in the negative.

The object of serving a summons is that the defendant may be informed of the institution of the suit in sufficient time before the date fixed for the hearing, and the procedure laid down for the service of summons is intended to guard against fraud and ensure that the proper person has been served. The summons in this case was clearly not duly served so far as rule 17 is concerned, nor can it be said that personal service was effected within the four corners of rule 16.

In *Maruti v. Vithu* (1) it was held that service had not been duly effected when the respondent in an appeal had refused to take a copy of the notice of appeal and the provisions of rule 17 had not been complied with. I hold, therefore, that Diwan Chand was not duly served with a summons.

The next question is whether he came to know of the decree in November 1916 or, as he says, in January 1917.

As to this it certainly is curious that Diwan Chand should have been away for the whole of the period—and that he should not have heard of this matter from his mother *Musammât Jiwani* who was living in the house.

The report of the deceased Civil Nazir would go to show that he had knowledge. It was urged that this report is not admissible in evidence. It was, however, made in the ordinary course of his duties and has been proved. Witnesses have also deposed to the correctness of what it contained. I do not think, therefore, that it can be entirely ignored.

It will be seen that the notices issued subsequent to the passing of the decree were served as provided for in rule 17, and after a careful consideration of the evidence on the record I am unable to hold that Diwan Chand duly came to know of the decree only in January 1917.

The evidence as to his absence from Lahore is vague and inconclusive, and it seems to me most improbable that he never heard of the decree till January 1917. The evidence that he knew of it in November 1916 is supported by the report of the deceased Nazir and, I think, should be accepted.

In these circumstances the appeal fails and is dismissed, but I leave the parties to bear their own costs in this Court.

Appeal dismissed

(1) 16 B. 117; 8 Ind. Dec. (N. S.) 553.

SHER SINGH v. PEM RAJ.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 2629 OF 1917.

April 19, 1918.

Present:—Mr. Justice Chevis.

SHER SINGH—DEFENDANT—APPELLANT
versus—PEM RAJ—PLAINTIFF AND MARU AND
OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), s. 12—Time spent in obtaining copies of judgment and decree—Separate periods, whether can be allowed—"Requisite," meaning of—Time requisite, whether question of fact or of law.

It is the duty of an appellant to obtain as many copies as possible on a single petition, and if he wastes time applying first for one copy and then for another, he cannot claim that all the separate periods spent in obtaining copies were really "requisite" within the meaning of section 12 of the Limitation Act. [p. 31, col. 2.]

An appellant can, under section 12 of the Limitation Act, only deduct such time as was requisite for obtaining copies, and what time is requisite for this purpose is a question of fact on the circumstances of each particular case. Where a lower Appellate Court decides that a double period was not necessary, the question whether it is right or wrong is not a question of law. [p. 31, col. 2; p. 32, col. 1.]

Second appeal from the decree of the District Judge, Karnal, dated the 1st May 1917.

Mr. Saeed Hassan, for the Appellant.

Mr. Rambhaji Dutta, for the Respondent.

JUDGMENT.—The plaintiff's suit for an injunction having been decreed by the first Court, Sher Singh, one of the defendants, appealed to the District Judge who dismissed his appeal as time-barred. Sher Singh appeals to this Court, and the only question is whether his appeal to the District Judge is barred by time.

The first Court's decree is dated 5th May 1916. Sher Singh applied for copy of judgment on 20th May 1916, and it was ready on 23rd May. He applied for copy of decree on 5th June 1916, and it was ready on 6th June. He lodged his appeal on the 10th June.

It is admitted by Mr. Sayyad Hassan that unless his client can get credit for both the above periods, *viz.*, 20th to 23rd May and 5th to 6th June, 6 days in all, the appeal to the District Judge is time-barred. Section 12 of the Limitation Act lays down that in computing the period of limitation for an appeal the time requisite for obtaining a copy of the decree, sentence or order appealed from shall be excluded, and where the appeal is from a decree the time requisite for obtaining a copy of

the judgment on which it is founded shall also be excluded. Relying on *Raman Chetti v. Kadirvalu* (1), *Karnam Narasimhulu v. Secretary of State* (2) and *Din Dayal v. Rameshar* (3), Mr. Sayyad Hassan urges that his client can get credit for both periods. But it is clear that only the time requisite can be excluded, and these judgments do not discuss the question whether when it is open to a party to apply for both copies at once, he can apply first for one and then for the other and claim to exclude two periods as both being *requisite*. The question is one on which there is a diversity of opinion. Other cases on the point in addition to those already mentioned have been cited on page 75 of Rustomjee's Limitation Act, 2nd Edition. There are two Punjab rulings. The first is an unreported case Civil Appeal No. 1505 of 1879. The two Judges differed, and the case was referred to a third Judge (Rattigan, J.), who held that it was the duty of a litigant to obtain as many copies as possible on a single petition, and that if he wasted time applying first for one copy and then for another he could not claim that all the separate periods spent in obtaining copies were really "requisite." The second case is *Thana Mal v. Musammal Nihali* (4) and is on all fours with the present case. The appellant first applied for copy of the judgment, and subsequently for copy of decree, and claimed to deduct the time spent in getting copy of decree in addition to the time spent in getting copy of the judgment. The Divisional Judge held that as he could have applied for both copies at the same time, the extra time spent in getting copy of decree was not requisite within the meaning of section 12, and dismissed the appeal as time-barred. On further appeal, with certificate to this Court, the learned Judge (Plowden, J.) held that the appellant could only deduct such time as was requisite for obtaining copies and said: "What time is requisite for this purpose is a question of fact on the circumstances of the particular case. The two periods may be concurrent or not concurrent, for the section

(1) 8 M. L. J. 148.

(2) 17 Ind. Cas. 393; 12 M. L. T. 360.

(3) 28 Ind. Cas. 366; 18 O. C. 74; 12 O. L. J. 159.

(4) 6 P. R. 1394.

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ordains nothing whatever on this point. In some cases it might properly be held that a separate allowance should be made in respect of each copy. But when the Divisional Judge decided that in this case two periods were not requisite, and made only one allowance, he decided that in this case a double period was not necessary and whether he was right or wrong is not a question of law."

With this decision I fully agree. I quite admit that cases may arise in which a person aggrieved by a decision may apply separately for copy of judgment and for copy of decree and may claim that both periods should be allowed as requisite. But in this case no reason has been shown for separate applications. All that has been suggested is that Sher Singh may have first applied for copy of judgment, merely to see whether he would appeal, and then, having made up his mind that he would appeal, applied for copy of decree. This may have been the case, but the fact remains that he could easily have applied for both copies at once. Even had he afterwards made up his mind that it was not worth his while to appeal, the extra expenditure involved in getting copy of decree as well as copy of judgment would have been slight, and if merely to avoid the risk of spending a little extra money he chose to apply first for copy of judgment only, I do not see how he can now say that both periods should be allowed as requisite.

As to allowing any extension under section 5, I need only remark that if Sher Singh had exercised due diligence he could have filed his appeal on the 7th or 8th of June, when it would have been within time, even allowing credit only for the time spent in getting copy of judgment. He had his copy of judgment in May, so he could easily have got his grounds of appeal drafted and could have filed his appeal accompanied by copies of both judgment and decree on the 7th or 8th June.

The appeal is dismissed with costs.

Appeal dismissed.

ODDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 78 OF 1916.

June 19, 1918.

Present:—Mr. Lindsay, J. C., and Pandit Kanhaiya Lal, A. J. C.

MUHAMMAD SHER KHAN—PLAINTIFF

—APPELLANT

versus

Raja Seth SWAMI DAYAL—DEFENDANT

—RESPONDENT.

Mortgage—Term fixed for redemption—Redemption, suit for, before expiry of term, maintainability of—Clog on redemption—Contract Act (IX of 1872), s. 16—Undue influence—Borrower in need of money—Lender, whether dominates his will.

A mortgage-deed provided that if the principal and interest due on the mortgage was not paid up to the date fixed for such payment, the mortgagee was to take possession of the mortgaged property, was to appropriate its profits in lieu of interest without any liability to account to the mortgagor for the profits, which exceeded the amount of interest at the contract rate by practically half as much, was to secure to himself certain further or collateral advantages and was to remain in possession of the mortgaged property for a fixed period during which the mortgagor could not claim redemption. On the mortgagor failing to pay the principal and interest as stipulated in the deed, the mortgagee entered into possession of the mortgaged property. The mortgagor then sued for redemption, alleging that he was entitled to redeem during the period of the mortgagee's possession on the ground that the conditions in the mortgage-deed constituted a clog on the right to redeem:

Held, that the mortgage-deed did not contain a clog on the right of redemption and that, therefore, the suit was premature. [p. 35, cols. 1 & 2.]

Urgent need of money on the part of a borrower does not of itself place the lender in a position to dominate his will. [p. 34, col. 2.]

Appeal from the decree of the Subordinate Judge, Kheri, dated the 17th April 1916.

The Hon'ble Syed Wasir Hasan and Syed Ali Mohammad, for the Appellant.

The Hon'ble Pandit Gokaran Nath Misra and Babu Ishwari Prasad, for the Respondents.

JUDGMENT—This is a mortgagor's appeal arising out of a suit for redemption, which has been dismissed by the Court below on the ground that the plaintiff under the mortgage-contract has no present right to redeem. Whether or not he has that right is the matter for determination in this appeal.

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A short statement of the material facts may conveniently be given here by way of introduction.

The plaintiff Muhammad Sher Khan is a Taluqdar holding an estate in the Kheri district and first entered into dealings with the mortgagee in this suit (or rather his father) in the year 1904. By that time the plaintiff had encumbered his property to a considerable extent. He had executed five mortgages hypothecating portions of his estate in favour of two mortgagees, and the outstanding debt amounted to close on Rs. 72,000. The earliest mortgage executed in favour of a banker named Dwarka Das carried interest at 12 per cent. per annum compoundable with six-monthly rests; on this the mortgagee had brought a suit and obtained a decree. The other four mortgages were in favour of Ganesh Prasad: two of these carried interest at the rate mentioned above, the third at 15 per cent. per annum compoundable in the same way; the fourth loan was given at 12 per cent. per annum simple. To discharge these debts the plaintiff on the 31st August 1904 borrowed a *lakh* of rupees from Seth Raghubar Dayal, the father of the present defendant: the sum owing to the prior mortgagees was left with Raghubar Dayal for payment and the balance was taken by the mortgagor.

To secure this loan the plaintiff executed a mortgage. It was agreed that interest should run at the rate of Rs. 7-1-8 per cent. per annum payable half-yearly, with a stipulation that the interest should be compounded in default of punctual payment, and the mortgagor undertook to pay off the debt at the end of four years in the month of Jeth.

It was further agreed that if the mortgagor failed to pay four successive instalments of interest, or if he failed to redeem on expiry of the period mentioned, the mortgagee was to have the option of taking possession of the mortgaged property for a period of twelve years during which the mortgagor was not to be entitled to exercise his right to redeem; the profits during the term of twelve years during which the mortgagor was not to be entitled to exercise his right to redeem, i.e., the profits during the term of the

mortgagee's possession, were to be appropriated in lieu of interest and there was to be no accounting between the parties for this period. The mortgagor undertook to deliver complete possession to the mortgagee, including possession of all *sir* and *khudkasht* lands and of all buildings. The mortgagee was to be allowed to appropriate fallen timber and to cut down four trees a year. Another condition was that when the mortgagor came to redeem on the expiration of twelve years he was to be liable to pay to the mortgagee, in addition to principal and interest making up the mortgage debt, all sums recoverable from tenants on account of arrears of rent and *taqavi*.

The only other condition of which we need take notice is one by which the mortgagee, while out of possession, agreed to receive payments of not less than Rs. 3,000 at a time in reduction of the principal sum.

On the 9th June 1908 before the period of this mortgage expired, the mortgagor renewed the bond after an account had been taken between the parties showing that the mortgagor owed Rs. 82,154-15-6. He paid up Rs. 154-15-6 and the fresh bond was executed for Rs. 82,000. This is the bond now in suit.

The terms of this bond are for the most part identical with those of the earlier document, but the period for redemption was fixed at five instead of four years. Further the mortgagee agreed that while he was out of possession he would receive payments of sums not less than Rs. 500 in reduction of principal. There was still a clause enabling the mortgagee to take possession for twelve years in case the mortgagor failed to redeem at the end of the five years' term, and under this clause the mortgagee is now in possession by virtue of a decree of this Court dated the 9th of February 1915. It is admitted that before this decree was passed, the Court gave the mortgagor an opportunity of paying off the debt by private arrangement so as to avoid delivery of possession to the mortgagee: the mortgagor, however, failed to take advantage of the indulgence. He has now brought this suit for redemption and claims that he is entitled to recover possession, notwithstanding the

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covenant in the deed by which he is debarred from seeking redemption for a period of twelve years to count from the date of the mortgagee's taking possession. He says that he is entitled to relief against this contract on the ground that the bargain between himself and the mortgagee is harsh and unconscionable and was procured by undue influence, the mortgagee having taken advantage of his necessities for the purpose of obtaining unfair terms. He asks the Court to treat this covenant, read with the other terms of the contract, as amounting to a 'clog' on the right of redemption which cannot in equity be enforced so as to prevent his now coming forward and asking to be restored to possession on payment of principal and interest.

With regard to the plea of undue influence, the Subordinate Judge has ruled that it was not open to the plaintiff in accordance with the doctrine of *res judicata*: in his opinion this was a plea which the plaintiff could have and ought to have raised when he was resisting the mortgagee's suit for possession.

We are not disposed to accept this finding of the Court below but we agree with the finding which it came to on the merits of the plea, namely, that there was no proof of undue influence which would entitle the plaintiff to avoid the contract under the provisions of section 16 of the Contract Act.

The plaintiff gave oral evidence for the purpose of showing that the mortgagee had taken undue advantage of him at the time the mortgage was renewed. A good deal of that evidence was irrelevant, and what was relevant has been found to be untrue. We agree entirely with the judgment of the Court below on this point; the evidence led by the defendant proves conclusively that the story told by the plaintiff and his witnesses regarding the events which happened at the time the deed was renewed is absolutely false. It is clearly established by the defendant's evidence that the transaction was entered into at the plaintiff's own request, that the mortgagee never pressed for renewal of the deed, and that the plaintiff of his own free-will and without compulsion of any kind executed the deed now in suit,

which was written out by his own *mukhtar*, one Abdul Qayum.

Apart from the oral evidence there is nothing either in the circumstances or in the terms of the document itself to justify the conclusion that the mortgagee was in a position to dominate the will of the plaintiff at the time the mortgage was executed. In this connection it is important to consider the admission made by the plaintiff in the witness-box that he had no complaint to make regarding the terms of the mortgage executed by him in the year 1904. His statement on this point may be quoted here:—

"I executed the former deed in favour of the defendant's father with all its terms, not under any undue influence brought to bear upon me by the defendant's father, but because I was badly in need of money at that time to pay off certain decrees. I did not care much for that deed."

By this last expression we understand the plaintiff to mean that he was indifferent and had no reason to complain of the terms offered him by the mortgagee. If this be so, he appears to have no particular reason to impeach the present contract as being harsh and unconscionable, for the terms are more favourable to him than those of the deed of 1904. While interest is at the same rate, the mortgagee gives the plaintiff the right to make payments of not less than Rs. 500 at a time in reduction of principal. Under the earlier deed the minimum sum which the mortgagee was bound to accept on this account was one of Rs. 3,000. While it may be true that the plaintiff stood in urgent need of money when he executed the first deed, there is nothing to show that he wanted more money when he came to renew it. Indeed no money was advanced to him on the latter occasion. Clearly he wanted a renewal of the contract so as to secure a further opportunity of redeeming before the mortgagee exercised his option to take possession of the mortgaged property, and this the mortgagee agreed to give him. And in any case urgent need of money on the part of the borrower does not of itself place the lender in a position to dominate his will. We are satisfied, therefore, that no case is made out for interference with the bargain

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of the parties on the ground of undue influence.

Next with regard to the argument that there is a clog upon the right to redeem from which the plaintiff is entitled in equity to be relieved, it is contended that the right to redeem which was settled by the contract is clogged by reason of the stipulation by which the mortgagee is entitled to retain possession of the mortgaged property for a period of twelve years without liability to account to the mortgagor for the profits. The plaintiff's allegation in paragraph 9 of the plaint is that under this arrangement the mortgagee is now receiving profits which represent a sum of over Rs. 6,000 a year in excess of the interest agreed upon. The Subordinate Judge has not expressed any definite opinion on this point, but he states that the defendant's Pleader admitted in the course of argument that the net profits exceed the interest by at least two or three thousand rupees a year; and before us it has been argued by the respondent's Advocate that on the assumption that the excess amounts to Rs. 3,000 a year there is no question of penalty, because on this reckoning the rate of interest has been enhanced from the date of default from Rs. 7-1-8 per cent. per annum to $10\frac{3}{4}$ per cent. per annum, which is still a moderate rate for transactions of this nature.

Then again we are referred on behalf of the appellant to the clause by which the mortgagee while in possession is entitled to cut and remove timber as also to the clause which renders the mortgagor liable at the time of redemption to pay arrears of rent and *tagavi* advances to tenants which may be recoverable. And lastly we are asked to consider the stipulation by which the mortgagor is precluded from making payments on account of principal during the period of the mortgagee's possession.

The case for the plaintiff, therefore, is that the mortgagee has secured to himself certain further or collateral advantages which constitute a fetter upon the right to redeem.

The agreement by which the exercise of the right of redemption is postponed for a period of twelve years cannot by

itself be treated as a clog: the parties are allowed to settle the period of redemption by contract between themselves, and to arrange the date after which redemption may be had. Here we have a time for redemption fixed by the parties themselves, and unless the mortgage is, if it legally can be, satisfied from the usufruct meanwhile, there is no ground apparent upon which the plaintiff should be allowed to depart from his agreement and seek redemption at an earlier date.

The clause by which the mortgagor is debarred from making payments towards principal during the period of the mortgagee's possession is part and parcel of the arrangement by which the exercise of the right of redemption is postponed: it is not a collateral or independent clause in restriction of the exercise of a right already agreed upon.

As for the other terms to which our attention has been drawn, they are concerned with the terms upon which redemption may be had when the time for redemption arrives, and the question whether they are to be treated as penal within the meaning of section 74 of the Contract Act is not one to be dealt with at the present stage, when the only matter before us is the right of the plaintiff to bring this suit for redemption in contravention of the terms of the contract.

We hold that the suit for redemption is premature and affirming the decision of the Subordinate Judge direct that the appeal be dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 585
OF 1917.

June 25, 1918.

Present:—Mr. Justice Walmsley and
Mr. Justice Panton.

SONAULLA SARDAR—DEFENDANT—
APPELLANT

versus

BHAGABATI DEBYA CHOWDHURANI

AND OTHERS—PLAINTIFFS—RESPONDENTS.
Bengal Tenancy Act (VIII B. C. of 1895), ss. 29, 52

SONAULLA SARDAR V. BHAGABATI DEBYA CHOWDHURANI.

—Area of holding increased on measurement—Agreement to pay rent at rate considerably in excess of original rate, whether enforceable.

The area of a holding for which the rent payable was Rs. 10-5-0 was described in the *dakhilas* (rent receipts) given to the tenant and in the papers kept by the landlord as $7\frac{3}{4}$ *bighas*. On a fresh survey made by the landlord the area was found to be $9\frac{1}{2}$ *bighas*: whereupon the tenant agreed to pay Rs. 16-14-0 as rent per annum for the holding as found by the measurement:

Held, that as the landlord could not point to any particular piece of land as being an excess area for which the tenant agreed to pay him so much rent in excess, the agreement of the tenant to pay Rs. 16-14-0 for the $9\frac{1}{2}$ *bighas* found on measurement was unenforceable under section 29 of the Bengal Tenancy Act, since by it the original rate of rent per *bigha* was increased considerably in excess of the authorised increase of 2 annas in the rupee. [p. 37, col. 2.]

Appeal against the decree of the Sub-Judge, Rajshahi, dated the 25th September 1916, reversing that of the Munsif, Naogaon, dated the 25th April 1916.

FACTS appear from the judgment and arguments.

Babu *Khitish Chunder Neogy*, for the Appellant.—This appeal is on behalf of the defendant and it arises out of a suit for rent. The plaintiffs claim that the rent of the *jama* is Rs. 16-14-0 per annum. The defendant says that the rent is not Rs. 16-14-0 but Rs. 10-15-0. The plaintiffs say that there was a measurement of the holding in 1309 B.S. and it was then found that the original area was $7\frac{3}{4}$ *bighas* and that it had increased to about $9\frac{1}{2}$ *bighas*. In 1311 B.S. the defendant agreed to pay the enhanced rent of Rs. 16-14-0. The defendant says that the agreement of 1311 B.S. having been made in contravention of the provisions of section 29 of the Bengal Tenancy Act is invalid. The first Court gave effect to the contention of the defendant, but on appeal the Court of Appeal below decreed the suit in full.

My submission is that under section 52 of the Bengal Tenancy Act it is incumbent upon the plaintiff to prove what was the original area of the land let out to the defendant and what is the amount of the excess; unless he can do that, he cannot claim additional rent for any additional area. It is not sufficient for the landlord to show that the area is more than what is entered in the *dakhilas* and other collection papers. The leading case on this point is *Gouri*

Pattra v. Reily (1). The case of *Rajendra Lal Goswami v. Chunder Bhusan Goswami* (2) is also in point. It has been found that the plaintiff has not been able to prove that the original settlement was made on the basis of a measurement, so it cannot be said that there has been any excess in area of land for which the plaintiff-landlord is entitled to claim enhancement of rent. To establish the existence of excess land the landlord has got to prove the area of the land at its inception; in a suit for additional rent he must also prove that the rent originally did not cover and was not intended to cover such excess area. But no such proof has been given in this case. Refers to *Rajkumar Pratap Sahay v. Ram Lal Singh* (3). Evidence has been given to show, and it has also been found by the Court of first instance, that the boundaries of the land leased and held by the defendant remain the same. The authorities show that when there is a lease of lands within specified and fixed boundaries, the landlord cannot claim additional rent if on a measurement the actual quantity of land let out is found to be in excess of the quantity specified in the lease. See *Jagan-nath Manjhi v. Jumman Ali Putwari* (4). See also *Akbar Ali Mian v. Hira Bibi* (5).

The enhancement of rent has contravened the provisions of section 52, clause (3). The excess area has not been assessed according to the provisions of section 52, clause (3).

The next point is that the enhancement is invalid having been made in contravention of section 29 of the Bengal Tenancy Act. It appears that prior to 1309 B.S. the rent was at the rate of about Re 1-6 $\frac{1}{2}$ annas per *bigha*. In 1311 B.S. there was by agreement between the landlord and the tenant, an increase of rent, viz., at the rate of Re 1-12 $\frac{1}{2}$ annas per *bigha*. That increase is by more than 2 annas in the rupee and, therefore, not enforceable.

Babu *Surendra Chandra Sen* (with him Babu *Hemendra Chandra Sen*), for the Respondents.—In order to apply section 29 the

(1) 20 C. 579 at p. 533; 10 Ind. Dec. (N. S.) 392.

(2) 6 C. W. N. 318.

(3) 5 C. L. J. 538.

(4) 29 C. 247.

(5) 15 Ind. Cas. 332; 16 C. L. J. 182 at p. 185.

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holding must remain constant. The section has no application where there has been an addition of area. If the holding remains the same, i.e., unaltered in area and the rent is enhanced by agreement, then and then only section 29 applies. Where there is an addition of area to the holding or where there is a subtraction of area from the holding, the holding does not remain constant and hence section 29 cannot apply. Refers to the case of *Satish Chundra Giri v. Kabiraddin Mallick* (6). It has been held that section 29 applies only to the increase in the rate of rent and not to an increase in the amount of rent for increase of area. Refers to *Raj Kumar Sarkar v. Haiuddin Tarafdar* (7) and *Nazir Peyada v. Jyatindra Narain* (8). The present case is stronger than the cases referred to above. By the addition of area the old holding ceases to continue and a new holding comes into existence, and when rent is fixed for the new holding, section 29 cannot be said to have been contravened. Considering that section 29 is a penal section, it should be applied to those cases only which fall strictly within its purview.

As regards section 52 I submit that that section does not apply to this case. It is a case upon an admitted agreement of both parties, which cannot be got rid of except on the ground of fraud, undue influence, etc., i.e., on some ground for which an agreement can be got rid of. It is not a suit for additional rent for additional area. It is a suit for rent agreed to be paid by the tenant for land held by him. The rule of law laid down in *Gouri Pattra v. Reily* (1) does not apply to this case.

As regards sub-sections (3) and (5) of section 52, I submit that they apply when the rent is determined by the Court in a suit under section 52 and not in a case of this nature.

Babu Khitish Chunder Neogy replied.

JUDGMENT.

WALMSLEY, J.—The plaintiff-landlord sued the defendant for rent at the rate of Rs. 16-14-0 per annum for three years. The defendant pleaded that his rent was not Rs. 16-14-0 but Rs. 10-15-0, and from the pleadings it appears that

the parties are agreed on the facts that the area of the holding was described in the *dukhlis* given to the tenant and in the papers kept by the landlord as $7\frac{3}{4}$ *bighas* and that in 1309 there was a fresh survey made by the landlord when the landlord said the area was increased to about $9\frac{1}{2}$ *bighas*. The plaintiff claims that in 1311 the defendant agreed to pay him rent at the rate of Rs. 16-14-0 per annum for the holding as found by measurement in 1309. The defence raised by the defendant is that the agreement, if made, was in violation of the provisions of section 29 of the Bengal Tenancy Act. The learned Munsif upheld this contention; but, on appeal, the learned Subordinate Judge reversed that decision and gave the plaintiff a decree for the entire amount claimed. The defendant has now appealed to this Court.

Now, it appears that the rent before 1309, assuming the area to be $7\frac{3}{4}$ *bighas*, was at the rate of about Re. 1-6 $\frac{1}{2}$ annas per *bigha*, but in 1311 the rent provided by the agreement was at the rate of Re. 1-12 $\frac{1}{2}$ annas. That increase is considerably in excess of the authorized increase of 2 annas in a rupee. Now, the landlord cannot point to any particular piece of land and say that the tenant agreed to pay him so much rent for this piece of land. The rate must be considered as applied to the whole area; and for the purpose of considering section 29 we must take the average rate per *bigha* throughout the whole area. And the question is whether, when we find an enhancement in the rate per *bigha*, the provisions of section 29 have been violated. It has been urged before us that section 29 of the Bengal Tenancy Act is applicable only when the holding "remains constant." These particular words have been used in a judgment, but the facts of that case, which is the case of *Nazir Peyada v. Jyatindra Narain* (8), are entirely different. The facts of an earlier case to which reference is made in that judgment are also entirely different from those in the present case. The principle of these cases has no application to this case. In my opinion, the agreement which was entered into between the landlord and the defendant in this case was made in violation of section 29 of the

(6) 26 C. 233; 13 Ind. Dec. (N. S.) 753.

(7) 30 Ind. Cas. 283; 22 C. L. J. 81.

(8) 30 Ind. Cas. 320; 22 C. L. J. 88.

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Bengal Tenancy Act. I think, therefore, that the appeal in this case should be allowed, the judgment and decree of the lower Appellate Court set aside and those of the Court of first instance restored with costs in this Court and in the lower Appellate Court.

PANTON, J.—I agree.

Appeal allowed.

ALLAHABAD HIGH COURT.
EXECUTION SECOND APPEAL No. 459
OF 1917.

June 26, 1918.

Present:—Mr. Justice Tudball and
Mr. Justice Abdur Raouf.

TAMIZ-UN-NISSA BIBI AND ANOTHER—
JUDGMENT-DEBTORS—APPELLANTS

versus

NAJJU AND ANOTHER—DECREE-HOLDERS
—RESPONDENTS.

*Limitation Act (IX of 1908), Sch. I, Art. 182 (5)—
Execution of decree—Application to reject objections
against execution of decree, whether step-in-aid of
execution.*

An application to a Court executing a decree to reject certain objections filed against the execution of the decree, so as to enable the execution to proceed, is an application made to the proper Court to take a step-in-aid of execution.

Execution second appeal from a decree of the District Judge, Badaun.

Mr. Iqbal Ahmad, for the Appellants.

Mr. Ibn Ahmad, for the Respondents.

JUDGMENT.—This is a judgment-debtor's appeal and the sole question is whether the decree-holders' application of the 18th of July 1913 is an application made to a proper Court to take a step-in-aid of execution. That application was an application to the Court to reject certain objections which had been filed against the execution of the decree, so as to enable the execution to proceed. It was, in our opinion, an application made to the proper Court, and it was an application asking that Court to take a step which was very necessary for the execution of the decree. The appeal fails and is dismissed with costs.

Appeal dismissed.

KOMANDUR KRISHNAMACHARLU v. B. DANOJI RAO.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 1004 OF 1917.

August 12, 1918.

Present:—Mr. Justice Abdur Rahim.

KOMANDUR KRISHNAMACHARLU

—PETITIONER

versus

B. DANOJI RAO AND OTHERS—

RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 115, O. XXI, rrr. 91, 92, 93—Execution of decree—Sale, cancellation of, for want of saleable interest in judgment-debtor—Notice, absence of, to persons entitled to rateable distribution, effect of—Revision—High Court, power of interference of.

Where an execution sale is cancelled under the provisions of Order XXI, rule 91, Civil Procedure Code, without notice to persons having an order in their favour for rateable distribution of the property, the Court, in passing the order, cannot be said to have failed or declined to exercise a jurisdiction vested in it by law and the High Court cannot interfere with the order in revision. [p. 39, col. 2.]

A mere error in the interpretation of a section is not a failure to exercise jurisdiction within the meaning of section 115, Civil Procedure Code. [p. 39, col. 2.]

Semble.—Persons who have an order for rateable distribution in their favour are persons affected by an application to set aside the sale within the meaning of Order XXI, rule 92, Civil Procedure Code, and an order made behind their backs cannot bind them for the purposes of Order XXI, rule 93. [p. 39, col. 1.]

Petition, under section 115 of Act V of 1908 and section 107 of the Government of India Act, praying the High Court to revise the order of the Court of the District Munsif, Tirupati, in Civil Miscellaneous Petition No. 231 of 1917 (Original Suit No. 821 of 1913).

FACTS appear from the judgment.

Mr. A. Ramachandra Iyer, for the Petitioner.—It is not necessary that persons who had orders for rateable distribution in their favour should have notice of, or be made parties to, proceedings under Order XXI, rule 91, Civil Procedure Code. They are persons affected by the order under rule 92 and when the order is made, all that the Court has to do is to direct the refund of the purchase-money to the purchaser.

Mr. T. M. Krishnaswami Aiyar, for the Respondents.—The respondents had an interest in the property and an order prejudicial to them could not be made behind their backs. The order for cancellation passed without notice to them cannot bind them. In any event even if

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the Munsif had erred in his view of the law, there is no question of want of jurisdiction to justify the High Court's interference in revision.

JUDGMENT.—This petition raises a somewhat difficult question of law on the interpretation of rules 92 and 93 of Order XXI, Civil Procedure Code. The petitioner before the High Court bought certain properties at an auction sale and afterwards applied to have the sale set aside under rule 91 of Order XXI, Civil Procedure Code, on the ground that the judgment-debtor had no saleable interest in the properties sold. He succeeded in his application, but he did not make parties to the proceeding the respondents before me, who had obtained orders for rateable distribution of the sale proceeds of the property of the judgment-debtor before the application was made by the petitioner to set aside the sale under rule 91 of Order XXI, Civil Procedure Code. The District Munsif held that under rule 92 of Order XXI persons having an order in their favour for rateable distribution were entitled to notice as persons affected by the application to set aside the sale and that, therefore, the respondents were not bound by the order made in their absence on the application of the petitioner.

It is argued before me by the learned Vakil for the petitioner that once there is an order made under rule 92, it binds all persons affected thereby, although they were not made parties to the proceedings, and all that the Court has to do under rule 93, when it finds that such an order has been made, is to direct any person to whom the purchase-money has been paid to refund it. The question is not covered by any authority, and as I have already stated, is not free from difficulty. If it were necessary to express my view on this point, I should be inclined to hold that persons who had obtained orders for rateable distribution are persons affected by an application to set aside the sale, within the meaning of rule 92, and an order made behind their backs cannot bind them for the purposes of rule 93. But Mr. T. M. Krishnaswami Aiyar has, I think, rightly pointed out that in any case this is not a matter in which any question of jurisdiction arises,

so as to call for interference of this Court under section 107 of the Government of India Act. The District Munsif was entitled, in deciding upon the rights of the parties, to deal with the question of law raised before him, and this is not a case in which it could be said, even if he erred in his interpretation of rules 92 and 93, that he declined or failed to exercise a jurisdiction vested in him by the law. The petition is, therefore, dismissed with costs.

M. C. P.

Petition dismissed.

ODDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEALS NOS. 2 AND 33 OF 1916.

June 19, 1918.

Present:—Mr. Kanhaiya Lal, A. J. C.,

and Mr. Daniels, A. J. C.

KANIZ MEHDI BEGAM AND OTHERS—

PLAINTIFFS—APPELLANTS

versus

Mirza RASUL BEG AND OTHERS—

DEFENDANTS—RESPONDENTS.

Construction of document—Will, interpretation of—Wakf, creation of—Private mosque, whether wakf—Evidence Act (I of 1872), ss. 115, 116—Estoppel—Minor, tenancy created on behalf of, by guardian de facto—Benefit of minor—Promise, whether constitutes estoppel—Civil Procedure Code (Act V of 1908), s. 47, O. XXI, r. 21—Execution of decree—Sale, setting aside of—Judgment-debtor, remedy of—Suit, separate, maintainability of—Mortgage-decree—Notice, failure to give, effect of—Minor—Guardian ad litem, who can be appointed as—Oudh Laws Act (XVIII of 1876), s. 20—Execution—Sale of ancestral property—Commissioner, sanction of, whether necessary—Section, whether applies to mortgage decrees.

Where a Will transferred a certain property in full proprietary right to a legatee and his representatives in perpetuity with a direction to continue a certain religious celebration in connection therewith:

Held, that the Will did not constitute the property *wakf* so as to render it inalienable. [p. 44, col. 1.]

The mere construction in a private house of a mosque, which is used for worship by the members of the family occupying that house, is not sufficient, without any other act or declaration on the part of the owner, to constitute a *wakf*. [p. 44, col. 1.]

In the absence of any representation deceiving the opposite party and thereby causing him to alter his position for the worse, a mere promise does not constitute an estoppel. [p. 48, col. 1.]

Where it was found that a minor had derived benefit from a tenancy created to his advantage by a *sarkhat* executed on his behalf by a person who was his guardian in fact, though not in law:

Held, that the minor was estopped under section 116 of the Evidence Act from denying the title of

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the man in whose favour the *sarkhat* had been executed. [p. 44, col. 2.]

Where a judgment-debtor impeaches the validity of execution proceedings which preceded and led up to the sale of his property, and thus seeks to have the sale set aside, his remedy lies by application under section 47, Civil Procedure Code, and not by means of a separate suit. [p. 46, col. 1.]

Bhagwati v. Banwari Lal, 1 Ind. Cas. 416; 31 A. 82; 6 A. L. J. 71; 5 M. L. T. 185 (F. B.) and *Maharaj Singh v. Jagan Nath*, 10 Ind. Cas. 714; 14 O. C. 70, distinguished from.

Where an auction-purchaser though he be also the decree-holder sues to recover possession on the basis of his purchase, he does so as the representative of the judgment-debtor and therefore the questions that arise in the suit are questions between the judgment-debtor and his own representatives and are not covered by section 47 of the Civil Procedure Code. [p. 46, col. 2.]

The right to bring an application within a certain period is not a vested right but a matter of procedure. [p. 46, col. 2.]

There is no rule that only the natural or certificated guardian of a minor can act as his next friend for the purpose of legal proceedings. [p. 47, col. 1.]

A duly appointed guardian for a suit is fully entitled to represent the minor in connection with all subsequent proceedings which take place in the course of the execution of the decree passed in the suit. [p. 46, col. 2.]

Where the Commissioner's order on an application for permission to sell ancestral land under section 20 of the Oudh Laws Act was, "considering the character of the buildings I think permission might be refused at present. If the judgment-debtor takes no steps to arrange, they might be sold afterwards":

Held, that the order was not intended to dispense with the necessity for any further application for sanction but meant that the refusal was not necessarily permanent and that sanction might be granted in future if the judgment-debtor took no steps to satisfy the decree. [p. 47, col. 2.]

The Commissioner's sanction under section 20 of the Oudh Laws Act is not a mere formality, but an essential preliminary to a legal sale being held, and, therefore, parties to a decree cannot dispense with the necessity for it [p. 47, col. 2; p. 48, col. 1.]

Section 20 of the Oudh Laws Act applies to sales in execution of mortgage decrees. [p. 48, col. 1.]

In cases of mortgage decrees the omission to issue a notice under Order XXI, rule 21, Civil Procedure Code, does not render the sale of the mortgaged property absolutely null and void.

Raghunath Das v. Sundar Das Khetri, 24 Ind. Cas. 304; 42 C. 72; 27 M. L. J. 150; 18 C. W. N. 1058; 16 Bom. L. R. 814; 13 A. L. J. 154; 41 L. A. 251; 1 L. W. 567; 16 M. L. T. 353; (1914) M. W. N. 147; 20 C. L. J. 555 (P. C.), distinguished from.

Appeal from the decree of the Subordinate Judge, Lucknow, dated the 3rd January 1916.

The Hon'ble Sayed Wazir Hasan, for Appellant No. 4.

Shaikh Mohammad Farzand Ali, for all the Appellants.

The Hon'ble Pandit Gokaran Nath Misra

and Babu Bhairon Prasad, for Respondent No. 1.

JUDGMENT.—These two appeals arise out of two connected suits. One was brought by five of the children of Mirza Farukh Muhammad Taki Ali Bahadur deceased for a declaration that compound No. 75, measuring 5 *bighas* 17 *biswas* 17 $\frac{3}{5}$ *biswas* in Muhalla Talab Gangni Shukul in the city of Lucknow containing a mosque, an Imambara and a number of tombs, was not liable to sale in execution of a mortgage decree obtained by Rasul Beg and Karim Beg and that the respondent Rasul Beg, one of the decree-holders who purchased the same on 10th March 1903 in execution of his decree, obtained nothing by his purchase. The other was brought by Rasul Beg for the ejectment of all the nine children and the widow of Farukh Muhammad Taki Ali Bahadur and for arrears of rent on the basis of a *sarkhat* executed by them as tenants of the same compound. Rasul Beg's suit is the earlier in point of time. He sued for arrears of rent and ejectment in November 1914. The declaratory suit was filed in February 1915.

The main issue in the case is whether the property in suit is *wakf*. But there is a further plea raised by the appellants that the sale under which the respondent Rasul Beg acquired the property was invalid on three grounds—

1. want of the Commissioner's sanction to the sale;

2. that the sale was held without proper notice to the appellants under section 248 of the Code of Civil Procedure, 1882;

3. that the representatives of Farukh Muhammad Taki Ali Bahadur were not brought on the record as required by section 234 of that Code.

On the other hand it was contended, and has been found, that these technical pleas are barred by section 47 of the Code of Civil Procedure and by limitation, and further that the entire suit is bad by reason of the fact that the plaintiffs, having become the tenants of the respondent in respect of the property in suit, are estopped from denying their landlord's title.

The compound in suit admittedly belonged prior to the Mutiny to Nawab Malka Geti, widow of Amjad Ali Shah, and it is proved by an inscription still in existence

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and is common ground between the parties that the mosque and the Imambara which it contains were constructed by her in the year 1850. It is said that she used to live in another house known as Kothi Zahur Bakhsh but that she removed her residence to the compound in suit after the Mutiny in consequence of the confiscation of the other property to Government. The following brief pedigree will show the relationship of the appellants. (A fuller pedigree is given in the plaint).

NAWAB MALKA GETI WIDOW OF AMJAD ALI SHAH, FOURTH KING OF OUDH, DIED 1866.

Prince Dara Sitwat Muhammad Raza Ali Bahadur.

Farukh Muhammad Taki Ali Bahadur, died 11th July 1900.

=Khurshed Jahan Taqiya Begam, defendant No. 8.

3 sons, 6 daughters.

All the nine children of Farukh Muhammad Taki Ali Bahadur are defendants in the suit brought by Rasul Beg. Four of the daughters and one son are plaintiffs in the declaratory suit while the remainder are arrayed as defendants. Farukh Muhammad Taki Ali Bahadur's widow is arrayed as a defendant in both cases.

The plaint contains no statement as to when or under what circumstances the alleged endowment was made or whether it was made in writing or orally. In the proceedings of 30th March 1915 prior to settlement of issues in the suit in the Subordinate Judge's Court, their Pleader stated that it was made in 1860 by means of a registered document which has since been lost. The plaintiffs' principal witness Asaf Ali Khan, an old man of 84 connected with the family of the appellants, asserts that Nawab Malka Geti who built the mosque and the Imambara executed a deed of *wakf* in presence of the Mujtahid and her relations, immediately after the construction of the Imambara was completed, i. e., about 1852 or 1853. This deed, if it ever existed, is not forthcoming, nor is there any satisfactory evidence of its loss. The statements on the latter point of Gajadhar Prasad, D. W. No. 5, a servant of the appellants whom the respondent had to put into the witness-box to

prove the *sarkhats*, were rightly rejected by the trial Judge as unreliable, relating as they do to details which it was most unlikely that the witness should remember regarding a suit filed 27 or 28 years ago. In this Court the appellants have tacitly thrown over the evidence of their own witness and asked the Court to infer an oral dedication or to hold that a *wakf* was constituted under the Will of Nawab Malka Geti referred to below. For this purpose they rely on

(1) the Will of Nawab Malka Geti, who died on 12th April 1866;

(2) a reference to the property as *wakf* in a letter, dated the 5th December 1860, addressed by her to the Chief Commissioner;

(3) instances in which her grandson Farukh Muhammad Taki Ali asserted the property to be *wakf* in his lifetime;

(4) the existence of the mosque and the Imambara and evidence of the use of the compound as a graveyard for members of the family.

The clause of the Will dealing with the suit property is as follows:—

"The house of the Imambara with the grove and all the houses and land appertaining thereto which are known as Chiraindapurwa and three notes relating to the Imambara of the value of Rs. 10,500 shall be owned by my worthy son Mirza Dara Sitwat Muhammad Raza Ali Bahadur, may God keep him safe, and his representatives, without any co sharer therein, and he and his representatives shall remain in proprietary possession thereof in perpetuity. But it shall be incumbent upon the said son and his representatives that they shall continue to hold *maglis ezadari* (i. e., the Muharram celebration) for ever in the same manner as I hold during my lifetime; rather they shall improve the same from time to time; in short, they shall not make any diminution therein."

The appellants rely principally upon the direction to the legatee to continue the annual Muharram celebration. Apart from this they attempt to derive support from the fact that the "representatives" and not the heirs of the legatee are mentioned, from the fact that the land is left to

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him and his heirs "in perpetuity", and from the expression "three notes relating to the Imambara of the value of Rs. 10,500." Apparently the interest of these notes had been used by her for the upkeep of the Imambara and so they are described as notes relating to the Imambara. These notes were subsequently released by the decree-holders in favour of the appellants by the compromise of 12th December 1898 (*vide* File of Execution Case No. 405 of 1901, Subordinate Judge, Lucknow). The other expressions are expressions which it is perfectly usual to find in Wills where nothing but proprietary right is in question, and the appellants' Counsel must have been hard to put it to support his argument when he was driven to rely on them. The document not merely makes no mention of the property being trust property but it expressly leaves it to Prince Dara Sitwat, the only son of the testator, in full proprietary right.

The case that this Will constituted the property *wakf* was never set up in the lower Court; indeed it is inconsistent with the case which the appellants there set up. It is a new case set up for the first time in appeal.

Not much assistance either way can be obtained from the conduct of Farukh Muhammad Taki Ali. When the property was threatened with sale by creditors, he did undoubtedly on two occasions between 1888 and 1890 put forward the plea that it was *wakf* and not liable to sale, and this plea was accepted. The Courts appear on these occasions to have been mainly impressed by the fact that there were a large number of graves in the area in dispute. As these pleas were put forward to save the property from the hands of creditors, no great reliance can be placed on them on the ground that they were against the interest of the maker. Faced with a choice of evils he might consider it better to keep the property as *wakf* than run the risk of losing it altogether. On the other hand, we have the fact that Farukh Muhammad Taki Ali on two occasions mortgaged the property as property belonging to him over which he had power of disposal. On 14th November 1895 he executed in favour of Rasul Beg and his brother Karim Beg

the mortgage which has given rise to the present proceedings, and on 5th February 1900 he executed a further mortgage of the suit property in favour of the Delhi and London Bank. The Bank obtained a decree for sale which it put in execution, though in the event no sale actually took place. In none of the proceedings was any plea of *wakf* ever taken.

The most important document in support of the appellants' case is a petition addressed by Nawab Malka Gati to the Chief Commissioner of Lucknow on 9th December 1860, in which she undoubtedly spoke of the property as *wakf*. The actual text is as follows:—

"Secondly, that Kothi Zahur Bakhsh, our residential house, was confiscated from us without any reason, and that a building worth six or seven lacs of rupees along with glass furniture, carpets, tents, etc., were confiscated without any fault, and we were ruined, so much so that we are living in great inconvenience in an Imambara house of insufficient accommodation and a *wakf* property situate in Muhalla Talab Gangni Shukul."

This is no doubt a substantial piece of evidence in the appellants' favour. But a consideration of the document as a whole deprives the expression relied on of much of its significance. Nawab Malka Gati was asking for the assistance of the British Government, on the ground that practically all her property had been confiscated and that she was left without means for her own subsistence and the support of her dependents. The suggestion that even the house in which she was living was not her own but she had been forced by destitution to take refuge in the appurtenances of an Imambara, adds a valuable touch towards heightening the impression of misery which it was her object to produce.

The appellants have, however, a second line of attack. They urge that, even if the Will of Nawab Malka Gati (Exhibit F 1) did not constitute a *wakf*, it had the effect of burdening the property with a trust for the maintenance of the Muharram celebration and thus rendered the property inalienable. In support of this contention they rely on the Privy Council

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decision in *Bishen Chand Basawat v. Nadir Hossein* (1). The facts of that case were, however, widely different. Whether the endowment amounted technically to a *wakf* or not, the property had been constituted trust property in unequivocal terms and made over to trustees appointed by the trust-deed, and what their Lordships decided was that the mere fact that the objects of the trust did not absorb the whole income of the trust property was not sufficient to render the property liable to be sold in execution of a decree.

The case of *Bishen Chand Basawat v. Nadir Hossein* (1) was considered by the Bombay High Court in a case [*Dossa Ram-chandra v. Narsimha Damodar Bhatt* (2)] which is reported in 9 Indian Cases, page 769. In that case certain property was burdened with a charge for the maintenance of certain religious services and the same argument was put forward as in this case, namely, that the Privy Council judgment above referred to prevented any part of the property from being sold in payment of debt. The learned Judges say:—

"The controversy turns upon the meaning of the partition deed, Exhibit 59 P. Is there by that deed a complete dedication of this property [to a religious trust or is there merely a gift to Vithoba of the property subject to an obligation to perform certain services? If there was a complete dedication, then admittedly the property is not liable to attachment. If there was merely a gift burdened with an obligation, then an attachable interest was admittedly left in Vithoba. The cases illustrating the two extremes are *Bishen Chand Basawat v. Nadir Hossein* (1) and *Basoo Dhul v. Kishen Chunder Geer Gossain* (3)."

It is unnecessary to determine whether the direction regarding keeping up of the annual Muharram celebration constituted a binding trust or was merely of the nature of an exhortation addressed by Malka Geti to her son, but even assuming the former the interest on the Government promissory notes, which, as has been already stated,

(1) 15 O. 329; 15 I. A. 1; 12 Ind. Jur. 170; 5 Sar. P. C. J. 113; 7 Ind. Dec. (N. S.) 203 (P. C.).

(2) 9 Ind. Cas. 768 at p. 769; 13 Bom. L. R. 101; 35 B. 156.

(3) 13 W. R. 200.

was released by respondents in favour of the judgment-debtors by the compromise of 1888, should be amply sufficient for its upkeep.

In his last argument on this part of the case the appellants' Counsel takes a bold stand. He urges that whatever may be the case with the rest of the property, any mosque which is used for worship must necessarily be *wakf* even though, as in this case, it is built inside the walled enclosure of a private house for the exclusive use of the members of the family, and though the general public have no access to it. In high class Muhammadan families where the women necessarily remain secluded, it is no uncommon thing for a mosque to be constructed inside a private house to enable them to perform their devotions without publicity. Counsel would like also to extend his argument to the scattered tombs of the Imambara, in spite of the admission of one of the appellants' own witnesses that every house of a Shia Muhammadan contains an Imambara for *tazias*.

The doctrine if accepted would lead to very serious consequences. As another of the appellants' witnesses says, "all the well-to-do Shias keep a place apart in their houses as Imambara. There are *masjids* (mosques) in many ordinary houses." Even if the character of inalienability is to attach in such cases only to the mosque or Imambara, its existence would largely destroy the value of the remainder of the house as a security for a creditor. No judicial authority has been cited in support of this, to us, novel proposition. Counsel relies on certain passages from Muhammadan authorities, and in particular on a passage from the *Sharaya-ul-Islam* reproduced on pages 219-220 of Baillie's *Imamia*. The sentence relied on reads: "if one should appropriate a *masjid* or place of worship, it is valid though only one person should pray in it. So, also, if the appropriation is of a cemetery, it becomes a *wakf* by the interment in it of a single corpse". Read in connection with its context this passage is far from supporting the appellants' argument. The learned author is speaking of the seisin necessary on the part of those for whom the appropriation is made, and the passage-

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assumes a prior appropriation. The sentence immediately following that relied on by the appellants makes the matter clear. It runs—"But though people should pray in a *masjid*, or bury in a cemetery without the formal words of *wakf* being pronounced, neither would pass out of the property of the original owner. So, also, the result would be the same, though the proper words were used, if possession were not also given of the subject of the *wakf*." The same passage is cited in page 432 of Tyabji's *Muhammadan Law*. These passages are no authority for the proposition that the mere construction of a *mōsque* in a private house with evidence that it had been used for worship by the members of the family occupying that house is sufficient, without any other act or declaration on the part of the owner, to constitute a *wakf*.

Agreeing with the lower Court we find that the appellants have failed to establish that any part of the property in suit is *wakf*, or otherwise unalienable, and we decide the issue accordingly.

The next issue is whether the appellants are estopped from denying the respondent's title to the property by reason of the fact that they are at the present time occupying the premises in suit as tenants of the latter. Immediately after the dismissal of Kazim Ali's application to set aside the sale, three successive attempts to get it set aside having failed, the judgment-debtors executed a *sarkhat* by which they were permitted to continue in occupation of the land as tenants of the successful decree-holders. This *sarkhat* was executed on behalf of Kazim Ali by his major brother Muhammad Ali Mirza and on behalf of the remaining plaintiffs by their mother. *Musammāt* Taqiya Begam. The *sarkhat* sets forth that whereas Rasul Beg has obtained a sale certificate in respect of the house, and whereas the executants are still living in it and are unable to find any other place in which to reside, therefore, in order that they may be provided with a residence they have agreed to rent the premises in question from the decree holder for one year at Rs. 35 a month. This was admittedly a favourable rent, the premises being valued in the plaint at Rs. 12,000. Successive *sarkhats* in renewal of this

agreement were executed on 14th December 1905, 15th March 1907 and 2nd April 1908 respectively. The last *sarkhat* was for three years. The judgment-debtors have continued to reside in the house up to the present time and paid rent up to March 1914. The cross suit brought by the decree-holder in the Munsif's Court was for rent for the period subsequent to that date. Under section 116 of the Evidence Act no tenant of immoveable property is permitted to deny that the landlord had a title thereto at the commencement of the tenancy. The plaintiffs seek to exclude the effect of the section by pleading that their brother and mother respectively had no authority to execute the *sarkhats* on their behalf. They say further that there was no person living who had such authority and that only a guardian appointed by the Court could have done so. Now conceding that a mother and brother respectively have no legal right of guardianship under *Muhammadan Law* even when the father is dead, it appears to us that the question of estoppel would depend on whether the minors derived benefit from the tenancy which the agreement created. The mother and the elder brother, though they might not be the legal guardians, were the persons on whom the care of the minors and of their interests naturally devolved. It has been urged with great force on behalf of the appellants that no such benefit could result as they were in possession, and if the respondent had attempted to turn them out they could have raised in answer to such attempt the same pleas which have been raised in this suit.

It is, however, right to look at the position as it stood at the time.

About two months after the sale was confirmed three of the judgment-debtors Taqiya Begam, Kaniz Husaini Begam and Kaniz Shappari Begam, put in an application under section 244 of the Code of 1882 asking for the setting aside of the sale on the very same objections which have been pressed in this suit. The application was rejected, the learned Subordinate Judge holding that if intended as an application under section 311 of the Code, which it was not, it would

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have been beyond time and that it did not lie under section 244. While this application was pending, two of the major sons of Farukh Muhammad Taki Ali filed a regular suit to set aside the sale on the ground of fraud, irregularities and want of jurisdiction. The learned Subordinate Judge held that on the merits the suit could not succeed, but he gave the plaintiffs an opportunity to pay up the decretal amount and directed that if they did so, the sale should be set aside but if not, the suit should stand dismissed with costs. They failed to avail themselves of the opportunity given to them. Finally on 12th August 1904, Kazim Ali presented through his next friend Wala Kadar the application which will be hereafter referred to and which was ultimately struck off for default.

Three several attempts had thus been made to get the sale set aside and those attempts had included all the grounds which have been put forward in the present litigation. All those attempts had failed. Possession was about to be delivered to Rasul Beg (*vide* evidence of the Court Bailiff, D. W. No. 1). In fact possession was delivered in accordance with the *sarkhat* by the officer of the Court. There was no prospect whatever that any further attempt would have any different fate from its predecessors. The plaintiffs and their brothers and sisters with their mother were faced with the alternative of coming to an agreement with the respondents or of being turned out of the property and rendered homeless. As circumstances stood at the time—and it is to this that we have to look—it can hardly be doubted that the agreement was to their advantage, and under it and the subsequent agreements they have retained undisturbed possession of the property from 1904 down to the present time, both during and subsequent to the minority of the plaintiffs. It is said that there is nothing to fix the plaintiffs individually with any payment of rent since they have come of age. This is true. The rent appears to have been paid in a lump. But on the other hand until the institution of the present suits they have made no attempt to repudiate the tenancy. They continued to occupy the house

jointly with the other tenants and it was not till the rent fell into arrears and the suit for ejectment on this ground had been filed against them, that it occurred to them to set up alverse title and to try their luck with the pleas which their brothers and sisters and their mother had unsuccessfully urged more than ten years before.

Before we go on to consider the various technical objections to the execution sale, we are met at the outset by the question whether the appellants' remedy was not by application under section 47 of the Code of Civil Procedure rather than by suit, and if so, whether it is not time-barred. There appears to be no question that the remedy was under section 47 or rather, as the Code of 1882 was in force when the right to apply accrued, under section 244 of that Code. The sale decree on the basis of the mortgage was obtained against the plaintiff's father, Farukh Muhammad Taki Ali, on 20th September 1897 and made absolute on 16th May 1898. The sale took place on 23rd December 1902 and was confirmed on 24th February 1903. The plaintiffs-appellants claim as Farukh Muhammad Taki Ali's heirs and legal representatives. There is, therefore, no question of their not having been parties to the suit. Their predecessor-in-interest was a party and their rights only accrued after the suit was decided, Farukh Muhammad Taki Ali having died in the year 1900.

There are authorities which lay down that where an auction-purchaser, even though he be also the decree-holder, sues to recover possession on the basis of his purchase, he does so as representative of the judgment-debtor, and, therefore, the questions that arise are questions between the judgment-debtor and his own representatives and are not covered by section 244 (now section 47) of the Code of Civil Procedure. This was the decision of the majority of a Full Bench of the Allahabad High Court in *Bhagwati v. Banwari Lal* (4), Stanley, C. J., and Knox, J., dissenting. This case was cited with approval in *Maharaj Singh v. Jagan Nath* (5), a case in which the question was whether the auction-purchaser had taken possession of property to which his sale

(4) 1 Ind. Cas. 416; 31 A. 82; 6 A. L. J. 71; 5 M. L. T. 185 (P. B.).

(5) 10 Ind. Cas. 714; 14 O. C. 70.

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certificate gave him no right. Here the facts are entirely different. The plaintiffs impeached the validity of the execution proceedings which preceded and led up to the sale and they have impleaded, as they were bound to implead, not only the auction-purchaser, but the representatives of both the original judgment-creditors. If their objection should prevail, the judgment creditors would be put back in the position of having a decree which was incompletely executed and they would be entitled, so far as limitation allowed, to have the property put up to sale afresh so as to bind the interests of the plaintiffs.

The appellants perceived this difficulty in their way; indeed the fact that section 144 applied has hardly been contested. Their plea is that the suit should be treated as an application under section 47 in accordance with the second clause of that section. When the history of this litigation is considered, prolonged as it has been over a period of 21 years since the decree-holders obtained a decree for sale, the appellants might have considerable difficulty in satisfying the Court that they were fit subjects for the Court's discretion, but at the outset they are met by the further difficulty that such a discretion can only be exercised "subject to any objection as to limitation." The reason for this is clear. If the judgment-debtors were allowed to attack execution proceedings by suit nearly 12 years after the sale, the decree-holder, on attempting to remedy his mistakes and putting in a fresh application for execution in accordance with the law, might find his way barred by the provisions of section 48 of the Code of Civil Procedure, which forbid any fresh application for execution to be entertained after the expiry of 12 years from the date of the decree. The period of limitation for an application under section 47 is three years under Article 181 of the Limitation Act, which would have allowed ample time for fresh sale proceedings to be taken, whereas the declaratory suit was not filed till 13th February 1915, just short of 12 years after the sale was confirmed.

The appellants were minors at the date of the sale. They rely on sections 6 and 8 of the Limitation Act. But in order to do so successfully it was necessary for them, even under the old law, to show that they

attained majority within three years of the institution of the suit. Section 7 of Act XV of 1877, which was in force in 1903, extended to all applications, whereas section 7 of the present Act does not extend to applications other than applications for execution of a decree. As the right to bring an application within a certain period is not a vested right but a matter of procedure [as was held, among other cases, in *Jia Bibi v. Ilahi Baksh* (6)] they were no longer entitled to an extension of time on account of minority when the present Limitation Act, IX of 1908, came into force. Moreover, even if the old Act had continued to apply they have failed to establish their case. Their oral evidence was disbelieved by the Subordinate Judge and we have not been asked to consider it. Such documentary evidence as is available goes to show that even the youngest plaintiff Kazim Ali was at the time of suit at the lowest computation somewhere between 21 and 22 years old or, as the Subordinate Judge says, not less than 22 years. As the learned Subordinate Judge points out, his age was given as 14 years in an application presented on his behalf through his next friend in August 1904. It is admitted that no guardian had ever been appointed for any of the plaintiffs under the provisions of the Guardians and Wards Act. They, therefore, attained majority at the age of 18 under the provisions of the Indian Majority Act.

The appellants' remedy being barred by efflux of time, it is not, strictly speaking necessary to go into the various technical objections which have been raised in the sale proceedings. As, however, these objections have been argued before us at great length, it may be well to record briefly the findings at which we have arrived upon them, it being premised that these objections would in any case only affect the shares of the female appellants (amounting in all to 4 annas 8 pies out of 16 annas), as the remaining heirs of Farukh Muhammad Taki Ali are barred by the rule of *res judicata* from contesting the validity of the sale. As regards those heirs who are not plaintiffs this is admitted. Kazim Ali also through his next friend Mirza Wala Kadar put forward on 12th August 1904 an objection to the sale (6) 30 Ind. Cas. 573; 13 A. L. J. 837; 37 A. 597.

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on the same grounds as are now put forward. This objection was dismissed on the merits on 30th August 1904. It is contended on his behalf that he is not bound by this decision, on the ground that his next friend was not the natural guardian of his property under Muhammadan Law. Admittedly there was no natural guardian in existence, since that office only belongs to a paternal ancestor and Kazim Ali had no paternal ancestor living. There is, however, no rule that only the natural or certificated guardian can act as a next friend for the purpose of legal proceedings. Mirza Wala Kadar, who acted as his next friend in this case, was the husband of Kazim Ali's sister who had a common interest with himself in the subject-matter of the application. The proceedings were taken in good faith in the minor's interest and there is no reason why they should not be binding on the minor.

The first of the technical pleas is that the sale was invalid, because it was made without obtaining the sanction of the Commissioner as required by section 20 of the Oudh Laws Act, 1876. On a previous application for execution sanction had been applied for and the Commissioner passed an order in the following terms:—

"I happen to know about this case. The buildings are a mosque, Imambara and graveyard. The judgment-debtor has a large pension and could pay off all debts with interest in seven or eight years. Considering the character of the buildings I think permission might be refused at present. If the judgment-debtor takes no steps to arrange, they might be sold afterwards.

"(Sd.) H. Fraser, Commissioner.

22nd August 1898."

Subsequently on 12th December 1898 the parties entered into a compromise arranging for the payment of the debt by instalments with the following condition added:—

"If the aforesaid instalments are not paid the decree-holder shall have power, without regard to his obligation to proceed first against the mortgaged property, to immediately realise his money in execution proceedings against the persons and the entire property of every description of us, the judgment-debtors. We shall have no right to put forward any objection of fact

or law in respect of it and the Court will have power to cause our property to be sold by auction without obtaining the sanction of the Commissioner."

A fresh application for execution was presented on 26th October 1900 and without any fresh application being made to the Commissioner for sanction, the property was sold and knocked down to Rasul Beg decree-holder for Rs. 705 on 23rd December 1902.

The respondents' contention is, *first*, that the Commissioner's order was intended to dispense with the necessity for any further application for sanction, a view adopted by the learned Subordinate Judge, and, *secondly*, that in any case the necessity for applying for sanction was waived and that the appellants are now debarred from raising this plea. We are unable to accept the interpretation placed on the Commissioner's order by the lower Court. All that is meant by the concluding sentence is that the refusal was not necessarily permanent and that sanction might be granted in future if the judgment-debtor took no steps to satisfy the decree. We have frequently had to deal with, and have ourselves passed orders in, somewhat similar form, and we are quite clear that the order was not intended to authorise the decree-holder to sell the property at his own pleasure whenever he might think it convenient to do so. It is also clear from their own subsequent conduct that the parties themselves did not regard the order in this light. Clause 3 of the compromise of December 1898 above referred to runs thus:—

"I agree in good faith and give trustworthy assurance that on non-payment of the aforesaid Rs. 250 the decree-holders and the creditors may act on the conditions in clause 2. At that time the Commissioner's order of 22nd August 1898 refusing to sanction sale shall not stand in the way of the sale."

The order is thus distinctly an order refusing sanction and the parties treated it as such in the very compromise which the respondents rely on. If the Commissioner's sanction was a mere formality, the parties were at liberty to dispense with it. If on the other hand such sanction was an essential preliminary to a legal

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sale being held, it is clear that no act of the parties could dispense with the necessity for it. The latter is the view taken in *Sheikh Abdul Ghafur v. Raghubar Singh* (7). That section 20 applies to sales in execution of a mortgage decree was decided as far back as 1898: *Syed Fida Husain v. Kailasa* (8). It is contended, however, that having caused the decree-holder to believe that he was entitled to get the property sold without sanction, they are now estopped from pleading want of sanction as invalidating the proceedings. This plea equally fails. There was no representation deceiving the opposite party and thereby causing him to alter his position for the worse. A mere promise does not constitute an estoppel. What the parties did was to enter into an agreement to dispense with a sanction which under the provisions of section 20 of the Oudh Laws Act could not be dispensed with. Such an agreement is forbidden by section 23 of the Contract Act as intended to defeat the provisions of section 20 of the Oudh Laws Act. If indeed we could hold that the requirement of sanction under that section was inserted purely in the interest of the debtor, it would be possible to hold that he had power to waive it. That, however, is not the view which has prevailed, and even apart from authority it was probably quite as much in the public interest as in that of the individual debtor that the restraint on the sale of land in execution of decree was enacted.

It is admitted that prior to the sale of the property no notice under section 248 of the Code of 1882, to show cause why the decree should not be executed, was issued to the judgment debtors. The first application for execution was that dated 21st May 1898, on which Mr. Fraser's order was passed and which resulted in the compromise of 12th December 1898, already discussed. Farukh Muhammad Taki Ali, the original judgment debtor, died on 11th July 1900. On 26th October 1900 the respondents-decree-holders applied to have the names of his widow and children brought on the record as his legal representatives under section 234 of the

old Code. On the same date a separate application was made under section 256 of the Code for the appointment of a guardian *ad litem* of the minor judgment-debtors, the present plaintiffs. Originally their mother *Musammata* Taqiya Begam was named as guardian of the female plaintiffs and his elder brother Muhammad Ali Mirza as the guardian of Kazim Ali. The application contained a statement duly verified that the proposed guardians had no interest adverse to that of the minors. Muhammad Ali Mirza declined to act as his brother's guardian, and ultimately *Musammata* Taqiya Begam agreed to act as the guardian *ad litem* of all the plaintiffs and was formally appointed by an order which runs—

"Taqiya Begam is appointed guardian of the minors Kazim Ali, Jawwadi Begam, Zakia Begam, Mehdi Begam and Hadiya Begam."

The application under section 234 was, however, ultimately dismissed as premature on the ground that no execution was applied for, the judgment debtors having regularly paid the instalments due from them under the compromise of 1898. Section 234, it may be noted, did not provide for an application to bring on the record the representatives of a deceased judgment-debtor, but for executing a decree against the legal representatives where the judgment-debtor had died after the passing of the decree but before it was fully satisfied. The appellants' argument is that because the application under section 234 was ultimately dismissed, the appointment of *Musammata* Taqiya Begam as guardian *ad litem* of the plaintiffs should be treated as being only for the purpose of deciding whether that application should be allowed or not and though she was treated as their guardian *ad litem* in all the subsequent proceedings, the plaintiffs should be deemed to have been unrepresented. This is to take much too narrow a view. Section 456 provides for the appointment of a guardian "for the suit", and when once such a guardian had been duly appointed and had accepted the office, she was fully entitled to represent them in connection with all the subsequent proceedings which took place in the course of the execution of the decree.

(7) 8 O. C. 409.

(8) 3 O. C. 1.

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This disposes of the question of non-representation.

The next application for execution was made on 3rd November 1902. The decree-holders in their application stated the previous history of the case, and actually inserted a prayer for the issue of a notice under section 248. They asked for execution by sale of the property. This was more than a year after the disposal of the previous application for execution, and both on this account and because it was the first application for execution against the legal representatives notice under section 248 should have been issued. In fact no such notice was issued. The decree-holders gave in their application a summary of the previous proceedings in connection with the execution of the decree. The Court, however, merely asked the office to report whether sanction to the sale by the Commissioner had been received or not. The office put up a report drawing attention to Mr. Fraser's order of 22nd August 1898 and the Court, being apparently satisfied with this, issued a sale proclamation, with the result that the property was put up to sale and purchased by the decree-holder on 23rd December 1902. In all these proceedings the minors were duly represented by their mother *Musammât Taqiya Begam*.

It has been strenuously contended on the strength of the decision of the Privy Council in *Raghunath Das v. Sundar Das Khetri* (9) that the omission to issue notice under section 248 rendered the sale absolutely null and void. It will be noticed, however, that the decree which was before their Lordships in that case, though based originally on a mortgage, was not a decree for sale under the mortgage but a simple money decree. Now there is a broad distinction to be drawn between a sale under a mortgage decree and an attachment and sale under a simple money decree. A mortgage decree directs the sale of the particular property described in it and the jurisdiction to sell is derived from the decree itself. On the other hand, a simple money decree confers in itself no jurisdiction to sell

(9) 24 Ind. Cas. 304; 42 C. 72; 27 M. L. J. 150; 18 C. W. N. 1059; 16 Bom. L. R. 814; 13 A. L. J. 154; 41 L. A. 251; 1 L. W. 567; 16 M. L. T. 353; (1914) M. W. N. 147; 20 C. L. J. 555 (P. C.).

any property whatever. A valid attachment is necessary before the Court can acquire such power. If, therefore, attachment is made without the necessary notice being given to the judgment-debtors to show cause against it, this is sufficient to invalidate the subsequent sale. But in the case of a mortgage decree which expressly directs the sale of the property, the omission to issue notice, unless it can be shown that the judgment-debtors were prejudiced by it, may be no more than an irregularity which might have entitled the judgment-debtors to apply to set aside under section 311 of the Code of 1882.

For the reasons given above both appeals fail and they are accordingly dismissed with costs.

In *Rasul Beg's* suit a cross-objection has been filed on the ground that the learned Subordinate Judge wrongly rejected the claim for arrears of rent. It is difficult to follow the learned Subordinate Judge's finding on this point and the learned Advocate for the appellants has been unable to support it. The learned Subordinate Judge, while decreeing the claim for ejectment, dismissed the claim for arrears of rent on the ground that "no arrears of rent as claimed have been proved." The tenancy and the rate of rent having been established, it was for the defendants to show what part, if any, of the rent alleged to be in arrears had been paid up. The defendants did not even allege that the rent in suit had been paid. On the contrary they disputed the *sarkhats* and denied the existence of a tenancy. Under these circumstances the claim for arrears of rent should have been decreed in full and we allow the cross-objection in Appeal No. 33 of 1916 with costs and modify the decree accordingly. The plaintiff will be entitled to his full costs in the lower Court instead of only to proportionate costs.

Appeals dismissed.

VITTA TAYARAMMA v. CHATAKONDU SIVAYYA.

MADRAS HIGH COURT:
FULL BENCH.

SECOND CIVIL APPEAL No. 484 OF 1917.

July 30, 1918.

Present:—Sir John Wallis, Kt., Chief Justice,
Mr. Justice Oldfield and Mr.
Justice Seshagiri Aiyar.

VITTA TAYARAMMA, BY HER
CONSTITUTED ATTORNEY KOPPARAPU
CHINNA VENKATASUBBAYYA

—PLAINTIFF—APPELLANT

versus

(CHATAKONDU SIVAYYA AND OTHERS,
—DEFENDANTS NOS. 1 TO 3—RESPONDENTS.

Hindu Law—Widow—Apostacy and re-marriage thereafter—Forfeiture of first husband's estate—Hindu Widow's Re-marriage Act (XV of 1856), s. 2, scope of—Caste Disabilities Removal Act (XXI of 1850), effect of.

Held, per Wallis, C. J., and Oldfield, J. (Seshagiri Aiyar, J. dissenting).—A Hindu widow, who becomes a Muhammadan and marries a Muhammadan, forfeits, by the re-marriage, her interest in her first husband's estate under the general principles of Hindu Law. [p. 56, cols. 1 & 2; p. 58, col. 2.]

Per Wallis, C. J., Oldfield and Seshagiri Aiyar, JJ. (dissenting).—The forfeiture is also entailed by reason of section 2 of Act XV of 1856. [p. 57, col. 1.]

Murugayi v. Viramakali, 1 M. 226; 1 Ind. Jur. 234; 1 Ind. Dec. (N. S.) 149, followed.

Karnam Chowdappa v. Karnam Narasamma, 44 Ind. Cas. 299; 23 M. L. T. 81; 7 L. W. 411; (1918) M. W. N. 274, overruled.

Per Wallis, C. J.—Act XXI of 1850, though it relieved the widow of a Hindu from forfeiture of her widow's estate on her abjuration of Hinduism, did not enlarge the nature of that estate, so as to relieve her from forfeiture in the event of her renouncing her status of widow by re-marriage. [p. 57, col. 1.]

The words "any widow,....upon her re-marriage," in section 2 of Act XV of 1856 are wide enough to cover the case of any widow of a Hindu re-marrying, whether or not her marriage would otherwise be prohibited by any custom or interpretation of Hindu Law and whether the re-marriage was to a Hindu or to a member of another religion. [p. 57, col. 1.]

Per Oldfield, J.—Act XV of 1856 is not applicable to cases of re-marriage after apostacy, and the forfeiture is entailed only by reason of the incompatibility between the renunciation of a widow's status and the retention of a widow's estate. [p. 58, cols. 1 & 2.]

Per Seshagiri Aiyar, J.—The rule of Hindu Law that a widow, who re-marries and is thus not true to the bed of her deceased husband, cannot inherit to his estate can be applied only when she is within the pale of Hindu Law. Her re-marriage after apostacy cannot divest her of the right to inherit which subsisted to her at the date of her conversion to another religion. [p. 59, col. 1.]

Second appeal against the decree of the District Court, Cuddapah, in Appeal Suit No. 196 of 1914, preferred against the decree

of the District Munsif, Proddatur, in Original Suit No. 574 of 1913.

This second appeal coming on for hearing on 20th February 1918, upon perusing the grounds of appeal, the judgments and decrees of the lower Appellate Court and the Court of first instance and the material papers in the suit, and upon hearing the arguments of Messrs. M. O. Parthasarathy Aiyangar and M. O. Tirumalachariar, for the Appellant, and of Mr. T. V. Subba Rao, for Respondent No. 1, and the other respondents not appearing in person or by Pleader and the case having stood over for consideration till the 28th February 1918, the Court (Phillips and Krishnan, JJ.) made the following

ORDER OF REFERENCE TO A
FULL BENCH.

PHILLIPS, J.—In this case the sole question for decision is whether a Hindu widow, who becomes a Muhammadan and is then married to a Muhammadan, forfeits by her re-marriage her right to her first husband's estate. There is no reported decision of this Court directly in point and the views held by the Calcutta and Allahabad High Courts are conflicting. In *Matungini Gupta v. Ram Rutton Roy* (1) a Bench of five Judges of the Calcutta High Court (one dissenting) answered the question in the affirmative, by reason of section 2 of the Hindu Widow's Re-marriage Act (XV of 1856), whereas the decisions of the Allahabad High Court are to the contrary effect [*vide Abdul Aziz Khan v. Nirma* (2)], on the ground that section 2 of Act XV of 1856 is applicable only to Hindu widows as such and is not applicable to Hindu widows who have ceased to be Hindu. It has also been held in Allahabad that section 2 of Act XV of 1856 does not apply to the re-marriage of Hindu widows, who are permitted by the rules of their caste to re-marry [in *Gajadhar v. Kaunsilla* (3) and in *Mula v. Partab* (4)]. In the latter case the Judges had hesitation in accepting the view, but followed the uniform course of

(1) 19 C. 289; 9 Ind. Dec. (N. S.) 638 (F. B.).

(2) 20 Ind. Cas. 335; 35 A. 466; 11 A. L. J. 678.

(3) 1 Ind. Cas. 761; 31 A. 161; 6 A. L. J. 107.

(4) 6 Ind. Cas. 116; 32 A. 489; 7 A. L. J. 417.

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decisions in their Court. Upon this latter point, this Court has taken a different view, and so long ago as 1877 it was held in *Murugayi v. Viramakali* (5) that a widow of the Maraver caste, in which caste re-marriage is allowed, who has re-married, has no claim to the property of her first husband. This decision was based not on section 2 of Act XV of 1856, but upon the general principles of Hindu Law. The principle relied on in that case was that a widow takes the life-interest of her deceased husband upon the fiction that she is a surviving portion of her husband. This decision was followed by *Sundara Aiyar, J.*, in *Doraisawmy Thevan, In re* (6), but he relied upon Act XV of 1856, and the same view was held in *Rasul Jehan Begum v. Ram Surun Singh* (7) and in *Vithu v. Govindu* (8).

In a recent case in this Court (Second Appeal No. 510 of 1916), *Karnam Chowdappa v. Karnam Narasamma* (9), *Seshagiri Aiyar* and *Napier, JJ.*, have followed the decision in *Abdul Aziz Khan v. Nirma* (2) and declined to follow *Matungini Gupta v. Ram Rutton Roy* (1), as being opposed to the ruling of the Privy Council in *Moniram Kolita v. Keri Kolitani* (10) that a widow does not forfeit her estate by reason of subsequent unchastity. If, however, the principle of Hindu Law relied on in *Murugayi v. Viramakali* (5) is to be applied, i.e., that a widow continues to be a surviving portion of her husband, her re-marriage, by which she becomes a portion of her new husband, does far more to remove the fiction than mere unchastity. The question of whether a widow, who had been degraded or outcasted on account of unchastity, forfeits her interest was left undecided. The decisions in *Murugayi v. Viramakali* (5) and subsequent cases do not appear to have been referred to in Second Appeal No. 1510 of 1916 [*Karnam Chowdappa v. Karnam Narasamma* (9)], which was ap-

parently decided solely on the construction of Act XV of 1856, and, therefore, I think it is advisable that the general question before us should be referred to a Full Bench of this Court for decision. I would like to add with respect that it appears to me that even under section 2 of Act XV of 1856 a Hindu widow who re-marries as a Muhammadan loses her rights to her first husband's property. There is nothing in section 2 which restricts its provisions to the re-marriage of Hindu widows as such, and I can see no reason for importing these words into the section merely because the Act as a whole deals with re-marriage of Hindu widows. While the Act as a whole is intended to legalise widow re-marriages, section 2 specifically provides that re-marriage, though legal, shall entail a certain disability, and this disability is not in terms restricted to a re-marriage contracted while still a Hindu. But for the widow's conversion to Muhammadanism, her re-marriage would entail forfeiture and there is nothing in the Act to suggest that such conversion is to remove her disability. If it were not for the decision in Second Appeal No. 1510 of 1916 [*Karnam Chowdappa v. Karnam Narasamma* (9)] I would, with all respect, follow the decision of the Calcutta High Court; but in view of that decision of this Court, I would refer the following question to a Full Bench:—

"Does a Hindu widow, who becomes a Muhammadan and marries a Muhammadan, by her re-marriage forfeit her interest in her first husband's estate?"

KRISHNAN, J.—In the suit from which this second appeal arises, plaintiff sued for a declaration of his title to a house and for the recovery of its possession. The house originally belonged to one Pullayya, a Kapu by caste, and on his death his widow, the 5th defendant, inherited a widow's estate in it under the Hindu Law. Some 10 years before suit she became a Muhammadan and soon after, married a Muhammadan husband in the *nikka* form. It may be mentioned here that Kapus do not allow re-marriage of widows in their caste; but the 5th defendant married a Muhammadan. Plaintiff's title is based on a sale-deed executed to him by the 4th and the 5th defendants. The

(5) 1 M. 226; 1 Ind. Jur. 234; 1 Ind. Dec. (N. S.) 149.

(6) 15 Ind. Cas. 602; 12 M. L. T. 158.

(7) 22 C. 599; 11 Ind. Dec. (N. S.) 392.

(8) 22 B. 321; 11 Ind. Dec. (N. S.) 793 (F. B.).

(9) 44 Ind. Cas. 299; 23 M. L. T. 81; 7 L. W. 411; (1918) M. W. N. 274.

(10) 5 C. 776; 6 C. L. R. 332; 7 I. A. 115; 4 Sar. P. C. J. 103; 3 Suth. P. C. J. 765; 4 Ind. Jur. 353; 3 Shome L. R. 198; 2 Ind. Dec. (N. S.) 1102 (P. C.).

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4th defendant was the sole next reversioner of Pullayya at the time of plaintiff's sale, but at the time the 5th defendant remarried, he and his brother, the father of defendants Nos. 2 and 3, now deceased, were the next reversioners equally entitled. The contesting defendants claim under defendants Nos. 2 and 3. The question, therefore, arises whether by her re-marriage the 5th defendant forfeited her rights in her first husband's property; for if she did, the plaintiff has got only the 4th defendant's half share in the property; otherwise he will be entitled to at least a life-estate in the whole property and his suit in ejectment must be decreed in full. The lower Courts held that the 5th defendant's re-marriage had worked a forfeiture and gave a decree only for half the property; plaintiff has appealed to us and has contended that there was no such forfeiture.

The point for decision is thus, as stated by my learned brother, 'whether a Hindu widow who becomes a Muhammadan and contracts a valid marriage according to Muhammadan rites forfeits her rights in her Hindu husband's estate?' It is conceded that her conversion did not *per se* affect her rights injuriously as they were saved by Act XXI of 1850. But it is argued for the respondents that a forfeiture was caused either by section 2 of Act XV of 1856 or if that did not apply, by the ordinary Hindu Law.

The applicability of section 2 may be considered first. In doing so, it must be borne in mind that there are two different classes of widows with reference to whom the question has been considered in the decided cases—the one class consisting of Hindu widows who belong to castes which permit re-marriage of widows in the caste itself, the other class consisting of widows who originally belonged to a caste which did not permit such re-marriage, but who subsequently obtained the right of re-marriage by conversion to a different religion. The cases of these two classes do not seem to be parallel and different considerations apply. The widows of the 2nd class could have re-married only under the Act so long as they remained Hindus, but they could no longer do so after their change of religion; whereas

the widows of the 1st class need not, and usually do not, take advantage of the Act to justify their re-marriage at any time though there is nothing to prevent them from doing so. Judicial opinion has differed as to whether when the latter class re-marries under a caste custom, the Act and particularly section 2 thereof apply to them at all; *vide Har Saran Das v. Nandi* (11), *Ranjit v. Radha Kani* (12), *Gajadhar v. Kaunsilla* (3) and *Mula v. Partab* (4) holding that they do not apply and *Vithu v. Govinda* (8) and *Duraisawmy Thevan, In re* (6) to the contrary. This question need not, however, be decided in the present case as it is one of a widow of the second class. The above authorities have thus no direct bearing on the case except in so far as they construe the language of section 2.

In the case before us we have to consider whether section 2 applies to the case of widows of the second class re-marrying according to their new religion and if so, whether we should adopt a strictly literal construction of the section or a limited one confining it to cases of re-marriage under the Act. The authorities bearing on the point are (1) a Full Bench decision of the Calcutta High Court in *Matungini Gupta v. Ram Rutton Roy* (1), where a majority of Judges held that section 2 applied and the subsequent marriage caused a forfeiture, (2) a decision of a Bench in Allahabad in *Abdul Aziz Khan v. Nirma* (2) and (3) a decision of a Bench of our own Court in Second Appeal No. 151C of 1916 [*Karnam Chowdappa v. Karnam Narasamma* (9)] (not yet reported), both of which held that section 2 did not apply. After a careful consideration I am inclined to follow the latter view.

It seems to me that having regard to the scope and object of the Act as stated in the preamble and seeing that it is a purely enabling Act, its provisions should not be applied to affect the property of persons who do not and could not take advantage of it. The 5th defendant having remained as a

(11) 11 A. 330; A. W. N. (1839) 77; 6 Ind. Dec. (N. s.) 638.

(12) 20 A. 476; A. W. N. (1898) 121; 9 Ind. Dec. (N. s.) 665.

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Muhammadan had nothing to do with the Act. But it is argued that, though this may be so, the language of section 2 is wide enough to make it applicable independent of the Act itself. Ordinarily the provisions of an Act must be construed with reference to its scope and object. We must, therefore, see whether the language of section 2 is clear enough to justify a departure from this rule. If we turn to the section it speaks of forfeiture on "re-marriage." Does it mean re-marriage in any form whatever or only re-marriage under the Act? I am inclined to think it is the latter. It will be seen from its language that a strictly literal construction of the section will make it applicable even to a Christian or Muhammadan or other non-Hindu widow who was never a Hindu at all, but who happened to inherit by virtue of a Will of her husband or other testamentary disposition a limited interest in his property, without an express permission from him to re-marry. I take it no one will contend that the section should be construed in this very wide manner to include persons who were never Hindus at all. It is clear, therefore, that some limitation must be placed on the words of the section and the only logical way to do it is, it seems to me, to take the scope and object of the Act and construe the section accordingly. We must look to the preamble and to the scheme of the Act generally to see what its scope and object are—See Maxwell on Interpretation of Statutes, 5th Edition, page 69 *et seq.* It is clear, as already stated, that the Act is an enabling one intended to remove disabilities of certain persons in the matter of re-marriage and to give them new rights regarding it. A reference to the various sections of the Act shows that the scheme of the Act is that, after authorising re-marriage under section 1, it deals with the conditions and consequences of such re-marriage in the following sections. The word "re-marriage" in section 2 should, therefore, I think, be reasonably read as referring only to a re-marriage under the Act and not to any re-marriage whatsoever.

In the judgment of the Full Bench in *Matungini Gupta v. Ram Rutton Roy* (1), there is no discussion of the question at

all. The learned Chief Justice merely says: "Section 2 includes all widows who are within the scope of the Act, that is to say, all persons who being Hindus become widows." Though this case was followed in *Rasul Jehan Begum v. Ram Surun Singh* (7), the learned Judges there based the forfeiture on the Hindu Law and not on the Act.

The reasoning in the Full Bench case in *Vithu v. Govinda* (8) has, no doubt, a bearing on this part of the case, though that case itself is one relating to the first class of widows. Mr. Justice Ranade says that section 2 should be construed literally, because "so far as the section is concerned, the law has only declared what was an universal practice, and this fact must have been present to the mind of the Legislature and explains the omission of all qualifying words." With all deference I am unable to follow this method of interpretation, nor am I satisfied that the practice of widows forfeiting their right in their first husband's property on re-marriage is so universal in India as is stated. If there are castes which allow widows to re-marry and keep their estates at the same time, and I am not sure there are not any, I can see no reason to think that the Legislature in enacting Act XV of 1856 intended to interfere with the rights of such widows. If section 2 is taken to cover such cases, we cannot escape the conclusion that such rights are abrogated. I think clearer and more direct language should be required before such an inference can be drawn: With all respect, I am unable to adopt the reasoning of the learned Judge.

As already stated, I am inclined to follow the ruling of our own High Court in Second Appeal No. 1510 of 1916 [*Karnam Chowdappa v. Karnam Narasamma* (9)] and of the Allahabad Court in *Abdul Aziz Khan v. Nirma* (2), in so far as they hold that section 2 does not apply to a Hindu widow re-marrying after conversion; but with all respect, I am not prepared to follow them when they hold further that no forfeiture at all was caused by the re-marriage, for I am inclined to think that a forfeiture is caused under the Hindu Law. I shall now consider this question,

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My learned brothers in the above second appeal hold that the decision of the Privy Council in *Moniram Kolita v. Keri Kolitani* (10) is conclusive on the matter, as they treat the widow's re-marriage as amounting at the highest only to "being false to the bed of her husband," and they decided that no forfeiture was, therefore, caused. With all respect I am unable to follow this view. The authorities cited to us are all against it, and they have not been considered by my learned brothers. The case of *Murugayi v. Viramakali* (5) held on a consideration of the principles of the Hindu Law that in the case of a Maraver widow re-marrying, she forfeited her life-estate, there being no custom to the contrary in the caste. This view was followed by the referring Judges, Wilson and Banerji, JJ., in *Matungini Gupta v. Ram Rutton Roy* (1), who state their reasons for their view in full and I agree with them and need not re-state those reasons. In fact section 2 of the Act is based upon a recognition by Legislature that a Hindu widow's estate is ordinarily forfeited under the Hindu Law by her re-marriage. This view and the Madras case were both followed by another Bench in Calcutta in *Rasul Jehan Begum v. Ram Surun Singh* (7). For some reason not apparent, the Allahabad High Court has not considered this position at all. The Bombay decision in *Vithu v. Govinda* (8), as already pointed out, expressly proceeded on the footing that the usual practice among Hindus was to treat the widow's estate as terminated by re-marriage. The authorities, except the second appeal above referred to, are all in favour of the view I am taking.

I shall now examine the reasons given in Second Appeal No. 1510 of 1916 [*Karnam Chowdappa v. Karnam Narasamma* (9)] for the view taken in it. The Privy Council case will no doubt be conclusive on the matter if the view that the widow's re-marriage amounts at the highest only to the adoption of a life of unchastity is correct. With all respect I am entirely unable to endorse this view of her position. I think it is wrong to treat the life of a re-married woman as necessarily a life of unchastity and nothing more. There is a clear and broad distinction between unchastity and re-marriage; the former is an

uncertain and changeable course of conduct while the latter is a definite legal step by which the woman ceases to be any longer the widow of the deceased. This is pointed out by both Wilson and Banerji, JJ., in *Matungini Gupta v. Ram Rutton Roy* (1). An observation in *Gajadhar v. Kaunsilla* (3) may also be referred to. It was suggested that the effect of the re-marriage should be considered from the point of view of the Hindu Law and as that Law does not recognise or sanction the marriage of a Hindu widow with a Muhammadan, such marriage should be treated as having no effect in changing the widow's status. It seems to me that this is an erroneous way of looking at the question. The status of an individual has to be decided with reference to his personal law at the time. There can be no doubt that after her conversion the 5th defendant was governed by the Muhammadan Law as to her marriage—See section 16 of the Civil Courts Act,—and therefore her second marriage was a perfectly valid one. She can, therefore, no longer be treated as a widow. A woman cannot be a married woman for certain purposes and a widow for others. I am, therefore, of opinion that her widowhood was terminated for all purposes and she cannot be treated as an unchaste widow under the Hindu Law.

On this view, the Privy Council case is easily distinguishable, as their Lordships were not dealing in it with a case of re-marriage at all. All that was decided in that case was that chastity was not a necessary condition for the continuance of the widow's estate after it had become vested, but it was not decided that the continuance of widowhood itself was not necessary.

Relying on the observations of Prinsep, J., in *Matungini Gupta v. Ram Rutton Roy* (1), it was next urged that as the determination of the widow's estate under the Hindu Law on re-marriage is based on the legal fiction that she takes her estate as the surviving half of her husband's body and as conferring spiritual benefits on him by her acts and as this fiction comes to an end on her conversion, it can no longer be relied on to divest her estate. The answer to this seems to me to be that the Hindu widow's estate is by its very nature an estate subject to limitations, one

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of which is a liability to forfeiture on re-marriage or cessation of widowhood. The condition is inferred from the origin of the estate and is one that attaches itself to the estate from its very commencement. Unless, therefore, the condition is abrogated by some subsequent event, it must continue to attach to the estate in the widow's hands always. Act XXI of 1850 which saved the estate from forfeiture on conversion had no effect on this condition and nothing else has been shown as affecting it. It is, therefore, not necessary to apply the legal fiction at the time of the forfeiture.

It is true, as pointed out by Prinsep, J., in the same case, that there is an anomaly in a widow losing her estate by her re-marriage when she does not do so by leading a notoriously unchaste life. But this anomaly exists equally in the case of marriages under Act XV of 1856 and under the caste custom. The existence of the anomaly does not seem to me to be an argument against forfeiture on re-marriage. Such a forfeiture is consistent with the notions of the Hindus generally.

For the above reasons I am of opinion that the 5th defendant, the widow in this case, lost her rights in the plaint house on her marrying her Muhammadan husband, the forfeiture being caused under the Hindu Law and not by section 2 of Act XV of 1856. The question is an important one on which there has been a considerable difference of opinion, and in fact we are differing from the view in Second Appeal No. 1510 of 1916 [*Karnam Chowdappa v. Karnam Narasamma* (9)] as to the final result. I, therefore, agree to the Order of Reference to the Full Bench proposed by my learned brother.

The second appeal came on for hearing before the Full Bench on 15th July 1918.

Mr. M. O. Parthasarathy Aiyangar (with him Mr. M. O. Tirumalachari), for the Appellants.—Act XXI of 1850 preserves the rights of inheritance by the apostate. The only question is whether the re-marriage of a Hindu widow after conversion entails a forfeiture of her rights in her husband's estate either under Hindu Law or under section 2 of Act XV of 1856.

Under the general Hindu Law no forfeiture is caused by the widow being false to her husband's bed. A re-marriage, taking it at its highest, amounts only to the adoption of a life of unchastity. *Vide* Second Appeal No. 1510 of 1916 [*Karnam Chowdappa v. Karnam Narasamma* (9)]. There is nothing in Hindu Law which penalises the widow in this regard. The forfeiture may follow on the re-marriage only when the widow is within the pale of Hindu Law. Her conversion causes a change in the law by which she is governed. A Hindu widow who embraces Muhammadanism is no longer subject to Hindu Law.

Section 2 of Act XV of 1856 is an enabling section and should be liberally construed. The Act should not be applied to persons who could not take advantage of it. The word 're-marriage' in the section could only refer to cases of re-marriage under the Act and not to all forms of re-marriage. It could not entail the forfeiture penalty to persons who are not Hindus at the time of the re-marriage. *Vide* *Abdul Aziz Khan v. Nirma* (2) and *Karnam Chowdappa v. Karnam Narasamma* (9).

Mr. T. V. Subbu Row, for the Respondents.—There is no analogy between unchastity and re-marriage. The latter is a definite act whereby the person re-marrying ceases to be the widow of the deceased. The widowhood terminates on the second marriage and the right to inherit also lapses.

Act XXI of 1850 cannot be invoked in aid of the continuance of the widow's estate after apostasy and re-marriage with a person of her new faith. That Act relieves the Hindu widow from forfeiture of her widow's estate on her renouncing the Hindu religion. It does not enlarge that estate or prevent forfeiture when she renounces her status as a widow.

Section 2 of Act XV of 1856 applies to the case. The word 'any widow' is wide enough to cover cases of convert widows. The section is declaratory and it would be incongruous that re-marriages by Hindu widows to persons of other religions should be held to be outside the scope of the section.

OPINION.

WALLIS, C. J.—I agree with the conclusion of Krishnan, J., in his

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Order of Reference that, independently of section 2 of Act XV of 1856, the widow of a Hindu forfeits her husband's estate on re-marriage. This was, in my opinion, decided by this Court in *Murugayi v. Viramakali* (5), a decision which, as I shall show, has been repeatedly approved in this and other High Courts. That decision did not, as was contended before us, proceed on any proof of a custom of forfeiture on re-marriage in the particular caste, but on general principles of Hindu Law, though in support of its conclusion the Court referred, as the Bombay Court did in a later case, to the fact that the extensive enquiry, the results of which are recorded in Steele's Hindu Castes, showed that among the very numerous classes of Hindus who practised re-marriage in the Deccan such a forfeiture was an invariable incident of re-marriage. Following and relying on the decision of this Court, Wilson and Banerji, JJ., [*Matungini Gupta v. Ram Rutton Roy* (1)] in their Orders of Reference, to which they adhered in their subsequent judgments, expressed the opinion that section 2 of Act XV of 1856 was merely declaratory, and the same view was expressed in *Rasul Jehan Begum v. Ram Surun Singh* (7) and by Ranade, J., delivering the judgment of the Full Bench of the Bombay Court in *Vithu v. Govinda* (8). In *Har Saran Das v. Nandi* (11), which was followed in *Ranjit v. Badha Rani* (12), it was held that a widow, who according to the custom of her caste was entitled to re-marry, did not forfeit her husband's estate on re-marriage on the ground that the case was not governed by section 2 of Act XV of 1856. The contention that the estate was liable to forfeiture independently of the section was not raised in those cases. When it was raised by Pandit Sundar Lal in *Gajadhar v. Kaunsilla* (3), Stanley, C. J., and Banerji, J., were inclined to accept it but for the earlier decisions, as to which they again expressed their doubts in *Mula v. Partab* (4), and *Abdul Aziz Khan v. Nirma* (2) only followed the earlier decisions without comment. The decision in *Murugayi v. Viramakali* (5) has, therefore, been approved by the Calcutta and Bombay Courts, and would have been approved by Stanley, C. J., and Banerji, J., in Allahabad but for the earlier de-

cisions of that Court. I think we should be very slow to interfere with a decision which has stood so long and is supported by so much authority, and with great respect I cannot agree with the conclusion of a Bench of this Court in Second Appeal No. 1510 of 1916 [*Karnam Chowdappa v. Karnam Narasamma* (9)] that it must be considered to have been overruled by the decision of the Privy Council in *Moniram Kolita v. Keri Kolitani* (10) that a Hindu widow does not forfeit her widow's estate by reason of unchastity committed after succeeding to the estate. In *Matungini Gupta v. Ram Rutton Roy* (1) that contention was overruled by Wilson and Banerji, JJ., with whom I respectfully agree. No question of re-marriage was raised before the Privy Council and, as observed by Wilson, J., there is a very broad distinction between misconduct on the part of a widow as a widow, and her ceasing to be a widow. In this state of the authorities I think the decision in *Murugayi v. Viramakali* (5) ought not to be overruled by this Court.

Considering the question apart from authority, I am of the same opinion. In his principles of the Hindu Law, page 173 (1st Edition), Mr. Ghose cites a text of Manu, IX, 191, "But if two (sons) begotten by two (different men) contend for the property (in the hands) of their mother, each shall take, to the exclusion of the other, what belonged to his father." And he also cites another text to the same effect attributed to Vishnu but not to be found in the recension that has come down to us. These texts can hardly refer to the estate which the widow took only in default of male issue. But whatever may have been the rule in archaic times when re-marriage was permitted, I think, considering the ideas which in later Hinduism underlay the prohibition of widow re-marriage as far as possible and the encouragement of Sati, that the retention by a widow of her deceased husband's estate is altogether incompatible with her renunciation of her status as his widow; and I respectfully agree with the opinion of the Bombay High Court in *Vithu v. Govinda* (8) that the invariable rule among so many castes in the Deccan that re-marriage, when permitted, entailed the forfeiture of the first husband's estate, is merely an illustration of that essential

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incompatibility which was again recognised by the Legislature when it enacted Act XV of 1856. As regards Act XXI of 1850 I agree with the opinion of Wilson, J., in *Matungini Gupta v. Ram Rutton Roy* (1) that, though that Act relieved the widow of a Hindu from forfeiture of her widow's estate on her abjuration of Hinduism, it did not enlarge the nature of that estate, so as to relieve her from forfeiture in the event of her renouncing her status of widow by re-marriage.

The construction of section 2 of Act XV of 1856 is not free from difficulty and has occasioned much difference of opinion, but, on the whole, I hesitate to differ from the liberal construction put upon the section by the Full Benches of the Calcutta and the Bombay Courts. The words "any widow, ... upon her re-marriage" in section 2 are, I am inclined to think, wide enough to cover the case of any widow of a Hindu re-marrying, whether or not her marriage would otherwise be prohibited by any custom or interpretation of Hindu Law, and whether the re-marriage was to a Hindu or to a member of another religion. As observed by Wilson, J., the Legislature was well aware of the existence of such re-marriages by the widows of Hindus, and must, I think, have considered that the case for enforcing the forfeiture on re-marriage was in the first case as strong as, and in the second case much stronger than, in the case for enforcing it as regards the re-marriages which were legalized by section 1. The words "any widow" in section 2 are certainly wider than was necessary, if it was intended to confine the operation of the section to the last mentioned class of marriages only. Having regard to the generality of the language, the fact that the section was in substance though not in form declaratory, and the incongruity which would result from holding re-marriages by the widows of Hindus to persons of another religion to be outside its scope, I think the more extensive and beneficial construction should be adopted. On both grounds, therefore, I would answer the question in the affirmative.

OLDFIELD, J.—We have been asked to answer the question referred in the affirmative (1) with reference to section 2, Act XV of 1856, and (2) with reference only to Hindu Law.

I regret that I cannot concur in the judgment just delivered and adopt the first of these grounds of decision. The section is worded generally as dealing with the rights and interests of "any widow". One construction of this expression, that it includes widows of whatever nationality or creed, has not been pressed and is excluded alike by the language of the preamble of the Act, to which I return, and the incongruity of the results, which it would involve. We have then to assume that the widows in question were originally Hindu widows and to choose between the contentions that the section relates only to those who re-marry as such or that it deals also with re-marriages after apostasy, solemnized by the rites of other creeds.

It would follow from the latter construction that the Legislature intended to deal in Act XV of 1856 with the problem, not only of Hindu widow re-marriage, but also of disability due to "renunciation of or exclusion from the communion of any religion", with which it had dealt recently in Act XXI of 1850. Yet the later Act contains no reference, express or implied, to the earlier, although the former declares and the latter exempts from forfeiture and although re-marriage, the event contemplated in the one, would in many cases be connected closely with the renunciation or exclusion dealt with in the other. So also the preamble to Act XV of 1856, which is full, refers only to Hindu widows, to the advisability of enabling Hindus, who may be so minded, to adopt the custom of re-marriage, and to the justice of relieving such Hindus and removing obstacles to the re-marriage of Hindu widows; and the references to Hindus in sections 1, 3 and 6 are clear, the last, in which Hindu ceremonies are prescribed, being particularly unambiguous. The wider construction, for which plaintiff contends, has in fact been based on no explicit extension of the subject-matter of the Act to widows in the other sections which no doubt include section 2, and only on the general references in them. In the circumstances, these references must, in my opinion, be read as qualified by the context. The conjecture of Wilson, J., in *Matungini Gupta v. Ram Rutton Roy* (1) that they were intended to apply to the class of widows, who might change their faith, seems to me

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(with all respect) unwarranted, since, as the learned Judge observes, the Legislature knew, not only of the existence of such widows, but also that they could already marry again without its assistance; and there is no reason for the assumption that it intended to deal with their position in an enactment passed statdly to give such assistance to widows, who required it. I am, therefore, constrained to hold that the Act is inapplicable to the present case and to turn to the general law as a ground of decision.

The Hindu Law is, as this and other High Courts have held since *Murugayi v. Viramakali* (5), that a widow's re-marriage entails forfeiture of her husband's estate. And I respectfully agree with the learned Chief Justice that there is no reason for departure from this long current of authority. But those cases dealt with re-marriage by the widow as a Hindu; and it is argued that a re-marriage, even after the widow's conversion, with the ceremonies of her new faith must be regarded, as it would be by Hindu Law, as no marriage and the widow's conduct as mere unchastity, which with reference to *Moniram Kolita v. Keri Kolitani* (10) entails no forfeiture. This view has been taken lately by a Bench of this Court in Second Appeal No. 1510 of 1916 [*Karnam Chowdappa v. Karnam Narasamma* (9)] and is regarded by Seshagiri Aiyar, J., in his judgment, which I have had the advantage of reading, as consistent with the decision in *Sundari Letani v. Pitambari Letani* (13). But with all respect, I cannot follow this application of the authorities. The last cited dealt with a case of real unchastity, since the person concerned was not a widow, but had gone through a Muhammadan ceremony of marriage after being deserted, not divorced, by her Hindu husband, who was still alive. And in *Moniram Kolita v. Keri Kolitani* (10) there was no question of a re-marriage, which could on any view be regarded as legal, but only of a temporary illicit connection. The judgment is based on the ancient texts and considerations of convenience. But the former were not dealing, and in the state of contemporary society could have no occasion to deal, with non-Hindu re-marriages, and the latter, based on the insecurity of titles created by the widow, if they could

be disturbed on proof of immorality, which is essentially secret and which the reversioners would be interested to promote, are irrelevant, when the question is of a connection, contracted publicly and authorized by the general law. I need offer no general opinion at present regarding the effect of the marriage of a Hindu with a non-Hindu woman or the position of their issue. In the case before us, authority being wanting, it is sufficient for me to express my respectful concurrence in the ground of decision proposed by the learned Chief Justice, the incompatibility between renunciation of a widow's status and retention of a widow's estate; and I do so the more willingly, because I can thus avoid the conclusion that a marriage is invalid for one purpose, although it is valid for all others.

I would answer the question in the affirmative.

SESHAGIRI AIYAR, J.—I regret I am unable to agree with the conclusion of the learned Chief Justice and Oldfield, J. I do not wish to add much to the judgment of myself and of Mr. Justice Napier in Second Appeal No. 1510 of 1916 [*Karnam Chowdappa v. Karnam Narasamma* (9)], on the question whether section 2 of Act XV of 1855 would deprive a Hindu widow, embracing Muhammadanism and afterwards marrying a Muhammadan, of the estate which she inherited from her Hindu husband. I agree generally with Oldfield, J., on this question. The belief that a Hindu widow adds insult to the injury to the memory of her deceased husband by apostasy first and by subsequent marriage with a person belonging to a different faith, is not a ground for reading into section 2 of Act XV of 1856 words which are not to be found there. The Act was intended to give relief to a certain class of people and not to penalise others; and Courts are not at liberty to supply a defect of this kind by indirect legislation. I, therefore, adhere to the view that I took in Second Appeal No. 1510 of 1916 [*Karnam Chowdappa v. Karnam Narasamma* (9)] on this question.

On the question of the applicability of Hindu Law, I wish to make a few observations in addition to what I stated in the second appeal already referred to,

(13) 32 C. 871; 2 C. L. J. 97; 9 C. W. N. 1003.

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It is said that the Hindu Law does not countenance inheritance by a person who has not been true to the bed of her deceased husband. I do not dissent from this view so long as it can be said that the party against whom this rule of Hindu Law is to be applied is within the pale of that Law. There is a great deal to be said for the position taken up by Mr. Justice Banerji in *Matungini Gupta v. Ram Rutton Roy* (1) on the question of Hindu Law. But it need scarcely be added that the Hindu widow who has embraced Muhammadanism and has married a Muhammadan is not subject to Hindu Law. In *Sundari Letani v. Pitambari Letani* (13), the Court had to consider the case of a Hindu daughter who had become a Muhammadan and had subsequently married a Muhammadan. The point was whether her children were legitimate and could inherit to the estate of their Hindu grandfather: "The woman was abandoned but not divorced by her husband." Her position was thus stated by the learned Judges: "She is in the position of an unchaste daughter who could not inherit according to Hindu Law." I think the same principle is applicable to the widow in the present case.

There are three incidents in the life of this woman. The first was when she inherited the estate of her husband after his death. In the Order of Reference, Mr. Justice Krishnan says that section 2 of Act XV of 1855 is based upon a recognition by Legislature that a Hindu widow's estate is ordinarily forfeited under the Hindu Law by her re-marriage. Even if I assent to this view, I fail to see how this conclusion touches a re-marriage while the widow has become a Muhammadan convert. It was contended that the right of a Hindu widow to inherit her husband's property is dependent upon a text of Brahaspati to this effect:—"He who has left a widow surviving him has got the half of his body verily alive, and when half of his body is alive, who else shall take his property?" The metaphor is undoubtedly picturesque. But it would not be safe to deduce principles of law by parity of reasoning from such a figure of speech. Granting that the reason of a widow inheriting to her deceased husband in preference to divided members

of the co-parcenary is based solely on this principle, it can only apply to a state of things which came into existence on the death of her husband. At that moment either by reason of this figure of speech or by reason of the more prosaic statement of the law contained in Yagnyavalkya Smriti which is to the following effect:—"Wife (widow), daughter, father, mother, brothers, their sons Gotraja (of the same family), Bandhus, disciples and Brahmacharins of the same school, each succeeding one is heir in the absence of the person immediately preceding him in the order of enumeration,—this is the law in respect of the inheritance to the property of a sonless deceased person of whatever caste", the widow inherited the estate. The second stage in her life was her conversion to Muhammadanism, which is found to have been subsequent to the death of her husband. If the Hindu Law had not been legislated upon, there could hardly be any doubt that conversion to a different faith would have entailed forfeiture of the estate inherited by the woman. But Act XXI of 1850, which was designed to preserve the rights of persons who exercised their liberty of conscience in entering the fold of another religion, maintained the rights of the widow to continue in possession of her deceased husband's property. Section 1 distinctly says: "So much of any law or usage within the territories of the East India Company as inflicts on any person forfeiture of rights or property or may be held in any way to impair or affect any right of inheritance by reason of his or her renouncing or having been excluded from the communion of any religion ceases to be enforced as law in the Courts of the East India Company". So under this Act the widow who had embraced Muhammadanism could not be deprived of the rights which she possessed prior to her conversion. Her inheritance subsisted. The third stage in her career was her marrying a Muhammadan. I fail to see how this step can deprive her of what she obtained under the Hindu Law and what the Legislature preserved to her under Act XXI of 1850. I am unable to find anything in the Hindu Law or in Act XXI of 1850 which can have this effect. It is hardly necessary to refer to cases in which it has been held that under the Hindu

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Law properties once vested in a male or a female cannot be divested by reason of the fact that if the subsequent state of life had existed at the time of the devolution of interest he or she would not have inherited the property. The well-known case of *Moniram Kolita v. Keri Kolitani* (10) laid down that principle in unequivocal terms. One sentence from the judgment may be quoted as bearing upon conversion: "The widow has never been degraded or deprived of caste. If she had been, the case might have been different, subject to the question as to the construction of Act XXI of 1850; for upon degradation from caste, before that Act, a Hindu, whether male or female, was considered as dead by the Hindu Law, so much so that libations were directed to be offered to his manes as though he were naturally dead." Following this decision all the High Courts have held that property once vested, under similar circumstances, cannot be divested. In *Abilakh Bhagat v. Bhekhi Mahto* (14), which was a case of a person becoming insane after inheritance had vested in him, Mr. Justice Ghose said that the principle of *Moniram Kolita v. Keri Kolitani* (10) was applicable to that case. In *Sanku v. Putamma* (15) the same principle was followed. *Deo Kishen v. Budh Pratash* (16) is also to the same effect. It was a decision of five Judges and they affirm the proposition that under Hindu Law subsequent conduct does not put an end to the rights once properly acquired. *Murli Singli v. Jai Singh* (17) follows this ruling. Much reliance was placed in the argument before us on *Murugayi v. Viramakali* (5). The judgment is based upon custom. It was the case of a person who was within the pale of Hinduism. I fail to see how that case affects the present question. I may draw attention to the observations of Mr. Ghose in his book on Hindu Law, wherein he says that Manu does not lay down that re-marriage while still a Hindu would deprive a Hindu widow of the inheritance once vested in her. Although the principle of *stare decisis* must be respected, I am not satisfied that in the

present case we would be violating the rule of law laid down in *Murugayi v. Viramakali* (5) by holding that the widow marrying a Muhammadan does not forfeit the estate which came to her from her Hindu husband. Moreover cases of this description are of rare occurrence, and when a very important principle relating to the applicability of Hindu Law is debated, I fail to see how a decision, passed forty years ago on a different set of circumstances, can be regarded as binding authority with reference to facts of a totally different character. For all these reasons, in my opinion, the answer to the question must be in the negative.

Answered in the affirmative.

M. C. P.

ODH JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL No. 5 of 1918.

May 27, 1918.

Present:—Mr. Lindsay, J. C.

Syed MUSHAF HUSAIN—OPPOSITE PARTY

—APPELLANT

versus

Syed MOHAMMAD JAWAD—APPLICANT

—RESPONDENT.

Guardians and Wards Act (VIII of 1890), ss. 19, 25—Father, whether can be appointed guardian—"Guardian", meaning of—"Custody", what is—Welfare of minor—Enquiry, duty of, whether can be delegated by Court.

A Court has no power under the Guardians and Wards Act to appoint a father the guardian of the person of his children, and where such appointment is made, the order of appointment is without jurisdiction. [p. 61, col. 2.]

The expression "guardian", as used in section 25 of the Guardians and Wards Act, is not confined to statutory guardians appointed under the Act, but includes any person having the care of the person of a minor or of his property or of both. Such a person need not necessarily be the *de facto* guardian of the minor. [p. 61, col. 2; p. 62, col. 1.]

The "custody" referred to in section 25 of the Guardians and Wards Act includes both actual and constructive custody. [p. 62, col. 1.]

The duty of inquiry under that section is cast upon the Court and cannot be delegated. [p. 62, col. 2.]

A father may in his discretion entrust the custody and education of his children to another but by doing so, he does not cease to be his children's guardian that being an office which in his lifetime he cannot delegate to a third person. [p. 62, col. 1.]

Appeal against the order of the District Judge, Rae Bareilly, dated the 19th January 1918.

(14) 22 C. 864; 11 Ind. Dec. (N. s.) 572.

(15) 14 M. 289; 5 Ind. Dec. (N. s.) 203.

(16) 5 A. 509; A. W. N. (1888) 105; 3 Ind. Dec. (N. s.) 442 (F. B.).

(17) 5 A. L. J. 115; A. W. N. (1908) 47.

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Mr. M. Wasim, for the Appellant.

Mr. Ali Mohammad, for the Respondent.

JUDGMENT.—This is an appeal against an order of the District Judge of Rae Bareilly, which purports to have been made under section 25 of the Guardians and Wards Act (VIII of 1890).

The facts are as follows:—

Syed Mushaf Husain, the appellant, had a daughter who was married to the respondent, Syed Mohammad Jawad.

Three male children were born of this marriage, and it seems to be the fact that since the time of their birth they have been living with their maternal grandfather.

Some time ago Syed Mohammad Jawad applied to the Court under the Guardians and Wards Act to be appointed guardian of the person and property of his minor sons. This application was opposed by the maternal grandfather. The result was that Mohammad Jawad was appointed the personal guardian of the children; the grandfather was appointed guardian of their property.

The application out of which the present proceedings have arisen was then made by Mohammad Jawad under section 25 of the Act: he asked for an order directing that the minors should be made over to his custody.

The application was resisted on the ground that Mohammad Jawad had no authority under the Act to make it. The District Judge has decided in favour of the applicant and it is against his order directing that the minors should be transferred to their father's custody that this appeal has been filed.

It is argued here, in the first place, that Mohammad Jawad is not the "guardian" of his children within the meaning of that expression as defined in the Act [section 4, clause (2)]. This objection was raised in the Court below, but was overruled on the ground that the Court had already appointed Mohammad Jawad to be the guardian of the persons of his minor sons, that the order of appointment had become final and could no longer be called in question.

It is not denied here that such an order was made, but the contention is that it was made without jurisdiction. Section

19, clause (b), of the Act is referred to in support of this argument, and to me it appears that the language of the clause does sustain the case put for the appellant. It lays down that, subject to the special provisions of the Act relating to European British subjects, the Court has no authority to appoint and declare a guardian of the person of a minor whose father is living and is not in the opinion of the Court unfit to be guardian of the person of the minor. This does not mean that where the father is a fit person the Court has power to appoint *him* to be the guardian. There is no necessity for doing so, the fact being that under the personal law the father is generally the authorized guardian of his minor children. It is admitted in the present case that under the Muhammadan (Shia) Law which governs the relations between Mohammad Jawad and his minor sons, he is their natural and lawful guardian.

This view of the law is laid down in a ruling of the Judicial Committee reported as *Mrs. Annie Besant v. Narayaniah* (1), where it was held that the Act does not authorize the Court to appoint the father of a minor to be the guardian of his person.

The learned Judge of the Court below was wrong, therefore, in thinking that the order appointing Jawad to be the personal guardian of his minor sons could not be called in question; as a matter of law the order is inoperative, having been made without jurisdiction.

This, however, does not dispose of the question whether the father was legally competent to apply to the Court under section 25 of the Act, for having regard to the language of the definition clause such an application may be made by a "guardian", that is, "a person having the care of the person of a minor or of his property, or of both his person and property." Such a person need not necessarily be a statutory guardian appointed under the Act.

The appellant, however, maintains that Jawad is not such a "guardian" on the ground that he has never had the actual custody of the minor children. In other

(1) 24 Ind. Cas. 290; 38 M. 807; 27 M. L. J. 30; 18 O. W. N. 1083; 16 M. L. T. 165; 1 L. W. 520; 20 C. L. J. 253; (1914) M. W. N. 585; 16 Bom. L. R. 625; 12 A. L. J. 1155 (P. C.).

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words, the case is that the "guardian" referred to in the Act must be at least a *de facto* guardian.

I am not disposed to assent to this proposition, for the definition does not, in my opinion, justify the notion that the "guardian" must be a person having actual custody of the minor. The word used in the definition is "care" and not "custody"; as their Lordships point out in the Madras case cited above [*Mrs. Annie Besant v. Narayaniah* (1)], a father may in his discretion entrust the custody and education of his children to another but by doing so he does not cease to be his children's guardian, that being an office which in his lifetime he cannot delegate to a third person. It cannot, therefore, be argued that Muhammad Jawad, the father of these three children, is not the guardian of their persons merely because the actual custody of them is with their maternal grandfather. I hold accordingly that as their guardian Jawad was legally competent to present the application under section 25.

There remains, however, a more difficult question, and that is whether in the circumstances disclosed Muhammad Jawad had lawful grounds for asking the Court to make an order in his favour under this section.

According to the language of the enactment such an order can only be made "if a ward leaves or is removed from the custody of a guardian of his person".

Here it is pointed out that the minors have never since the time of their birth been in the custody of their father, and so it is argued that there can be no case of their having "left" or "been removed from" such custody.

A case very similar to the present one came before the Madras High Court a little while ago [*Of. Mohideen Ibrahim Nachi v. Mahomed Ibrahim Sahib* (2)]. There as here the applicant under section 25 had never had the actual custody of his minor son. The language of the section was discussed at length in the judgment and it was held that the word "custody" as used in section 25 ought to be held to include both actual and constructive custody. It was admitted that this inter-

pretation could only be arrived at by some straining of the language, but it was considered that it was justified because it would serve to carry out the intention of the Legislature in framing the Act.

It certainly would be strange if we were to take it that the law, while it provides for and insists upon the due discharge by a guardian of his duties towards his wards, should deny him the means of doing those duties, and I agree that for the purpose of enabling the guardian to do his duty by the ward it should be assumed that the Court can make an order for the delivery to him of custody of his ward, even if it is the case that he has not previously had the ward in his actual keeping. And this can only be done by adopting the liberal interpretation of the term "custody" accepted by the Madras Court.

There remains only one other matter. Even if Mohammad Jawad is entitled to make the application under section 25, and if he has a lawful occasion for applying, no order can properly be made unless the Court is satisfied that it will be for the welfare of the ward to return to his guardian's custody, and the Court must arrive at this conclusion after a judicial investigation. It is not made to appear that any due inquiry has been made upon this point. I was informed in the course of arguments that either during the present proceedings or in connection with the earlier proceedings which resulted in Jawad's being appointed the personal guardian of the minors, there was some inquiry and report by a Tahsildar. All that need be said on this score is that the duty of inquiry under section 25 is cast upon the Court and cannot be delegated.

In order to enable me to come to a right decision it is necessary for me to remand the following issue for determination by the District Judge:—

"Is it for the welfare of the minors that they should be delivered over to the custody of their father and guardian, Syed Mohammad Jawad?"

The Judge will receive any evidence which the parties may desire to produce and will return his finding within six weeks from the date of his receiving this order of remand. Fifteen days, to count

(2) 33 Ind. Cas. 894; 30 M. L. J. 21; 39 M. 608.

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from the date of the lower Court's finding, will be allowed to the parties for the filing of objections.

Issue remanded.

PRIVY COUNCIL.

APPEAL FROM THE BOMBAY HIGH COURT.

March 14, 1918.

Present:—Earl Loreburn, Lord Dunedin and Lord Sumner.

ABDUL RAHIM MAHOMED NARMA

AND OTHERS—APPELLANTS

versus

THE MUNICIPAL COMMISSIONER FOR THE CITY OF BOMBAY AND OTHERS—

RESPONDENTS.

City of Bombay Municipal Act (III of 1888), ss. 297, 299, 301—Preservation of regular line in public street—Commissioner, powers of, exercise of—Acquisition of land—Compensation, calculation of, mode of.

There is nothing in the City of Bombay Municipal Act which prescribes the frame of mind in which the Municipal Commissioner is to exercise the powers given by section 297 of the Act, or which restricts the objects for which he is to exercise them to the mere regulation of the street in question or to the creation or preservation of a regular line in it. "Preservation of Regular Line in Public Streets," the heading to the group of sections beginning with section 297, does not limit the exercise of the powers given by the express words of the Act. [p. 68, cols. 1 & 2.]

For the purpose of building a bridge in order to carry a street over a railway line the Municipal Commissioner wished to acquire additional land on a side of the street, and so he first prescribed a regular line of the street under section 297 of the City of Bombay Municipal Act and then under section 299 acquired a part of the appellant's land which fell within the line:

Held, that the exercise of the powers was within the terms of the Act and that the appellant was entitled to compensation for the land acquired under section 301 of the Act, and not under the Land Acquisition Act. [p. 68, col. 1.]

Appeal from a judgment and decree of the High Court of Bombay (Scott, C. J., and Chandavarkar, J.), dated the 9th August 1912, affirming with slight variations a judgment and decree of Beaman, J., dated the 7th October 1911.

FACTS of the case fully appear from the following judgment of the High Court:—

"This suit was filed by the plaintiffs against the Municipal Commissioner

and the Municipal Corporation on the 5th December 1910 for possession of certain portions of plaintiffs' premises upon the Elphinstone Road, taken possession of by the Municipal Commissioner on the 7th July 1909, the Commissioner purporting to take them under the powers contained in section 299 of the Municipal Act of 1888, as amended by the Act of 1905. That section provides that if any land not vesting in the Corporation, whether open or enclosed, lies within the regular line of a public street, and is not occupied by a building, the Commissioner may, after giving to the owner of the land not less than 4 clear days' written notice of his intention to do so, take possession on behalf of the Corporation of the said land, which shall henceforth be deemed a part of the street. Section 301 provides that compensation should be paid by the Commissioner to the owner for any land acquired for a public street under section 299. A regular line of a public street could be prescribed under the Act of 1888 as originally framed by the Commissioner, and after it had been prescribed no portion of any building abutting on the street could after such a line had been prescribed be constructed within the regular line.

One of the plaintiffs, who are co-owners of the land taken up, sent in a building application in December 1902 for permission to build a three-storeyed *chawl* with certain shops on the basement on the road frontage owned by the applicant and his brothers on the north side of the Elphinstone Road. On the 6th of March 1903, in reply to his application, he was informed that the building could not be permitted on the whole of the land as 50 feet of the land had been taken into the regular line of the street. Then, on the 25th of May 1909, the plaintiff received from the Municipal Commissioner a notice under section 299, saying that 20 feet only were required for the purposes of the street. This was in consequence of action having been taken by the Municipal authorities for laying down a fresh regular line of the street, on the assumption that no regular line had already been laid down. We have not got the whole of the Municipal correspondence upon the point, but it appears that on the 13th March 1909

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the Executive Engineer, in continuation of his letter of the 5th March, forwarded to the Commissioner a plan showing in red the new proposed regular lines of the street at Elphinstone Road, Parel, along which a proposed overbridge was to be constructed. That was the regular line which showed that only 20 feet of the plaintiffs' property was within the regular line of the street. On the 1st July 1909 one of the plaintiffs wrote to the Municipal Commissioner drawing attention to the regular line proposed in 1903 and to the papers relating to the previous building proposal. Upon investigation it then appeared to the Municipal authorities that the fixing of the regular line in March 1909 was not the fixing of an original regular line but the fixing of a new regular line in substitution of a previous line. Now, the power of the Municipal Commissioner to fix a new line in substitution of a previous line was conferred upon him by the City of Bombay Municipal Amendment Act of 1905, which provided that he might from time to time, but subject in each case to his receiving the authority of the Corporation in that behalf, prescribe a fresh line in substitution for any line so prescribed or for any part thereof, provided that such authority shall not be accorded except upon certain conditions. Notwithstanding the letter of the 1st July, however, which put the Municipal Commissioner on inquiry as to the legality of the new line which he prescribed, possession was taken of the plaintiffs' land under section 299 on the footing of the land so taken possession of falling within the regular line prescribed in 1909. It appears that it was not until after that date that any resolution of the Corporation was obtained authorising the Commissioner to prescribe a regular line in substitution of the regular line of 1903. The resolution of the Corporation giving that authority is dated the 11th of October 1909. The plaintiff contends that no regular line of the street on the Elphinstone Road has been or was ever prescribed as required by law under the City of Bombay Municipal Act in 1903, and that the action of the Commissioner subsequent thereto at various times in purporting to prescribe a regular line of the

street was *ultra vires* and illegal. The defendants contend that the regular line of the street is the line prescribed subsequent to the passing of the resolution of the 11th October 1909.

The first point for consideration is whether the line prescribed in 1903 was lawfully prescribed. Now, the facts relating to it are to be found in Exhibit E. On the 21st January 1903 the Executive Engineer of the Municipality forwarded the building application already referred to to the Commissioner, stating that the plan showed that it was proposed to construct a large three storeyed *chawl* with privies and store rooms on the Elphinstone Road; that as the Commissioner was aware, the lines of an overbridge over the two railways, as already sanctioned by Government at the recommendation of the Overbridge Committee, were at a short distance north of the Elphinstone Road; that the matter of the overbridges over the two railways had been discussed by the Municipal Commissioner and the officials of the Railway Companies and the question as regards the overbridge near Elphinstone Road, as it then stood, was to construct an overbridge the lines of which would pass through the ground on which the *chawls* were proposed to be constructed; and the Municipal Executive Engineer asked to be informed whether the proposal of the building applicant could be accepted until the question of the overbridge could be settled. Upon that the Municipal Commissioner Mr. Harvey gave orders that the proposed construction should be stopped and proposals for new lines be sent up as soon as possible. The Executive Engineer then sent up proposals for new lines of road and the Commissioner on the 4th March sanctioned those proposals.

Now, it is contended that the Commissioner could only prescribe a regular line of the street under the Unamended Act of 1888 in a case where it was necessary to prescribe a regular line and that if the only object of prescribing the line was to acquire land for the purposes of a street in a manner other than that prescribed in section 286, the prescribing of the line was unlawful and did not give power to the Commissioner to acquire land under section 299; and for this the decision of

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this Court in *Essa Jacob Haji Jamal v. Municipal Commissioner of Bombay* (1). was cited as an authority. That was a case in which the Commissioner had prescribed a regular line for a street at a subsequent date in order to widen the street and throw it back beyond the line already prescribed. He prescribed a fresh line having no express authority so to do; and it was stated by the Chief Justice in his judgment that there could be no question of there being any necessity to prescribe a regular line at the time when the second line was prescribed, because *ex concessis* a regular line had been prescribed at an earlier date.

Now, in the present case the circumstances were entirely different. As the letter of the Executive Engineer showed, the lines of the overbridge, which had been settled in consultation between the officials of the Railway Companies and the Commissioner, would bring the bridge across the existing northern edge of the street and break into it, and, therefore, put an end to its regularity as an existing street. Then the Commissioner having ordered that proposals for new lines should be sent up, the Executive Engineer proposed a line giving a regular and continuous line of street so far as the bridge extended 50 feet further back on the north side. This proposal was accepted by the Commissioner and as a result a regular line was provided for to meet the time when the overbridge should be built, which would break into the existing line of the street. This, it appears to us, was entirely in accordance with the powers of the Commissioner under the unamended section 297 and we have no reason to suppose that the Commissioner was actuated by improper and indirect motives in the matter. To show that the result of laying down a regular line would be to enable the Commissioner to enter upon vacant land within that line under section 299 does not show that the Commissioner was not also actuated by the necessity of laying down a regular line for the street and the existence of the incidental result does not vitiate the legality of his action.

The first point taken by the plaintiff's Counsel in this appeal is that the line

of 1903 being illegal, the refusal of the Commissioner to allow the applicant to build was also illegal and, therefore, damages are claimable in consequence of the plaintiff being unable to build from 1903 up to the date of suit. This claim falls to the ground with our decision that the prescription of the line in 1903 was within the powers of the Commissioner.

Then, it was contended that because the object of acquiring the land under section 299 was to provide ground for the erection of the foundations of the bridge, the acquisition was unlawful, because there was section 296 of the Act which provided the manner in which the Commissioner might acquire the land. Now, that section gives the Commissioner power to acquire land, whether vacant or with buildings upon it; whereas section 299 only gives him power to acquire vacant land falling within the regular line of the street. Provided he had a regular line and vacant land falling within that line, it was quite unnecessary for him to resort to the powers given under section 296 of the Act; and granting the legality of the prescription of the line, the powers under section 299 lawfully followed. The question, however, although it was argued in connection with the line of 1903, did not really arise until after the prescription of the line in 1909.

There is no dispute that the new line prescribed in 1909 without the sanction of the Corporation was unlawfully prescribed and, therefore, the possession by the Commissioner before the prescription of the last line with the sanction of the Corporation was unlawful. In respect of that unlawful possession, damages are claimed by the plaintiff, and the Advocate-General on behalf of the Municipal Commissioner has agreed to pay 6 per. cent. on the compensation which may be fixed as the value of the land as from the 7th July 1909, the date of the acquisition, and this has been agreed to by Counsel for the plaintiff. It might perhaps be contended that the acquisition on the 7th July was a lawful acquisition on the footing of the line of 1903 being the then existing line of the street, but that point has not been taken as the question

(1) 25 B. 107; 2 Bom. L. R. 810.

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of damages is a small one and the Corporation through their Counsel have agreed to pay compensation.

Then, the fresh line which was prescribed subsequent to October 1903 is a line prescribed in accordance with the provisions of section 297 (b) of the Amended Municipal Act, and if the first line of 1903 was, as we have held, a lawfully prescribed line, it follows, we think, that the Municipal Commissioner could substitute a fresh line for it if the effect of that line would be to provide a new regular line for the street. There is no question that the Commissioner prescribed a fresh regular line and the effect of that was to give 30 feet more of his property to the plaintiff than he would have on the original line of 1903.

It was contended on behalf of the plaintiff that having prescribed a line 50 feet from the north of the existing Elphinstone Road, the Municipality were estopped from acquiring less than 50 feet under section 299, but section 299 does not compel the Commissioner to acquire land as soon as a regular line of the street has been laid down. He may acquire whenever he thinks fit on giving not less than 7 clear days' notice under the section. The estoppel apparently, it is contended, arises owing to the plaintiff being prevented from building from 1903 up to the present time, but that prevention arises from the statutory provision that no person shall construct any portion of the building within the regular line of the street.

The last point taken was that the Municipal Act does not give power to the Municipal Commissioner so as to cause a nuisance. Now with regard to that the plaintiff merely says that the construction of the overbridge approaches and retaining walls thereto on the Elphinstone Road is in opposition to the plaintiff's rights of property and easements on the road and will irreparably damage plaintiff's land and is *ultra vires* and illegal of the defendants, and the plaintiffs say that the construction of the overbridge approaches and retaining walls thereto on only the central strip of the street will make the street in front of the plaintiffs' land of three different levels and is *ultra vires*,

illegal and unreasonable of the defendants. It is admitted that the Municipal Commissioner has power under section 295 to agree with the Railway Company for the building and maintenance of the overbridge, and it has not been shown that the plaintiff has any easements upon the road which will be interfered with by the overbridge. It may be very unpleasant for him to have a wall 30 feet high opposite to his property, but if that wall will not interfere with his ancient lights or any other easements, he has no cause of action with regard to it. For these reasons, we think that this point also fails. The plaintiffs to pay $\frac{1}{4}$ of the costs of the Municipality throughout."

Mr. De Gruyther, K. O., Sir W. Garth and Mr. J. M. Parikh, for the Appellants, contended that on the evidence in the case the mode of prescribing by the respondents of the alleged "regular lines of the street" both in 1903 and in 1907 was *ultra vires* and illegal and that the land required for the purposes for which the appellants required could only be legally acquired, if not by agreement, under the Land Acquisition Act. Reference was made to the case of *Essa Jacob Haji Jamal v. Municipal Commissioner of Bombay* (1) and the Bombay Municipal Act (Bombay Act III of 1888 as amended by Bombay Act V of 1905), sections 87, 90, 91, 286, 289, 295, 296, 297, (amended in 1905), 299 and 301, subsection (1). The land was wanted for widening the street in order to construct an overbridge, and not for the purpose of preserving the regular line of the street, and to acquire the land the respondents were not entitled to proceed under the Municipal Act. The construction of the overbridge on it was not using it as a public street. The English cases referred to were *Galloway v. London Corporation* (2) and *Gard v. Sewers Commissioners* (3).

The steps taken by the respondents were unnecessary and the object only afterwards appeared to be the building of a bridge over the street, the whole question being whether what the respondents

(2) (1866) 1 H. L. 34; 35 L. J. Ch. 477; 12 Jur. (N. S.) 747; 14 L. T. 865.

(3) (1885) 28 Ch. D. 486; 54 L. J. Ch. 698; 52 L. T. 827.

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did was done for the purpose of preserving the regular line of the street. If, as contended, the action of the respondents was *ultra vires* and illegal, the appellants were entitled to the relief claimed in the plaint. But even if it was legal and valid they were bound to take the whole of the land included in the original line of 1903, and to pay damages for the period during which the land remained vacant and useless owing to the prescription of the line.

Messrs. P. O. Lawrence and A. M. Dunne, K. O., for the Respondents, were not called upon.

JUDGMENT.

LORD SUMNER.—By the City of Bombay Municipal Act, 1858, section 289, the Municipal Commissioner for the City of Bombay has under his control all public streets within the city, and may from time to time widen, extend, or otherwise improve any such street, or cause the soil thereof to be raised, lowered, or altered, subject to the sanction of the Corporation in certain events. By section 297 he may prescribe a line on each side of any public street, and subject to receiving the necessary authority, may from time to time prescribe a fresh line in substitution therefor, and the line so prescribed shall be called "the regular line of the street." If the line is so drawn that any land not vesting in the Corporation falls within it, the Commissioner may, by section 299, take possession of it on the Corporation's behalf, which has the effect of acquiring it for the Corporation, and thereupon the land so acquired shall thenceforward be deemed a part of the public street, and the former owner will be entitled to receive certain compensation as prescribed by section 301. The Commissioner further has power, under section 296, to acquire any land required for the purpose of widening, extending or otherwise improving any public street, subject among other things to the payment of compensation in accordance with the Land Acquisition Act, 1894. The only question in this appeal is whether the compensation to be paid for certain land of the appellants, which the Commissioner has acquired, is to be calculated according to the provisions of section 301 of the City of Bombay Muni-

cipal Act or according to those of the Land Acquisition Act.

Elphinstone Road, which is within the area of the Municipal Corporation of Bombay, intersects at right angles and by level-crossings two railway lines, which run parallel with and close to one another at Parel station, namely, the Bombay, Baroda and Central India Railway and the Great Indian Peninsula Railway. The appellants were the owners of a plot of land fronting the road and lying in the north-east angle between the road and the railways. In 1909 the Commissioner prescribed a line on the north side of the road as the regular line of the street, which was so drawn that part of the appellants' land, namely, the front part, fell within it, and he duly gave notices and took possession of this land in order that, within section 299, this part of the appellants' land might thus be acquired by the Corporation, and might thenceforward be deemed part of Elphinstone Road. In point of fact, the line so prescribed was in substitution for an earlier prescribed line, but, in the view of their Lordships, nothing now turns on this.

That the Commissioner meant to prescribe the regular line of the street under section 297, and that in form he purported to do so, and in fact actually did so, there can be no manner of doubt. The whole object of what he was doing depended on its being an exercise of the powers given by this section. Equally little is there any doubt why he did so. Even if he concerned himself to some extent with prescribing a regular line, simply in lieu of the somewhat irregular line which previously bounded Elphinstone Road on the north, his main object at any rate was a different one, and he has never made any secret of it. Whether what he did was in the circumstances within the Act or without it, whether or not the exercise of his powers was a harsh application of the section, unforeseen by those who framed it, their Lordships think it quite clear that he acted in good faith, for the benefit, as he supposed, of the Corporation which he represented, and, as he conceived, in the discharge of his duty. Sooner or later, Elphinstone Road must have been carried over these two

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railways by a bridge. A double level-crossing could not be indefinitely maintained there. Such a bridge involved approaches of considerable length and height, and the embankment with its retaining walls and the provision of access to land adjoining it would require a site considerably wider than the existing width of Elphinstone Road. For this purpose the Commissioner wished to acquire additional land, and to do so on the cheapest possible terms, and so he first of all prescribed a line and then took possession of the part of the appellants' land which fell within that line. Thus he avoided having to proceed under the Land Acquisition Act.

The appellants' whole contention is that this exercise of the Commissioner's power was good or bad according as he acted with a single eye to the creation and preservation of a regular boundary to Elphinstone Road as an end in itself, or with the ulterior object of extending the road in order to be able to raise it by an incline to the level of the necessary overbridge.

The contention must stand or fall on the construction of the Bombay Act. There is no word in the Act which prescribes the frame of mind in which the Commissioner is to exercise the powers given by section 297, or which restricts the objects for which he is to exercise them to the mere regulation of the street in question or to the creation or preservation of a regular line in it. Even if it were proved, as it is not, that the creation and preservation of a regular line on the north side of the road was no part of the Commissioner's object, though it certainly was an incidental result of his scheme, their Lordships can find nothing in the Act which either entitles the appellants to investigate his motives or has the effect of invalidating his action on account of the purpose, with which in fact he prescribed the regular line of the street in 1909.

Cases in which it has been held that powers conferred only for a statutory purpose cannot be validly exercised for a different purpose are not in point. Such an exercise of the powers is outside the Act which confers them. Here the exercise of the powers was within the Act, for it

was in strict conformity with the terms of the Act. "Preservation of Regular Line in Public Streets" is the heading to the group of sections beginning with section 297, but this cannot be pressed into a constructive limitation upon the exercise of the powers given by the express words of the Act. The preservation of the line of the street is not laid down as the definite and sole object for which the power is to be exercised. It may be the immediate effect of that exercise, but certainly it is not more. The case was very fully and cogently dealt with by the learned Chief Justice of Bombay in the High Court of Bombay, and their Lordships think it unnecessary to discuss the matter further. They will humbly advise His Majesty that the appeal should be dismissed with costs.

Appeal dismissed.

Solicitor for the Appellant: Mr. E. Dalgado.

Solicitors for the Respondents: Messrs. Cameron, Kemm & Co.

MADRAS HIGH COURT.

LETTERS PATENT APPEAL No. 25 OF 1918.

August 13, 1918.

Present:—Justice Sir William Ayling, Kt., and Mr. Justice Krishnan.

VEERARAGHAVA AIYANGAR

—RESPONDENT—APPELLANT

versus

SOURI AIYANGAR—PETITIONER

—RESPONDENT.

Evidence Act (1 of 1872), s. 73—Comparison of signature or writing, admissibility of.

Section 73 of the Indian Evidence Act is not limited, in its scope, to documents which are signed or contain some intrinsic statement of the identity of the writer. As under English Law, all that is necessary to render proof by comparison admissible is a dispute as to the writing. [p. 63, col. 1.]

Emperor v. Ganpat Balkrishna, 15 Ind. Cas. 649; 14 Bom. L. R. 310; 13 Cr. L. J. 505, followed.

Barindra Kumar v. Emperor, 7 Ind. Cas. 359; 37 C. 467; 14 C. W. N. 1114; 11 Cr. L. J. 453, not followed.

Appeal, under clause 15 of the Letters Patent, against the judgment of Mr. Justice Bakewell, dated the 26th February 1918, in Civil Revision Petition No. 250

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of 1917, preferred to the High Court against the decree of the Court of the Subordinate Judge, Negapatam, in Small Cause Suit No. 278 of 1915.

Mr. M. K. Rangachariar, for the Appellant.

Mr. T. Narasimha Aiyangar, for the Respondent.

JUDGMENT.—This case turns solely on the meaning to be given to the word "purports" in section 73 of the Indian Evidence Act. Different views have been taken by Jenkins, C. J., in *Barindra Kumar v. Emperor* (1), and by Chandavarkar and Batchelor, JJ., in *Emperor v. Ganpat Balakrishna* (2). We are inclined to agree with the latter. We do not discern any object in limiting the scope of the section to documents which are signed or contain some intrinsic statement of the identity of the writer: and apparently in English Law all that is necessary to render proof by comparison admissible is a dispute as to the writing (*vide* Stephen's Digest on the Law of Evidence, Article 52, Taylor's Law of Evidence, 10th Edition, page 1340, and Phipson, the 5th Edition, pages 93 and 94).

In the second portion of the section under construction the word used is "alleged", and as from the context it is clear that no contradiction between the two words could have been intended, the impression left on the mind is that the two must have been used to express the same idea.

In our opinion, the Subordinate Judge was entitled, in the circumstances, to compare the handwriting of Exhibits B and D and that being so, there was no ground for interfering with his decree.

We must, therefore, set aside the order of the learned Judge and restore the decree of the Small Cause Court. Appellant will get his costs throughout.

M.C.P.

Appeal allowed.

(1) 7 Ind. Cas. 359; 37 C. 467; 14 C. W. N. 1114; 11 Cr. L. J. 453.

(2) 15 Ind. Cas. 649; 14 Bom. L. R. 310; 13 Cr. L. J. 565.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 196 OF 1918.

September 2, 1918.

Present:—Mr. Lindsay, J. C.

GAYA PRASAD AND OTHERS—PLAINTIFFS—
APPELLANTS

versus

SADA SUKH AND OTHERS—DEFENDANTS—
RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 76—Contract Act (IX of 1872), s. 69—Mortgage, usufructuary—Mortgagee, position of—Under-proprietary plots, rent of, paid by mortgagee, whether can be claimed against mortgagor—Contribution, suit for.

A usufructuary mortgagee of under-proprietary plots is, in the absence of any stipulation to the contrary entered in the mortgage-deed, bound, under the provisions of section 76 of the Transfer of Property Act, to pay to the superior proprietor the rent due in respect of those plots, and is, therefore, not entitled to recover it by way of contribution from the mortgagor under the provisions of section 69 of the Contract Act.

Appeal from the decree of the Subordinate Judge, Unao, dated the 12th February 1918, upholding that of the Munsif, South Unao, dated the 12th July 1917.

Babu Surendro Nath Roy, holding brief of Pandit Tara Shankar Sharma, for the Appellants.

JUDGMENT.—This appeal is up for admission under Order XLI, rule 11, of the Code of Civil Procedure. It arose out of a suit which was framed as a suit for contribution, and a plea is taken in the memorandum of appeal that the plaintiffs were entitled to recover under the provisions of section 69 of the Contract Act. The facts, however, appear to me to render an argument of this kind quite impossible. It is admitted that the plaintiffs-appellants are the mortgagees with possession of certain plots of under-proprietary tenure. The defendants-respondents were the mortgagors. The superior proprietor had to bring a suit for arrears of rent due in respect of these plots. A decree was obtained. The present plaintiffs-appellants objected to the execution of the decree but being unsuccessful, they had in the last resort to pay up the arrears in order to protect the mortgaged property. Obviously, however, they have no claim against the mortgagors in respect of the rents so paid. Under the provisions of section 76 of the Transfer of Property Act the mortgagees in possession

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were, in my opinion, liable to pay the under-proprietary rent of the holding. It is admitted before me that in the mortgage-deed there is no contract to the contrary. Consequently the primary liability for the rent of the plots in question lay upon the plaintiffs-appellants; and in these circumstances it is not possible for them to set up a case under section 69 of the Contract Act. Relief under that section can be granted only where one person is interested in the payment of money which another person is bound by law to pay, but here the defendants-respondents were not bound by law to pay the arrears of rent. That obligation rested upon the plaintiffs themselves. The learned Subordinate Judge is hardly right in saying that the plaintiffs were guilty of contributory negligence.

The case is not one of contributory negligence. The whole responsibility for the payment of these rents lies upon the plaintiffs and they are not, therefore, entitled to seek any contribution from the defendants-mortgagors.

The appeal is dismissed.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 76-B OF 1918.

September 4, 1918.

Present:—Sir Henry Drake-Brockman,
Kt., J. C.

CHAMPAT—PLAINTIFF—APPELLANT.

versus

LAXMI NARAYAN AND ANOTHER

—DEFENDANTS—RESPONDENTS.

Ejectment, suit for—Burden of proof.

Where a plaintiff seeks to recover possession as upon dispossession, the burden is on him to prove possession at some time within 12 years before the commencement of the suit. [p. 71, col. 1.]

In all actions for ejectment the plaintiff must recover by the strength of his own title, not by the weakness of his adversary's. [p. 71, col. 1.]

Mohima Chunder Mozoomdar v. Mohesh Chunder Neoghi, 16 C. 473 at p. 479; 16 I. A. 23; 5 Sar. P. O. J. 321; 8 Ind. Dec. (N. S.) 312 (P. O.) and *Basant Singh v. Mahabir Pershad*, 19 Ind. Cas. 240; 35 A. 273; 17 C. W. N. 669; (1913) M. W. N. 481; 11 A. L. J. 469; 17 C. L. J. 566; 15 Bom. L. R. 525; 16 O. C. 136; 14 M. L. T. 64; 25 M. L. J. 301; 40 I. A. 86 (P. O.), followed.

Appeal from the decree of the Court of the 2nd Additional District Judge, East Berar, dated the 3rd January 1918, in Appeal No. 163 of 1917.

Mr. S. Ramdas, for the Appellant.

Mr. P. S. Kotwal, for Respondent No. 1.

JUDGMENT.—The suit out of which this second appeal arises was brought to recover possession of 1 acre 13½ *gunthas* of land, which the plaintiff alleged to be at the eastern end of that portion of Survey No. 83 which he bought from one Saru (P. W. No. 2) by a sale-deed (Exhibit P-2) on the 22nd November 1906.

On Exhibit P-2 the total area of the field appears as 23 acres 33 *gunthas*, but in the Record of Rights recently drawn up the figure is 29 acres 5 *gunthas*, of which 12 acres 17 *gunthas* are shown as in the plaintiff's and 16 acres 17 *gunthas* in the defendant Laxmi Narayan's possession.

The field was originally the property of Shrawan and Dawan. Dawan was succeeded by his daughter Saru (P. W. No. 2) and Shrawan by a female heir named Bhimi.

Saru and Bhimi partitioned the field sometime before 1902 and Bhimi sold her share to one Mahimaji, who on the 13th May 1902 conveyed it to the defendant Laxmi Narayan.

The allegation in the plaint is that in the month of July 1914 the 2nd defendant Nago Rao, who held under the defendant Laxmi Narayan, destroyed the plaintiff's crops standing on the strip of land in dispute and cultivated the land himself thus wrongfully ejecting the plaintiff.

Nago Rao put in no appearance except as a witness, for his co-defendant Laxmi Narayan pleaded that ever since his purchase he has been in possession of the land which he now holds.

The Courts below have concurred in finding that the allegation in the plaint is not proved. Laying the burden on the plaintiff to show that he had been in possession of the strip claimed within the last 12 years, they found that no such possession was made out. The lower Appellate Court has further come to the conclusion that the defendant has been in possession of the land in dispute ever since he purchased his part of No 83 in 1902 and that it belongs to that part. That the field was not divided into two exactly equal parts in stated by Moham-

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mad Bekar D. W. No. 3; who owns one of the adjoining fields.

The claim of the plaintiff having been dismissed, he has preferred this second appeal and the only point pressed in his behalf is that inasmuch as his sale deed gives the area of the entire field as 28 acres 33 *gunthas* and conveys half of it (*i.e.*) 14 acres 16½ *gunthas*, the burden should have been laid upon the defendant to show that he is entitled to hold more than half of the total area. No authority is cited for this proposition, which is opposed to the well settled rule that where the plaintiff seeks to recover possession as upon dispossession, the burden is on him to prove possession at some time within 12 years before the commencement of the suit. In all actions for ejectment the plaintiff must recover by the strength of his own title not by the weakness of his adversary's, as laid down by their Lordships of the Privy Council in *Mohima Chunder Mozoomdar v. Mohesh Chunder Neoghi* (1) and again in *Basant Singh v. Mahabir Pershad* (2). That the appellant's case is really rested on nothing better than the discrepancy between the areas in actual possession of the parties respectively appears from his own deposition as P. W. No. 7, where he admitted that though the alleged encroachment took place before the Record of Rights was prepared, he took no steps to bring his claim to the notice of the officers who made the preliminary enquiry. It is common ground that the road to Amraoti passes through the south eastern corner of the defendant's portion, and quite possibly this furnished a reason for dividing the field unequally at partition. However this may be, the contention of the appellant is without foundation in law. His appeal is accordingly dismissed with costs. In the lower Courts costs will be paid as already ordered.

Appeal dismissed.

(1) 16 C. 473 at p. 479; 16 I. A. 23; 5 Sar. P. C. J. 321; 8 Ind. Dec. (N. S.) 312 (P. C.).

(2) 19 Ind. Cas. 340; 35 A. 273; 17 C. W. N. 669; (1913) M. W. N. 481; 11 A. L. J. 469; 17 C. L. J. 566; 15 Bom. L. R. 525; 16 O. C. 136; 14 M. L. T. 64; 25 M. L. J. 301; 40 I. A. 86 (P. C.).

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 2 of 1917.

July 18, 1917.

Present:—Mr. Justice Abdur Rahim and
Mr. Justice Kumaraswami Sastri.

KANAKASUNDARAM PILLAI—COUNTER-
PETITIONER No. 2—PETITIONER

versus

SOMASUNDARAM PILLAI AND ANOTHER—

PETITIONERS NOS. 1 AND 2—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. IX, r. 13, scope of—Mortgage decree—Final decree passed ex parte, application to set aside, maintainability of.

A final decree passed *ex parte* in a mortgage suit is a 'decree' within the meaning of Order IX, rule 13, Civil Procedure Code, and an application to set it aside is, therefore, maintainable under the rule. [p. 72, cols. 1 & 2.]

Petition, under section 115 of Act V of 1908, praying the High Court to revise the order of the Court of the District Munsif, Tiruturaipundi, dated the 27th November 1916, in Interlocutory Appeal No. 1314 of 1916 in Original Suit No. 150 of 1913.

FACTS appear from the judgment.

Messrs. T. R. Venkatarama Sastri and S. Visanatha Aiyar, for the Petitioner.—Order IX, rule 13, contemplates only the first decree passed in a suit. The rule contemplates cases where summons is issued to the defendant. Proceedings leading up to the final decree in a mortgage suit are separate and what is served on the defendant is not a summons but a notice.

Mr. S. Muthiah' Mullick for Mr. G. S. Ramachandra Aiyar, for the Respondents.—The final decree is as much a decree as the preliminary decree. There is no reason for limiting or narrowing the scope of Order IX, rule 13, Civil Procedure Code. The terms of the section are general and comprehensive. There must be a remedy to the party against whom the final decree is passed *ex parte* in a mortgage suit.

JUDGMENT.—The petitioner obtained a preliminary mortgage decree for the sale of certain property and an application was then made for the passing of the final decree. At the hearing of this application the respondent did not appear and the final decree was passed in his absence. Subsequently he made an application under Order IX, rule 13, Civil Procedure Code, to set aside the final decree, which he alleged was passed *ex parte*. The District Munsif acceded to that application and the petitioner now has applied to us in revision to set aside the

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order, firstly, on the ground that it is not a case to which Order IX, rule 13, applies.

The point raised seems to be one of first impression and its decision depends on the interpretation of Order IX, rule 13. It says: "In any case in which a decree is passed *ex parte* against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside." Now there is nothing in the language of that rule which compels us to limit the word 'decree' to the preliminary decree in a case where the law contemplates preliminary and final decrees. It cannot be denied that a final decree is as much a decree within the meaning of the law as a preliminary decree. The Code provides certain procedure to be followed in the proceedings for a final decree; an application has to be made by the preliminary decree-holder and notice has to be given to the judgment-debtor to show cause why such a decree should not be passed. We do not see any good ground, nor has any been suggested to us, why a final decree like this should not be treated as a 'decree' within the meaning of Order IX, rule 13, if it has been passed *ex parte* within the meaning of the law. In such cases, the proceedings commencing from the preliminary decree must be treated as separate proceedings and if those proceedings are terminated by a decree which has been passed *ex parte* we do not see, so far as the language of the rule or of any other provisions of the Code that have been brought to our notice are concerned, why the procedure set down for setting aside *ex parte* decrees should not apply. Our attention has been drawn to the fact that rule 13 contemplates cases in which the summons has not been duly served, and the contention is that in proceedings for final decree in a mortgage suit what is served is not a summons but a notice. We do not think that there is really any substantial distinction to be based on a ground like this, and we are of opinion that the ends of justice require that we should not unduly narrow the scope of rule 13, Order IX. It is of importance that the proceedings for a final decree should be had with due regard to the procedure laid down for the purpose and that if a final decree is passed *ex parte*

in the absence of the defendant, he should be given an opportunity of having that decree set aside by a proper application if he was prevented from appearing for sufficient cause.

The next contention raised is that the application was made after the time limited had expired, but that is not a question of jurisdiction in which we can interfere with the order in revision. The petition, therefore, fails and is dismissed with costs.

M.C.P.

Petition dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No 182-OF 1912.

February 16, 1914.

Present:—Mr. Stanyan, A. J. C.

POONAMCHAND—DEFENDANT—
APPELLANT

versus

NANDLAL AND OTHERS—PLAINTIFFS
—RESPONDENTS.

Wajib-ul-arz, entry in, construction of—Waste land—Lease granted by lambardar without consulting co-sharers, validity of—Remedy.

A clause in a village *wajib-ul-arz* recognizing the general power of the *lambardar* to create tenancies in respect of village waste land, but providing at the same time that he should consult the other co-sharers before granting a lease, will not avail a co-sharer for the purpose of avoiding any lease of waste land which may have been created by his representative, the *lambardar*, without consulting him. [p. 73, col. 1.]

The co-sharer's remedy, if any, in such cases lies in an action for damages against the *lambardar* or his removal from office or for partition. [p. 73, col. 1.]

Appeal from the decree of the Court of the District Judge, Nimar, dated the 19th February 1912, in Appeal No. 184 of 1901.

JUDGMENT.—The judgment of the lower Appellate Court is clearly wrong. Certain land which lay fallow in 1906 was in that year leased to the defendant by the *Lambardar*. Four years later the plaintiffs, who are co-proprietors of the land, bring the present suit whereby they seek to repudiate the tenancy, on the ground that their consent thereto was not obtained by the *Lambardar* as re-

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quired by the Nimar Wajib-ul-arz. It is a question whether the Hoshangabad or Nimar Wajib-ul-arz is applicable, because the case comes from the Hoshangabad Taluqa which has only recently been transferred from the Hoshangabad to the Nimar District. But the question is quite immaterial because, assuming that the Nimar Wajib-ul-arz on which the plaintiffs rely is applicable, the suit must still fail. The 1st Court rightly dismissed the suit but the District Judge, ignoring the previous decisions of this Court and upon an entirely mistaken interpretation of the Wajib-ul-arz, reversed that decision and gave the plaintiffs, *qua* landlords, joint possession with the defendants, *qua* tenants, over the land in dispute, declaring their share to be one-half.

The Nimar Wajib-ul-arz, while recognising the general power and responsibility of the Lambardar to create tenancies, provides that in letting waste lands he should consult the wishes (or take the advice) of his co-sharers.

I have held in more than one case, though I cannot now lay my hand on any of them, that this clause will not avail a co-sharer for the purpose of avoiding any lease of waste land which may have been created by his representative, the Lambardar, without consulting him, and that his remedy, if any, lies in action against the Lambardar for damages, for his removal from office, or by claiming partition. But the same view was laid down so far back as 1901 by Ismay, J. C., in *Kesho Rao v. Nana* (Second Appeal No. 228 of 1901) decided on the 17th September 1901 with reference to a similar clause in the Wardha Wajib-ul-arz. The learned Judicial Commissioner wrote: "What I imagine the clause in the Wajib-ul-arz to mean is that if a Lambardar persists in ignoring the wishes of his co-proprietors, he renders himself liable on their application to be removed from office. But the co-sharers certainly could not claim to avoid a *bona fide* lease merely on the ground that their wishes were not consulted before it was given."

In the present case there is the further element against the plaintiff of a delay of 4 years (for which personally they have

received their share of the rent) before bringing the suit.

The appeal is allowed. The decree of the lower Appellate Court is reversed, and the plaintiffs' suit is dismissed with costs on them throughout.

Appeal allowed.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 451 of 1915.

February 25, 1918.

Present:—Mr. Justice Scott-Smith and Mr. Justice Le Rossignol.

MUHAMMAD BAKHSH—PLAINTIFF—

APPELLANT

versus

NAWAZISH ALI—DEFENDANT—

RESPONDENT.

Custom—Immoral custom, whether enforceable—Succession—Kanjars—Presumption of marriage.

An immoral custom has no legal force. [p. 74, col. 2.]

A custom by which a brothel-keeper succeeds to the property left by a *nauchi*, or slave kept for the purpose of prostitution, is immoral and has no legal effect, for, if recognised, it would have the effect of encouraging brothel-keeping. [p. 74, col. 2.]

The general presumption in favour of marriage, which prevails in the case of ordinary people, does not hold good in the case of *kanjars*, who must prove the fact of marriage by very clear evidence. [p. 74, col. 1.]

First appeal from the decree of the District Judge, Lahore, dated the 16th January 1913, dismissing plaintiff's claim.

The Hon'ble Pandit Sheo Narain and Mr. Manohar Lal, for the Respondent.

JUDGMENT.—In February 1908 *Musammatt* Jhandi, a prostitute, mortgaged the property in dispute to the defendant in this case, and the plaintiff who is a brothel-keeper claims possession of the property on the ground that *Musammatt* Jhandi had no power to make the mortgage and that she made it without necessity. In the alternative he claims to pre-empt.

The learned District Judge has dismissed plaintiff's claim with costs, holding that no right of pre-emption accrues in respect of the mortgage, that the property in dispute was originally acquired by one *Musammatt* Matti and by her transferred to *Musammatt* Jhandi. Further that plaintiff has not

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established that he is a legitimate descendant of Rahman through whom the plaintiff claims to succeed; that *Musammāt Jhandi* acquired an absolute interest in the property either by gift or by succession; that even on plaintiff's own showing *Musammāt Jhandi* had power to mortgage for necessity; and that consideration and necessity for the mortgage had been fully established.

The appellant in this case states that he has been unable to secure the services of Counsel, and we have, therefore, been obliged to call upon the Counsel for the respondent to take us through the record; and after consideration of the evidence in the case, we have come to the conclusion that the plaintiff's suit must fail.

To deal first with the question of necessity, however, we are unable to agree with the learned District Judge that *Musammāt Jhandi* had necessity to mortgage the property in suit for the large sum of Rs. 8,000. She was, no doubt, a very old woman and admittedly for many years past had abandoned the trade of prostitution, but we can find nothing to prove the necessity for the loan of Rs. 3,000 which she is said to have obtained on a promissory note from one Mehr Jhandu, which promissory note is said to have been liquidated out of the mortgage-money.

The property in dispute is situate on a plot of land which was taken in mortgage by *Musammāt Matti*, the daughter of *Musammāt Fatti*, whose relationship with the plaintiff will be found from a glance at the genealogical tree propounded by the plaintiff which is printed in the body of the lower Court's judgment. From that genealogical tree it will appear that Rahman had two wives, but bearing in mind that Rahman was a *kanjar*, we hold it necessary for the plaintiff to prove that *Musammāt Rahmati* was indeed the legal wife of Rahman, and in view of the fact that the general presumptions which obtain in the case of ordinary people do not hold good in the case of *kanjars*, who are prostitutes and bullies, we are unable to hold it proved that the plaintiff is the legitimate great-grandson of Rahman. Consequently his claim to succeed as a relative of *Musammāt Matti* falls to the ground,

The plaintiff has advanced another ground why he should succeed. In that he alleges that on the death of *Musammāt Matti*, *Musammāt Mamo*, a *nauchi*, or slave kept for the purpose of prostitution, was allowed to remain in possession of the property in suit, and that he as a brothel-keeper is by custom entitled to succeed to the property left by the deceased *nauchi*. This custom has not been proved, but the matter need not delay us, for such a custom, even if proved, could have no legal effect, for, if recognized as binding, it would have the effect of encouraging brothel-keeping. Such a custom by reason of its immorality would have no legal force.

In 1879 *Musammāt Mamo* executed a Will by which she left the whole *haveli* to *Musammāt Jhandi*. Thereupon a dispute arose between her and one Pir Bakhsh, a brother of the plaintiff, and the matter was referred to arbitration but to that arbitration the plaintiff was no party. The award given by the arbitrators apparently conferred upon *Musammāt Mamo* a life-interest in the property plus a right to mortgage it, should she be driven thereto by poverty. However that may be, *Musammāt Jhandi* on the death of *Musammāt Mamo* in 1879-1880 took possession of that part of the *haveli* which is now in suit and has since that date been in possession of the same. Disputes between the plaintiff and *Musammāt Jhandi* regarding the property started shortly after *Musammāt Mamo*'s death and the plaintiff admits that she has been mortgaging the property at various times, but he asserts in one breath that the mortgages were effected by her by stealth and in the next that sometimes he gave her permission to mortgage and sometimes he did not.

In 1899, 1904 and 1906 *Musammāt Jhandi* mortgaged the property of which she was in possession to different persons and the plaintiff admits that he consented to the mortgage of 1899. In all these mortgages *Musammāt Jhandi* asserted that the property mortgaged was her own absolute property, and we see no reason to doubt that she had been in possession of the property in suit claiming it as her own since the death of *Musammāt Mamo* in 1879.

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With reference to ground No. 2 of the appeal, the property in dispute and that possessed by *Musammāt Jhandi* consists of not two *kothris* but of two blocks of buildings, and the expression used by the Court below is incorrect, but there is no doubt that the Court was referring to the two properties, one of which is a block of buildings or collection of *kothris*, in suit.

The Court below is again in error in stating that before the award Mamo had gifted her interest to Jhandi, whose title was perfected before the issue of the award.

No gift was made to Jhandi by Mamo, but by a Will dated 20th January 1879 (page 17 of the paper-book) Mamo bequeathed the property in her possession to Jhandi.

It is true that in the reference to arbitration dated 26th May 1879 the devise is called a gift, but that is a mere looseness of expression which cannot affect the real nature of the transaction, and in it is stated that the gift has been revoked.

A gift followed by delivery could not be revoked but a bequest could. But it is clear that whatever limitation on Jhandi's right was placed by the award in favour of the brotherhood, of which plaintiff is the representative, Jhandi has refused to be bound by it. In 1887 her disputes with plaintiff commenced and in 1892 she clearly repudiated any right of plaintiff in the property (page 29 of paper-book), whilst defendant insisted, obviously ignoring the terms of the award, that *nauchis* had only a right of residence.

In 1899 Jhandi mortgaged the full proprietary right to *Musammāt Allah Rakhi* and set forth in the deed that she was full owner and the plaintiff was one of the attesting witnesses.

In the face of these facts we must hold that Jhandi ignored the award and had been in adverse possession for over 12 years when the suit was brought, and we dismiss the appeal with costs.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL No. 34 of 1917.

August 23, 1918.

Present:—Mr. Mittra, A. J. C.

Musammāt CHIRONJI KASAR—APPELLANT
versus

PUNAM CHAND—RESPONDENT.

Guardians and Wards Act (VIII of 1890), s. 15—Hindu Law—Guardianship—Mother, whether natural guardian after re-marriage—Joint guardians, whether can be appointed.

A Hindu mother's natural right to be a preferential guardian of the person of her minor children is lost by reason of her re-marriage, though she may be appointed a guardian as any stranger. [p. 76, col. 1.]
Ganga Prasad v. Ramasrey Shahu, 10 Ind. Cas. 69; 33 C. 86; 15 C. W. N. 579; 13 C. L. J. 558, followed.

There is nothing in the Hindu Law which prevents the Sovereign as guardian from appointing more persons than one as guardians of the person of a minor. [p. 76, col. 1.]

Appeal from the order, dated 19th April 1917, passed by the District Judge, Nimar, in Guardian Case No. 74 of 1916.

Mr. *Bhawanishanker*, for the Appellant.

Mr. *V. V. Chitale*, for the Respondent.

JUDGMENT.—The respondent Punam Chand applied under the Guardians and Wards Act to be appointed guardian of the person of his step-sister *Musammāt Anandi*, a minor of the age of about ten. Shortly after the death of Ganna, father of Punam Chand and *Musammāt Anandi*, Ganna's widow *Musammāt Chironji* re-married. The girl has been living with her mother for the last eight years in the house of Ganpat, her step-father. The application was resisted by *Musammāt Chironji*. Punam Chand, it has been explained to me, does not want to have the girl removed from the custody of her mother but claims to have the right to select a bridegroom for the girl, and in this connection he alleges that there was a betrothal in the lifetime of the father with one Bhagwan. The lower Court in its judgment appears to be under a misapprehension in stating that Bhagwan has been, since married to another girl. This is denied before me, and there is no evidence to establish it. However, the point to decide is whether the half brother or the natural mother who has re-married out of the family has the preferential right to give the girl in marriage. This question has been answered by the lower Court in favour of Punam Chand, but the actual order passed does not appear to me to be a happy one.

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The order appoints both Punam Chand and Musammat Chironji to act as the joint guardians of Musammat Anandi, the latter being free to live with either, and directs that a husband for her shall be chosen by the common consent of both, and if they disagree, by the Court. There is no appeal by Punam Chand against the order. I have, therefore, to consider upon Musammat Chironji's appeal whether the order of the lower Court, so far as it recognizes the claims of Punam Chand, is wrong.

Under the cover of an application for the guardianship of the person the parties are really seeking a decision as to the right to give the girl away in marriage. I agree with the lower Court that the mother's natural right to be a preferential guardian of the minor's person is lost by reason of her re-marriage, though she may be appointed by the Court as any stranger. See *Ganga Prasad v. Ramasrey Shahu* (1). The duty of getting a minor girl married devolves upon the male relations of the family and as the mother has ceased to be in the family by her re-marriage, the preferential right seems to be in Punam Chand. Punam Chand and his father were joint, although there does not appear to be any joint property left so far as the evidence goes. The order of the lower Court, so far as it concedes a right to Musammat Chironji to select a husband for her daughter, might possibly have been successfully impeached by Punam Chand if he had appealed. Musammat Chironji cannot complain of Punam Chand's right declared by the order.

It is urged that the appointment of two persons contravenes the provisions of section 15 of the Guardians and Wards Act. There is nothing in the Hindu Law, so far as I know, which prevents the Sovereign as guardian from appointing more than one person as guardians of the person of a minor. In any case Musammat Chironji is not aggrieved by the order passed by the lower Court. The appeal is, therefore, dismissed with costs. I fix Rs. 10 as Pleadar's fee in this Court.

Appeal dismissed.

(1) 10 Ind. Cas. 69; 33 C. 862; 15 C. W. N. 579; 13 C. L. J. 558.

MADRAS HIGH COURT.

CIVIL APPEALS NOS. 80 AND 155 OF 1917.

April 25, 1918.

Present:—Sir John Wallis, Kt., Chief Justice, and Mr. Justice Spencer.

THANGATHAMMA AND ANOTHER—
DEFENDANTS—APPELLANTS

versus

V.A.A.R. ARUNACHALLAM CHETTIAR
AND OTHERS PLAINTIFFS AND DEFENDANTS—
RESPONDENTS.

Hindu Law—Mitakshara—Suretyship, kinds of—Suretyship for payment by father—Sons, liability of—Construction of documents.

There are three kinds of suretyship according to the Mitakshara, for appearance, for assurance and for payment. The surety by way of assurance consists of a general warranty of credit, but a surety for payment is one who says "if he does not pay, then I myself will pay." When a surety for appearance or a surety by way of assurance dies, his sons are under no obligation to pay, but in the case of a surety for payment they are bound to pay. [p. 77, col. 1.]

A Hindu father entered into a suretyship obligation in the following words: "I shall make V. pay the amount due under the said promissory note within two months from this date. In default of payment as aforesaid by the said person within the said time, I shall pay the amount of principal and interest on the said promissory note and get back the said promissory note and the surety bond and the title deeds."

Held, that this was a suretyship for payment (*danē*) and the surety's son was liable for the obligation created by the said contract. [p. 77, col. 2.]

Appeals against the decree of the Court of the Subordinate Judge, Trichinopoly, in Original Suit No. 42 of 1916.

Messrs. R. Kuppuswami Aiyar, S. Krishna-swami Aiyangar, K. R. Ranganaswami Aiyangar and V. Pattabhirama Aiyar, for the Appellants.

The Hon'ble Mr. T. Rangachariar, Messrs. K. S. Ganesa Aiyar, A. Krishnaswami Aiyar and M. Patanjali Shastri, for the Respondents.

JUDGMENT.

A. S. No. 80 OF 1917.

At the hearing of this appeal, two contentions were raised:—

1 that the Varthamanam or guarantee (Exhibit M) alleged to have been written by 5th defendant's husband Audinarayana Pillai was not genuine;

2. that owing to the nature of the transaction which Exhibit M evidences, the heirs of the guarantor are not liable under Hindu Law.

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On the first point, we do not find the least reason to doubt the correctness of the learned Subordinate Judge's finding of fact. The circumstance that during Audinarayana's lifetime a notice of demand setting out his liability under the Varthamanam was sent to him and he did not repudiate his liability, tells strongly against the present theory that it is a forgery. It was again mentioned in the subsequent promissory note (Exhibit Q), in a sentence which may have been written after the stamp was affixed but not necessarily after Audinarayana had signed across the stamp.

The attempts made to prove an *alibi* for the 1st defendant on the day when Exhibit M was executed by means of certain post-cards do not, in our opinion, in the least detract from the genuineness of that document.

The determination of the second point depends upon the application to the facts of this case of the Hindu Law as to the liability of sons of persons who have stood sureties for others.

Verses 53 and 54 of Yajnavalkya run as follows:—

* * * * *
which are translated by Mr. Gharpure in his collections of Hindu law texts thus:—

Suretyship is ordained for appearance, assurance and for payment. The first two, however, should be made to pay in case of default while in the case of the last, even the sons (should be made to pay). Where a surety for appearance or a surety by assurance dies, the sons of such a one must not pay; (but) in the case of a surety for payment, they should pay.

It is argued that the 5th defendant was under Exhibit M a surety for assurance (***pratyaye*) and not for payment (*dane*) and that the fact that the money had already been lent to the debtor when the surety bond was executed is an indication of this. According to the illustration given in the Mitakshara when commenting upon the above verses, the surety by way of assurance consists of a general warranty of credit, but a surety for payment is one who says: "If he does not pay, then I myself will pay." The distinction between these two classes of sureties is further explained in Colebrook's Digest, Volume I, page 164, and that has been dis-

cussed fully by Ranade, J., in *Tukarambhat v. Gangasam Mulchand Gujar* (1). In *Rasik Lal Mandal v. Singhaswar Roy* (2) it was held that a surety obligation for payment was binding on the son even where the creditor's claim against the principal debtor did not arise out of a loan from the creditor to the debtor.

In Exhibit M the promise which Audinarayana Pillai made was in these words:—"I shall make the said Veera Pillai pay the amount due under the said promissory note within 2 months from this date. In default of payment as aforesaid by the said person within the said time, I shall pay the amount of principal and interest on the said promissory note and get back the said promissory note and the surety bond and the title-deeds."

There could hardly be a more definite promise to pay, if the debtor failed to pay, than this, and, therefore, this falls under the third clause of suretyship, that for payment (*dane*), and it makes no difference that the money had already been lent to the debtor when the surety executed the bond.

Defendants Nos. 5 and 9 are, therefore, liable to pay out of the family assets in their hands.

The appeal is dismissed with costs of plaintiff and 8th defendant (two sets).

A. S. No. 155 of 1917.

We agree with the Subordinate Judge that Exhibit C covered past as well as future advances. The participle used, as the Subordinate Judge has observed, is without time and is equally applicable to past as well as future borrowings. The fact that a deposit of title-deeds had been taken at the time of the earliest advance of Rs. 2,000 under Exhibit A, shows that it could not have been the intention of the parties to exclude under Exhibit C the money already borrowed on the security.

As regards the other points, we agree with the Subordinate Judge that the sum of Rs. 3,000 was intended to apply to advances of principal and that the property mortgaged was made security under the terms of the document not only

(1) 23 B. 454; 12 Ind. Dec. (N. S.) 301.

(2) 14 Ind. Cas. 147; 39 C. 343; 16 C. L. J. 107; 16 C. W. N. 1103.

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for the principal sums not exceeding Rs. 3,000 in all but also for the interest thereon. The appeal is dismissed with costs.

M. C. P.

Appeals dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL CIVIL NO. 63 OF 1915.

December 21, 1915.

Present:—Sir Lancelot Sanderson, Kt., Chief Justice, Justice Sir John Woodroffe, Kt., and Justice Sir Asutosh Mookerjee, Kt.

SHIB CHANDRA KAR—DEFENDANT NO. 2

—APPELLANT

versus

A. C. DULCKEN AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, rr. 22, 23, scope of—Cross-objection by respondent against co-respondent, whether entertainable—Evidence Act (I of 1872), s. 115—Estoppel—Hindu Law—Reversionary heirs joining in mortgage by female, whether bound by mortgage—Appeal, second—Question of law raised for first time, whether can be entertained.

Order XLI, rule 22, of the Civil Procedure Code is wide enough to cover a cross-objection by one respondent against another. But a cross-objection by a respondent as against his co-respondent should not be allowed under this rule where the matters sought to be raised by the cross-objection have no relation to or connection with the question raised by the appeal. [p. 81, cols. 1 & 2; p. 82, col. 2.]

A Hindu female in possession of property inherited from her deceased father or mother mortgaged it by a deed which recited legal necessity. Some of her sons joined in the mortgage:

Held, that the sons who joined in the mortgage were estopped from denying that there was legal necessity for the mortgage and that the mortgage and the execution sale consequent thereon were binding on the property in their hands after the death of their mother. [p. 87, col. 2; p. 84, col. 2.]

Per Sanderson, C. J.—Order XLI, rule 33, Civil Procedure Code, gives important and useful powers to a Court of Appeal, which a Court of Appeal would not hesitate to make use of on a proper occasion. [p. 82, col. 1.]

Per Mookerjee, J.—Order XLI, rule 33, Civil Procedure Code, must be cautiously applied, for instance, applied generally in cases where but for recourse to it the ends of justice would be defeated. Thus the rule should not be allowed to be invoked in favour of a litigant so as to enable him to evade the provisions of other Statutes such as the Limitation Act or the Court Fees Act. [p. 82, col. 2.]

When a question of law is raised for the first time in a Court of last resort, upon the construction

of a document or upon facts either admitted or proved beyond controversy, it is not only competent but expedient in the interests of justice to entertain the plea. [p. 86, col. 1.]

Appeal against the decision of Mr. Justice Chaudhuri, sitting on the Original Side, dated the 7th December 1914.

FACTS of the case appear from the following judgment of

CHAUDHURI, J.—This is a suit for partition. The plaintiffs claim a half share in the premises No. 36 Foriapooker Street. Their case is shortly this:—that one Harbhans Neogi had two sons, Shib Chandra Neogi and Chuni Lal Neogi. Shib Chandra and Chuni Lal formed a joint Hindu family and carried on a joint business. 36 Foriapooker Street was purchased by them in the name of the wife of Shib Chandra Neogi named Ramanimoni Dassee. In this property Shib Chandra Neogi was entitled to one half and Chuni Lal to the other half. It appears that there was a mortgage decree against Chuni Lal, dated 10th March 1904. The half share of Chuni Lal in this property was put up for sale under that decree and the same was purchased by Kaminimoni Dassee and one Nistarini Dassee in equal shares. On the 27th July 1910 Nistarini Dassee sold her half share to the 2nd plaintiff, Amrita Lal Sur. The plaintiffs thus claim to be entitled to one-fourth each. The defendants in this action are Shib Chandra Kar and Dulcken. The way that their claims arise may be shortly thus stated. Shib Chandra Neogi died in 1856 leaving him surviving a married daughter, namely, Giribala, and some grandsons by her. Ramanimoni died on the 24th March 1896. After her death Giribala, her husband Harish Chunder Sur and three of their sons who had then attained majority—Satish, Sirish and Suresh Chandra Sur—executed two mortgages of the premises No. 36 Foriapooker Street, dated the 13th February 1901 and the 22nd January 1902, in favour of Tincowrie Halder and Shib Chandra Kar respectively. One of these grandsons, Sirish Chunder Sur, died and thereafter there was a mortgage again of the very same premises executed by Giribala, Harish, Satish and Suresh (and Sarat) and also by Giribala as guardian of her infant sons, Subodh and Sushil. This was dated the 12th January 1903.

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Tincowrie Halidar then filed a suit being Suit No. 278 of 1903, against his mortgagors and Shib Chandra Kar and Nil Kanta as puisne mortgagees, and obtained the usual mortgage decree on the 25th February 1904. This decree was assigned to Shib Chandra Kar on the 25th March 1904. The property covered by the mortgage was sold by the Registrar on the 17th December 1910. Shib Chandra Kar had got his name added as a plaintiff as such assignee and purchased the property on that date. Shib Chandra Kar thus claims to be entitled to the other half share of the premises No. 35 Foriapooker Street, being the share which originally belonged to Shib Chandra Neogi. Giribala died in December 1905, and upon her death Satish, Suresh and Sarat conveyed their 3/5th share of that half which they claimed to be entitled to as the grandsons of Shib Chandra Neogi, to one William O'Brien Hutchison. On the 16th July 1910 Hutchison sold same to Dulken. Dulken thus claims to be entitled to the rights of these persons in the property so far as the share of Shib Chandra Neogi is concerned. He, however, claims the entirety of the premises No. 36 Foriapooker Street under the following circumstances. He alleges in his written statement that after Ramani-moni's death, quarrels arose between Giribala on one side as the married daughter of Shib Chandra Neogi and Chuni Lal on the other. Matters in dispute between them were referred by a deed of arbitration to two arbitrators—one of them being an attorney of this Court. This deed is dated the 8th June 1899. The arbitrators were, amongst other things, to partition the joint family estate and to settle all disputes as regards accounts between them. Dulken alleges that the family property consisted of 36 Foriapooker Street and other parcels of property and that the arbitrators, by consent of the disputants, allotted in the first instance premises No. 127 Cornwallis Street and other properties to Chuni Lal and premises Nos. 22 and 36 Foriapooker Street and 221 Upper Circular Road to Giribala, but the parties changed their mind, and the properties which had originally been allotted to Chuni Lal were allotted to Giribala and *vice versa*. But the parties again reverted to the original allot-

ment and on the 6th August 1899 the final allotment was made giving 36 Foriapooker Street to Giribala. It is said that upon such allotment Giribala went into possession of 36 Foriapooker Street to the exclusion of Chuni Lal, and Chuni Lal held exclusive possession of 127 Cornwallis Street and the other properties allotted to him as aforesaid to the exclusion of Giribala. Dulken contends that by virtue of the arbitration and allotment and possession Chuni lost his share in 36 Foriapooker Street, and the purchasers of Chuni's share in the said premises have thus got nothing.

I shall first of all deal with this contention so far as it relates to his case against the said purchasers. Now so far as the arbitration is concerned, there was no effective award. One arbitrator refused to sign any award. No award was ever filed or made a decree of Court. It appears also from the proceedings before the arbitrators, which have been put in, that various matters in dispute between the parties remained unadjusted, although at one stage there was an arrangement between them that they were to live in different houses. They appear to have agreed to do so on the basis that there was going to be an effective award by the arbitrators on all matters in dispute between them. There was no such award. I am unable to hold upon the evidence that these properties were held adversely by one of the co-sharers as against the other. I cannot hold that Chuni thus lost all his right in 36 Foriapooker Street; I hold that the purchasers from Chuni became entitled to his half share in it.

A further question was raised as to whether the plaintiffs had ever obtained possession of this half share. There was some evidence that Suresh used to collect rent, but it appears that it was with regard to a small portion of the house. I am unable to hold that he had at any time excluded Amrita Lal Sur from possession of the premises. Amrita Lal Sur has been examined and spoke to having been in possession on behalf of the purchaser, namely, his mother-in-law, and to have resided in the premises for 8 or 9 months. He is supported in this by the evidence of Gonesh Chunder Day, an attorney of this Court, and also by some correspondence which passed between Gonesh Chunder and himself. A

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letter appears to have been addressed by post to Amrita Lal Sur to 36 Foriapooker Street, where he said he was living at the time. Having regard to this evidence, I hold that Amrita Lal Sur did obtain possession and decree this suit, so far as the plaintiffs are concerned. They are entitled to $\frac{1}{4}$ th each in the premises No. 36, Foriapooker Street.

The contention, however, as between the defendants is somewhat difficult, and it has been made still more difficult by the fact that the suit was heard on different dates to suit the convenience of Counsel and witnesses. I am not at all sure that I did not deal with the contending parties more leniently than they deserved in the matter of postponements. The case began in June and was finally heard on the last day of August, just before the holidays. It was not fair to myself that a case of this character with complicated questions of title, in which evidence was given in instalments, should have gone on in the manner it did; but the only person to be blamed is perhaps myself. So far as the two defendants are concerned, Dulken contends that Giribala had only a Hindu daughter's interest, and, although some of her sons joined in the mortgage executed by her, she could not deal with the corpus so as to bind all the reversioners after her death. All of them were admittedly not majors at that time, and it is, I think, justly contended that a Hindu daughter, such as Giribala who has only a limited interest, is unable without the consent of all the reversioners to make an effective transfer of the property. This seems to me to be the view held by the Full Bench in the case of *Debi Prosad Chowdhry v. Golap Bhagat* (1). It was further contended on behalf of Dulken that it had not been shown that Giribala had any legal necessity, on account of which she had mortgaged the property. Learned Counsel who appeared on behalf of Shib Chandra Kar pleaded that he had overlooked the point, and as he was not ready with any evidence on that point he asked for a postponement. Even at that stage I allowed it, because I did not want the client to suffer, because learned Counsel or attorney had not applied their minds

to one of the substantial issues in this suit. Evidence to supplement matters of this character given at a late stage of the proceedings requires careful scrutiny. Having regard also to the nature of the evidence given in this case, I am not at all satisfied that it has been made out that there was any legal necessity at the time that Shib Chandra Kar alleges the transaction took place. There was a great deal of evidence about decrees outstanding against Shib Chandra Neogi's estate, evidence of payments being required for urgent purposes, all of an indefinite and confused character, but I cannot hold that any legal necessity has been established. Having regard to that view, I think the transfer by three of the sons to Hutchison was an effective sale, and that Dulken has acquired their interest, namely, $\frac{3}{5}$ ths of $\frac{1}{2}$ or $\frac{3}{10}$ ths of this property. So far as Subodh and Sushil are concerned, they were infants at the time of the original transaction, but they have since released their interest in the property in favour of Shib Chandra Kar; and although a written statement was filed by Sirish, they have not appeared to contest the action. Suresh was examined as a witness, but stated quite clearly that he did not contest the action at all against Shib Chandra Kar, and that apparently was the position taken up by all of them and learned Counsel who appeared, instructed by their attorneys, merely asked that his costs might be taxed as between attorney and client on scale No. II. I, therefore, hold as between the defendants that $\frac{3}{10}$ ths go to Dulken and $\frac{2}{10}$ ths to Shib Chandra Kar. With the above declaration of shares, I direct a partition of the property.

As regards the costs, costs up to the first day's hearing as in a partition suit. Shib Chandra Kar and Dulken will pay their own costs of the subsequent days. Costs of the plaintiff of the other days are to be borne by Dulken to the extent of $\frac{3}{5}$ ths and Shib Chandra Kar to the extent of $\frac{2}{5}$ ths. Costs after decree will be according to the shares of the parties. All these costs are to be taxed on scale No. II.

With regard to the reserved costs, they will be as of a hearing, and the same order as I have made for the costs of the parties subsequent to the first day's hearing will apply. Mr. Sen states that the

(1) 19 Ind. Cas. 273; 17 C. W.N. 701; 17 C. L. J. 499; 40 C. 721 (F. B.)

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plaintiffs did not appear when the case was being fought out between the two contending defendants about their respective claims. If that be so, the said defendants will bear their own costs of the subsequent days and will not have to pay costs of the plaintiffs according to the shares above mentioned. I give leave to Mr. Sen to mention the matter again if necessary, since there is some uncertainty about the matter. Leave to the parties to mention the matter as to costs if they consider it necessary, including the question of the reserved costs. Leave to mention the name of the Commissioner of partition.

Messrs. H. D. Bose and A. Rasul, for the Appellant.

Mr. N. Sircar, for the Plaintiff Respondents.

Mr. R. D. Bose, for the Defendant-Respondent Paritoshini Dasi.

Messrs. S. R. Das and P. K. Sen, for the Respondent A. C. Dulken.

PRELIMINARY JUDGMENT.

SANDERSON, C. J.—In my judgment the preliminary objection which was taken by Mr. Sircar must prevail. The appeal in this case was by Shib Chandra Kar and was against the decree made by Mr. Justice Chaudhuri in so far as it related to Mr. Dulken's claim. It proceeded upon the basis that the plaintiffs were entitled to a half share in certain property, and there was no appeal as to the decision which allocated the half share to the plaintiffs, and the dispute between Shib Chandra Kar and Dulken was solely in relation to the other half. Then the widow of Satish Chandra Sur who did not appear at the trial, but who has been, as I understand, since added as a party to this appeal filed a cross objection, alleging that the learned Judge was wrong in holding that the plaintiffs were entitled to a half share of the property, and that the learned Judge should have held that Satish Chandra and the other heirs of Shib Chandra Neogi were entitled to the whole property. The widow did not enter a separate appeal, but has raised this point, as I have said, by way of cross-objection. The question is whether such cross-objection should be allowed.

Now, Order XLI, rule 22, which was

read yesterday, which I need not read again, in its terms is certainly wide enough to cover such a cross-objection as was made in this case. But it has been held that cross-objections under this rule ought not to be allowed in every case: and, I refer to the decision in *Jadunandan Prosad Singha v. Koor Kallyan Singh* (2) and read part of the head-note which refers to this matter and which is as follows: "No exhaustive rule on the subject can be formulated, and the true test is, whether, for the ends of justice, it is necessary that upon the appeal of one of the parties the matter should be re-opened only so far as he is concerned or the whole case should be reviewed and some of the respondents allowed the opportunity to urge a cross-objection against their co-respondents. One test of a negative character is sometimes useful: if the party, against whom a cross-objection is sought to be urged by his fellow-respondents, is not a necessary party to the appeal, the cross-objection can hardly be allowed to be urged", and the judgment of my brother Mookerjee is to be found at page 62,* I read from a passage at the bottom of page 63* which seems to me to be applicable to this case: "The principle is that, as a general rule, the right of any respondent to urge a cross-objection should be limited to his urging it only against the appellant; and it is only by way of exception to this general rule, that one respondent may urge a cross-objection as against another respondent; the exception, it is said, holds good in those cases where the appeal opens up questions which cannot be disposed of completely without matters being allowed to be opened up as between co-respondents." And, then later on, he refers to the negative test which I have already read, and goes on to say: "The test to be applied is, whether the questions which arise between the several sets of parties are so connected that one of them ought not to be allowed to re-open matters so far as he is concerned without opportunity allowed, in the interests of justice, to another to protect himself by urging his objections, even though they be directed,

(2) 13 Ind. Cas. 653; 15 C. L. J. 61; 16 C. W. N. 612.

*Page of 15 C. L. J.—Ed.

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not against the appellant, but against a co-respondent." Now, in my judgment the matters which I have referred to and which are sought to be raised by the cross-objection had no relation to or connection with the question which was raised by the appeal, and cannot be said to be within the test which is laid down by this judgment, namely, "so connected that one of the parties ought not to be allowed to re-open matters so far as he is concerned without opportunity allowed, in the interest of justice, to another to protect himself by urging his objections, even though they be directed, not against the appellant, but against a co-respondent." I do not think this case comes within that test. What I have only to add is this: our attention was drawn to Order XLI, rule 33. This rule, as I understand, has been passed since this decision. It gives undoubtedly important and useful powers to the Court of Appeal, which, speaking for myself, I should think the Court of Appeal would not hesitate to make use of on a proper occasion; but as regards this case it is sufficient for me to say that in my judgment it is not a proper case in which the Court of Appeal ought to exercise the powers which are given to it by that rule.

For these reasons I think the preliminary objection which was raised by Mr. Sircar must prevail.

WOODROFFE, J.—I agree.

MOOKERJEE, J.—I agree that the cross-objection taken by the defendant-respondent against the plaintiff-respondent should not be entertained. The property, it has been held, belonged, in equal halves, to two brothers Shib Chandra Neogi and Chunilal Neogi. According to the facts found by Chaudhuri, J, the share of the latter has devolved upon the plaintiff, while the share of the former has vested in the two defendants, Kar and Dulken. Kar has preferred this appeal and has raised the question, whether the share of Shib Chandra was not vested in him alone to the exclusion of Dulken. The plaintiff has been joined as a respondent to this appeal, as a partition is sought of the entire joint property. Thereupon, another defendant, who unsuccessfully resisted the claim of the plaintiff to the half share of Chunilal, has sought

to re-open that question by way of cross-objection. Clearly, the cross objection should not be entertained under Order XLI, rule 22 of the Code; the question raised thereby is entirely distinct from and in no way related to the question in controversy in this appeal. The grounds for this conclusion need not be elaborated here and will be found formulated in my judgment in the case of *Jadunandan Prosad Singha v. Koer Kallyan Singh* (2). Our attention, however, has been invited to Order XLI, rule 33 of the Code, which, it has been argued, invests the Court of Appeal with wide discretionary powers, comprehensive enough to cover the present case. This contention, in my opinion, should not prevail.

The scope of this rule has been the subject of judicial determination in the case of *Ganga Dhar Muradi v. Banabashi Padihari* (3), *Ananga Mohun v. Bejoy Chandra* (4), *Abjal Majhi v. Intu Bepari* (5), *Akimannessa Bibi v. Bepin Behari Mitter* (6), *Mathura Mohan Saha v. Ramkumar Saha* (7) and *Rangamlal v. Jhandu* (8). These decisions show that Order XLI, rule 33, must be cautiously applied, for instance, applied generally in cases where but for recourse to it, the ends of justice would be defeated. Thus the rule should not be allowed to be invoked in favour of a litigant so as to enable him to evade the provisions of other Statutes, such as the Limitation Act and the Court Fees Act. Here, a recourse to the other provisions of the Code would have been sufficient for the purposes of the respondent; she has failed to do so, and, cannot now be permitted to fall back upon Order XLI, rule 33. The cross-objection must consequently be dismissed with costs.

JUDGMENT.

SANDERSON, C. J.—This case has taken rather a curious course, and it is about to be decided by the Court upon a point

(3) 24 Ind. Cas. 208; 22 C. L. J. 330.

(4) 32 Ind. Cas. 491; 22 C. L. J. 391.

(5) 32 Ind. Cas. 414; 22 C. L. J. 394; 20 C. W. N. 542.

(6) 32 Ind. Cas. 499; 22 C. L. J. 397; 20 C. W. N. 544.

(7) 35 Ind. Cas. 305; 23 C. L. J. 23; 20 C. W. N. 370; 43 C. 790.

(8) 11 Ind. Cas. 640; 34 A. 32; 8 A. L. J. 1111.

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which, as far as I understand, was not taken in the Court of first instance, and was not mentioned in the grounds of appeal, but was one which occurred to the members of the Court, and which was put yesterday to Mr. Das and, I may say for myself, the case was argued exceedingly well on both sides, and when Mr. Das was faced with this point he met it with the candour, which always characterizes his conduct in Court, and in spite of his ingenuity he had to admit practically that there was no answer to it. When I come to deal with the question about costs, I shall have to say something of the course the case has taken. Before I deal with that, I propose to state shortly the facts of the case and then give my judgment.

The appeal is by Shib Chandra Kar, who appeals, as I have already said in dealing with the other part of the case, against the decision in favour of another defendant whose name is Duloken. The learned Judge has decided that Shib Chandra Neogi and Chhnilal Neogi formed a joint Hindu family and had a joint business carried on at premises No. 36 Fariapooker Street, that that property was purchased in the name of the wife of Shib Chandra Neogi, and that the plaintiffs who claim through Chhnilal were entitled to half that property. The dispute between the defendant Shib Chandra Kar and Duloken has been confined entirely to the other half, namely, what I may call the half to which the heirs of Shib Chandra Neogi were entitled.

Now, Shib Chandra Neogi had a daughter whose name was Giribala who had six sons, Satish Chunder Sur, Suresh Chunder Sur, Sirish Chunder Sur, Sarat Chunder Sur, Subodh Chunder Sur and Susil Chunder Sur. There were considerable dealings with the property in question into which I do not intend to go—the material dealings were three mortgages: the first was dated the 13th of February 1901 in which Giribala was the mortgagor and her eldest three sons, Satish, Suresh and Sirish joined; the mortgage was to a man called Tincowrie Haldar, and the property was mortgaged for Rs. 4,030. On the 22nd of January 1902 there was another mortgage of the same property by Giribala and the same three sons, to

Shib Chandra Kar, the defendant, for Rs. 4,500. On the 12th of January 1903, there was a further mortgage to one Nilkanta Pal and in this mortgage Giribala joined on behalf of herself and also on behalf of her two infant sons Subodh and Susil, and to this mortgage her first, third and fourth sons, Satish, Suresh and Sarat were parties, the second son Sirish having died in the meantime; that was a mortgage for Rs. 3,000. On the 25th of February 1904, Tincowry Haldar obtained a decree in Suit No. 273 of 1903; the defendants to that suit were Giribala, Satish and Suresh and the subsequent encumbrancers Shib Chandra Kar and Nilkanta Pal. On the 27th of April 1904, there was an agreement between Giribala and all her sons, except Sirish who was dead at that time, by which the parties agreed to sell the property in Fariapooker Street and another property to Duloken subject to mortgages—the mortgages being specifically mentioned—and subject to the decree in Suit No. 273 of 1903. On the 17th of December 1905, Giribala died. On the 2nd of March 1906, Nilkanta Pal assigned his mortgage-debt and his benefit under the decree to the defendant Shib Chandra Kar. On the 23th of March 1906, there was a substitution order on the register of the suit by which Sarat and one or two of his brothers were added as parties. On the 24th of July 1903, there was a conveyance to Hutchison by Satish, Sarat and Suresh, the three sons, and Harish, their father, and it is the basis of the title of Duloken. By that, these three sons purported to convey their $\frac{3}{5}$ th share of the property:—in that conveyance there was no mention or recital of the mortgage. On the 31st of July 1903, there was an order amending the decree and substituting the names of the sons for that of the mother Giribala; and, on the 3rd of May 1909 the decree was made absolute for sale. On the 16th of April 1910, Hutchison conveyed the property, or rather I think I shall be more accurate in saying the $\frac{3}{5}$ th share of half the property, to Duloken for Rs. 500. On the 2nd of August 1910, Tincowrie Haldar assigned his decree to the defendant Shib Chandra Kar and all rights under it for Rs. 3,100. On the 23rd of August 1910 Shib Chand-

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ra Kar was made plaintiff in Suit No. 278 of 1903. In December there was a sale by the Registrar, and at this sale Shib Chandra Kar purchased all the properties, and paid a sum of Rs. 17,600. On the 7th March 1911, the sale certificate was handed to Shib Chandra, Kar. There is one other fact which I need now mention, and that is that on the 24th of March 1911 the infant sons, the fifth and sixth sons of Giribala in consideration of a sum of money, Rs. 500, released all interests in the property to the defendant Shib Chandra Kar.

Now, the question arises upon those facts whether the defendant Duleken is entitled to 3/5th share of this property in Foriapooker Street or to any part of that 3/5th share. The learned Judge has held that he was. In my judgment the appellant is entitled to succeed upon this ground—and I may mention here, as I have already mentioned, that I do not differ from the learned Judge's judgment because this point was never raised before the learned Judge, and he never had an opportunity of considering it—I think that by joining in the mortgage of 1903, Sarat and the other two sons, who were the parties conveying to Hutchison in 1906, represented that the property was being mortgaged by their mother for what has been called *legal necessity*. Upon those mortgages decrees have been made. But I am prepared to hold and do hold that apart from those decrees those sons who joined in those mortgages would not be allowed to go back upon those representations when they are dealing with a party such as Shib Chandra Kar, who has changed his position relying upon the representations of fact, Shib Chandra Kar having parted with no less than Rs. 17,600. In the course of the argument, I referred to the well-known case of *Pickard v. Sears* (9), and also the case of *Carr v. London and North Western Railway Company* (10) and I read to Mr. Das a passage which I read again, (see Leake on Contract, sixth Edition,

page 4) "where one by his words or conduct wilfully causes another to believe in the existence of a certain state of things,"—I pause here for a moment and point out that in the present case the three sons by their conduct and statement wilfully caused another to believe in the existence of a state of things to this effect that Giribala was mortgaging the property for a legal necessity and was entitled to convey the whole of the property—"and induces him to act on that belief or to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time." Therefore in my judgment, the three sons would be estopped from denying, as far as Shib Chandra Kar was concerned, that the state of things which they had represented existed. Then Mr. Das drew my attention to section 115 of the Indian Evidence Act and also to the illustration which is given in the section, although it was directly contrary to his client's case but naturally it was his duty and he did perfectly right in drawing our attention to it, where the illustration given is, "A intentionally and falsely leads B to believe that certain land belongs to A, and thereby induces B to buy and pay for it. The land afterwards becomes the property of A, and A seeks to set aside the sale on the ground that, at the time of the sale, he had no title. He must not be allowed to prove his want of title."

For these reasons I am of opinion that Duleken, who claims in this case through the three sons whose names I have mentioned, obtained no better interest in this particular property than the sons themselves had and, therefore, this appeal must be allowed.

Now, as regards the costs—I speak entirely for myself for the present moment but I think my learned brothers will agree with me—this case had a most unfortunate course. In the Court below the question of legal necessity was only raised, if I may call it, at the last minute, and an adjournment was taken in order that the appellant might prove, if he could, the case of legal necessity on the part of Giribala and her three sons who joined with her. Then the learned Judge on the facts and on the

(9) (1837) 6 A. & E. 469; 2 N. & P. 488; 112 E. R. 179; 45 R. R. 538.

(10) (1875) 10 C. P. 307; 44 L. J. C. P. 109; 31 L. T. 785; 23 W. R. 747.

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evidence which was given at the late stage of the case decided against the case of legal necessity. That being so, the appellant comes to this Court and he first of all argued that the learned Judge was wrong in holding that no case of legal necessity was proved, and then went on further to argue that even if he could not substantiate that case, he was entitled to succeed on the ground that under the circumstances of this case there was a presumption, by reason of the mortgages by the three sons who were of age at the time the mortgages were given, that there was a legal necessity, and that inasmuch as the other side did not rebut that presumption, the appellant is entitled to succeed. Even that case, as far as I can understand, was not urged in the Court below, and the ground upon which we have decided the case was not mentioned in the notice of appeal, and that is the only ground upon which this appeal has been allowed. I purposely abstain from expressing any opinion as to whether the learned Judge was right in holding that there was no such legal necessity: speaking for myself, I should have very great hesitation in interfering with his judgment on that point. I also refrain from expressing any opinion as to whether there was the presumption. If I were to do that, I should have to consider very closely indeed, whether the other side ought not to have an opportunity of displacing that presumption. Fortunately we have not to do that: for I think the appellant is entitled to succeed upon the ground I have mentioned. Having regard to these circumstances, I think the appellant ought not to have any costs against Dulken either in this Court or in the Court of first instance and that each party should bear his own costs in this Court and in the Court of first instance.

WOODROFFE, J.—I agree both as to the order passed on the appeal and as to costs.

MOOKERJEE, J.—This is an appeal by the first defendant in a suit for partition of joint property, which belonged originally to two brothers Shib Chandra Neogi and Chuni-lal Neogi, though it had been acquired and continued to stand in the name of Ramanimoni Dasi, the wife of the elder

brother. The question of the devolution of the share of the younger brother is not in controversy in this appeal, and, we are concerned only with the share of the elder brother. The rival claimants in respect of this share are the appellant Shib Chandra Kar and the respondent Arthur Clayton Dulken; the former sets up a title by purchase at a sale held in execution of a decree on three mortgages granted on the 13th February 1901, 22nd January 1902, and 12th January 1903 by Giribala, the daughter of Shib Chandra Neogi and Ramanimoni Dasi; the latter claims as assignee from three of the sons of Giribala who had joined with their mother in the execution of one or more of the mortgages already mentioned. Mr. Justice Chaudhuri has decided in favour of Dulken on the ground that the mortgages granted by Giribala and the sale consequent thereon did not bind the inheritance in the hands of her sons. On the present appeal, the argument was at first directed to controvert this proposition, and reliance was placed upon the decision of the Full Bench in *Debi Prosad Chowdhury v. Golap Bhagat* (1) as to the precise effect of a transfer by a limited owner with the concurrence of some of the reversionary heirs. If the decision of the appeal had depended on the determination of this question, it would have been necessary for the Court to consider, whether, upon the pleadings, the appellant should have been allowed to raise this point in the Court of first instance, and, whether upon failure of the case made in the trial Court, he should be allowed to rely here upon a radically different aspect of the matter. As the argument proceeded, however, it transpired that the determination of the rights of the parties really depended upon a question of law, neither raised nor investigated in the Court of first instance, namely, were the vendors of the respondent Dulken estopped to deny the validity of the mortgages (to which they were parties) and the operative character of the consequential execution sale. This question must be entertained and decided by this Court, as its solution does not require the investigation of new facts. In this connection, we may usefully recall to mind the observations of Lord Watson in

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Connecticut Fire Insurance Company v. Kavanagh (11), "when a question of law is raised for the first time in a Court of last resort, upon the construction of a document or upon facts either admitted or proved beyond controversy, it is not only competent but expedient, in the interests of justice, to entertain the plea."

We must now examine the true legal position of the three sons of Giribala who joined with her in the mortgage transactions; and, upon her death, transferred the property on the 24th July 1906 to Hutchison, from whom Dulcken purchased on the 16th April 1910. The record shows that the first two sons not only joined their mother in the execution of the first two mortgages but were also parties to the mortgage suit, which, on the 25th February 1904, resulted in the usual decree for sale, subsequently made absolute on the 3rd May 1909. The other son, though one of the executants of the mortgage of the 12th January 1903, was not made a party to the mortgage suit in the first instance; but on the death of his mother on the 17th December 1905, he was brought on the record as one of her representatives-in-interest. I use this inaccurate expression, as it occurs in the decree; but what happened in essence was that the sons of Giribala were, upon her death, brought on the record of the mortgage suit to represent that interest in the hypothecated property which was sought to be bound by the decree made therein: *Premmoyi Choudhrani v. Preonath Dhur* (12). There is no controversy that on the dates when the mortgages were executed, the entire interest in the property was vested in Giribala and Giribala alone, subject, no doubt, to the qualification that as she was a limited owner, she could bind the inheritance by a transfer, only if it was made under circumstances recognized as necessary or proper under the Hindu Law. Now, each of these mortgages recited her title as derived from her mother by right of inheritance and narrated the circumstances which constrained her to create the incumbrances. Here, we may observe parenthetically that whether

the property belonged really to her father or to her mother, she would equally take as the heiress; in either contingency, she would be a limited owner, and, upon her death, the property would pass to her sons, who were the reversionary heirs, as much of the estate of her father as of the *stridhan* property of her mother. It was thus wholly immaterial, for purposes of devolution, whether the property belonged really to her father or to her mother. The mortgages no doubt proceeded on the assumption that the property belonged to her mother and that the money raised was required for such legitimate purposes as justified an absolute alienation of the inheritance by a limited owner, but how could this prejudice the position of the mortgagee? how could the mortgagors be allowed to rely upon some title other than that alleged in their deed? *Brijraj Nopani v. Pura Sundary Dassee* (13). The question thus inevitably arises, whether her sons who joined with her in these mortgages are concluded by their solemn declarations, or whether they are free to resile from the position they deliberately took up and to rely upon a title derived, not from their maternal grandmother, but from their maternal grandfather, and thus impeach, possibly defeat, the interest of the mortgagee; this, be it noted, is not a question as to their competency to bind their expectant interest as reversioners by actual alienation before the succession had opened out: *Sham Sundar Lal v. Achhan Kunwar* (14). In my opinion, section 115 of the Indian Evidence Act furnishes an answer emphatically in the negative. This conclusion is supported by the decisions of the Judicial Committee in *Sarat Chunder Dey v. Gopal Chunder Laha* (15) and *Chandra Kunwar v. Chaudhri Narpat Singh* (16). In the former case, Lord Shand

(13) 24 Ind. Cas. 296; 41 I. A. 189; 20 C. L. J. 368; 42 C. 56; 27 M. L. J. 93; 18 C. W. N. 1313; 1 L. W. 555; (1914) M. W. N. 679; 16 Bom. L. R. 796; 16 M. L. T. 338; 12 A. L. J. 1185 (P. C.).

(14) 21 A. 71; 2 C. W. N. 729; 25 I. A. 183; 7 Sar. P. C. J. 417; 9 Ind. Dec. (N. S.) 755 (P. C.).

(15) 20 C. 296; 19 I. A. 203; 6 Sar. P. C. J. 224; 10 Ind. Dec. (N. S.) 201 (P. C.).

(16) 34 I. A. 27; 4 A. L. J. 102; 11 C. W. N. 321; 5 C. L. J. 116; 17 M. L. J. 103; 2 M. L. T. 109; 9 Bom. L. R. 267; 29 A. 184 (P. C.).

(11) 892) A. C. 473 at p. 480; 61 L. J. P. C. 50; 67 L. T. 508; 57 J. P. 21.

(12) 23 C. 636 at p. 737; 12 Ind. Dec. (N. S.) 423.

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said: "What the law and the Indian Statute mainly regard is the position of the person who was induced to act; and the principle on which the law and the Statute rest is, that it would be most inequitable and unjust to him that if another, by a representation made, or by conduct amounting to a representation, has induced him to act as he would not otherwise have done, the person who made the representation should be allowed to deny or repudiate the effect of his former statement, to the loss and injury of the person who acted on it." In the latter case, Lord Atkinson said: "In *Heane v. Rogers* (17), Bayley, J., in delivering the judgment of the Court lays it down that: 'there is no doubt but that the express admissions of a party to the suit, or admissions implied from his conduct, are evidence, and strong evidence, against him; but we think he is at liberty to prove that such admissions were mistaken or were untrue, and is not estopped or concluded by them unless another person has been induced by them to alter his condition. In such a case, the party is estopped from disputing their truth as against that person (and those claiming under him) and that transaction, but as to third parties he is not bound. In *Newton v. Liddiard* (18), Lord Denman approved and adopted this statement of the law; and *Morgan, Ex parte, Simpson, In re* (19) and *Trinidad Asphalt Co. v. Coryat* (20) in effect illustrate the same principle." Reference may also be made to other decisions which illustrate this principle: *Cairncross v. Lorimer* (21), *Pickard v. Sears* (9) and *Freeman v. Cooke* (22), *Cornish v. Abington* (23), *Carr v. London and North Western Railway Co.* (10), *Suton v. Lafone* (24) and *Bepin Behari Mitter v. Tinkowri*

Pathak (25) the doctrine was recognised as early as 1812, when the Sudder Court held in *Mohun Lal Khan v. Hanees Siroo-munnee* (26) that a reversioner who has voluntarily signed the deed of the widow cannot legally claim in opposition thereto, *Sia Dasi v. Gur Sahai* (27) and *Ramadhin v. Mathura Singh* (28); Mr. Das, who argued the case for the respondent with great ability indeed, admitted with his usual candour, that the sons who had actually joined in the mortgages granted by their mother could not be heard to maintain to the detriment of the mortgagee or of the purchaser at the mortgage sale: *Sarat Chunder Dey v. Gopal Chunder Laha* (15), that the recitals therein were untrue, but he contended that the position of the transferee from them was different in view of section 43 of the Transfer of Property Act, which defines the effect of a transfer by an unauthorised person who subsequently acquires an interest in the property transferred. In my opinion, that section is of no real assistance to the respondent, even on the assumption that he is a purchaser for value without notice. The sons are concluded by the recitals in the mortgage instruments to which they were parties; those recitals establish indisputably that the appellant has obtained an absolute title to the property, a title not defeasible at the instance of the sons; consequently, no title did or could pass to the purchaser from the sons. The two sons who were parties to the mortgage suit and are bound by the decree made therein, are obviously in a position of still greater embarrassment than their brother who was not initially made a party to that suit. There is, further, no room for doubt that what was mortgaged was the entire interest in the property, which was precisely what was intended to be bound by the decree and to be sold thereunder. This follows irresistibly from the fact that the execution sale actually took place after the death of Giribala, for if the decree had been intended to bind merely the limited inter-

(17) (1829) 9 B. & C. 577 at p. 586; 103 E. R. 215.

(18) (1843) 12 Q. B. 925; 6 Railw. Cas. 42; 18 L. J. Q. B. 52; 116 E. R. 1117.

(19) (1876) 2 Ch. D. 72; 45 L. J. Bk. 36; 34 L. T. 329; 24 W. R. 414.

(20) (1896) A. C. 587; 65 L. J. P. C. 100; 75 L. T. 108; 45 W. R. 225.

(21) (1860) 3 Macq. H. L. 829; 7 Jur. (N. S.) 149; 3 L. T. 150.

(22) (1848) 2 Ex. 654; 6 Dowl. & L. 187; 18 L. J. Ex. 114; 12 Jur. 777; 76 R. R. 711; 154 E. R. 653.

(23) (1859) 4 H. & N. 549; 28 L. J. Ex. 262; 7 W. R. 104; 118 R. R. 603; 157 E. R. 956.

(24) (1887) 19 Q. B. D. 63; 56 L. J. Q. B. 415; 57 L. T. 547; 35 W. R. 749.

(25) 9 Ind. Cas. 374; 13 C. L. J. 271; 15 C. W. N. 976.

(26) 2 Mac. Sel. Rep. 40; 6 Ind. Dec. (O. S.) 389.

(27) 3 A. 362; 2 Ind. Dec. (N. S.) 170.

(28) 10 A. 407; A. W. N. (1888) 79; 13 Ind. Jur. 232; 6 Ind. Dec. (N. S.) 274.

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est of Giribala, a sale would have been impossible after her death. There is thus no escape from the conclusion that the Court intended to sell the entire interest, and, in the events which have happened, that interest has vested in the appellant. The appeal must consequently be allowed, and the decision of Chaudhuri, J., reversed in so far as it affects the appellant.

*Appeal allowed;
Decree varied.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 304-B OF 1917.
April 15, 1918.

Present:—Mr. Kotwal, Officiating A. J. C.
Musammât RUKHMI—PLAINTIFF—APPELLANT
versus

KISAN—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1909), s. 91—Public nuisance, suit for removal of, by private person—Special damage, proof of.

The fact that a person suffers in a special degree the inconvenience felt by the public arising from a public nuisance cannot be said to cause him special damage and does not give him any right to sue for the removal of the nuisance, unless he proves that it causes him damage in a way different from the general public.

Appeal from the decree of the District Judge, West Berar, Akola, in Appeal No. 55 of 1916, dated the 2nd April 1917.

Mr. M. R. Bobde, for the Appellant.

JUDGMENT.—It is urged in second appeal that the lower Courts were wrong in holding that the plaintiff could not maintain the suit in respect of Panhals A and B and window C, as they did constitute a private nuisance to the plaintiff and caused him special damage. It is said that the plaintiff has to use the lane into which the Panhals A and B and the window C open more than the rest of the public, she, therefore, suffers in a special degree from the inconvenience caused to the general public by their existence. The fact that a person suffers in a special degree the inconvenience felt by the general public cannot be said to cause him special damage.

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It is not alleged that the nuisance is specially aimed at or intended to cause damage to the plaintiff, or that the plaintiff suffers damage in a way other than the general public. It is impossible to see how the window C can in any sense constitute a nuisance. I agree with what the lower Appellate Court has said in paragraph 5 of that Court's judgment.

The appeal fails and is dismissed under Order XLI, rule 1, Civil Procedure Code.

Appeal dismissed.

POUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 340 OF 1917.
July 23, 1918.

Present:—Mr. Lindsay, J. C.
JAGANNATH SINGH—DEFENDANT—
APPELLANT
versus

DRIGBIJAY SINGH—PLAINTIFF—
RESPONDENT.

Jurisdiction of Revenue Courts to decide finally on validity of documents of title.

The proposition that the Revenue Courts have no exclusive jurisdiction to decide finally upon the validity of documents of title, though correct as a general statement of the law, is subject to the obvious qualification that the Civil Courts cannot decide any matter in which jurisdiction has been exclusively reserved to Revenue Courts. [p. 89 col. 2.]

Appeal against the decree of the District Judge, Rae Bareilly, dated the 18th May 1917, upholding that of the Sub-Judge, Partabgarh, dated the 17th March 1917.

Babu Bisheshwar Nath Srivastava, for the Appellant.

The Hon'ble Pandit *Gokaran Nath Misra*, for the Respondent.

JUDGMENT.—The dispute between the parties to this appeal has arisen out of certain proceedings which were taken by the plaintiff-respondent, the Taluqdar, in the Revenue Court. The Taluqdar issued a notice of ejectment against the appellant in respect of the lands in suit. The appellant contested the notice in the Revenue Court on the ground that he had under-proprietary rights. The case was fought out as far as the Board of Revenue. The Board held that the notice must be cancelled on the ground that a *prima facie* case of under-proprietary

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rights had been made out. The result is that the Taluqdar has brought the present suit for declaration. The relief claimed in paragraph 12 of the plaint is (1) that a declaration be made that the defendant has got neither proprietary nor under-proprietary rights in the land in suit, (2) that he is a mere tenant of the land in question, (3) that the lease (*patta*) which is set up by the defendant is a fictitious deed and (4) that the decision of the Board of Revenue is erroneous.

The Courts below have found that the defendant has neither proprietary nor under-proprietary rights in the lands in suit and that finding is not disputed by the appellant. The case with which the appellant comes to this Court is that the Courts below were wrong in giving a decision as to the genuineness of the *patta*, that is to say, the document upon which the appellant had relied in the Revenue Court. It is said that the Civil Court had no jurisdiction to give any declaration regarding the genuineness or otherwise of this document. In my opinion, this contention must be allowed and the decree of the Court below must be modified accordingly. It appears that during the trial in the Court of first instance the defendant admitted that he was not in a position to claim proprietary or under-proprietary rights in these lands. He set up the case that he was a tenant with a right of occupancy. Consequently the only matter upon which the parties remained at issue after these admissions had been made was whether the defendant was, as the plaintiff described him, an ordinary tenant of the lands in suit or whether he was an occupancy tenant, as he himself claimed to be. Obviously a Civil Court could give no declaration on a question of this kind. It is well settled that the Revenue Courts have exclusive jurisdiction to determine the class to which a tenant belongs. This being so, it seems to me that after the admission made by the defendant the Courts below were wrong in going further for the purpose of determining whether or not the document set up by the defendant was a genuine document. On behalf of the respondent I have been referred to a ruling of my own reported as *Debi Bakhsh v. Ram Dhani* (1), in which it (1) 35 Ind. Cas. 446; 19 Q. C. 58,

was laid down that the Revenue Courts have no exclusive jurisdiction to decide finally upon the validity of documents of title. As a general statement of the law this appears to me to be correct, but it is necessarily subject to the qualification that the Civil Courts cannot decide any matter in which jurisdiction has been exclusively reserved to the Revenue Courts. It appears to me that in the present case the issue regarding the genuineness or otherwise of the *patta* relied upon by the defendant-appellant could only be decided with the object of determining a question which is exclusively reserved for the jurisdiction of the Revenue Courts, namely, whether the defendant is an ordinary tenant or a tenant with a right of occupancy.

The result is that the appeal is allowed. The decree of the Court below is modified by striking out the declaration regarding the genuineness of the *patta* relied upon by the defendant-appellant. The parties will bear their own costs.

Appeal allowed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1062 OF 1917.

April 22, 1918.

Present:—Mr. Justice Seshagiri Aiyar
and Mr. Justice Napier.

NARAYANASWAMY MUDALI—

PLAINTIFF—APPELLANT

versus

GANGHADARA MUDALI AND ANOTHER

—DEFENDANTS NOS. 2 AND 3—RESPONDENTS.

Limitation Act (IX of 1908), s. 19, Sch. I, Arts. 106, 120—Arbitration, reference to—Agreement to be bound by amount settled by award, whether amounts to acknowledgment—Partnership, suit for dissolution of—Limitation.

A request to arbitrators to settle accounts coupled with an undertaking to be bound by whatever sum is fixed as payable by their award, amounts only to a conditional acknowledgment of liability which will not save limitation under section 20 of the Limitation Act if the arbitration falls through and the reference does not fructify into an award. [p. 90, cols. 1 & 2.]

NARAYAN SWAMY MUDALI v. GANGHADARA MUDALI.

Maniram v. Seth Rupchand, 31 C. 1047; 4 C. L. J. 94; 8 Bom. L. R. 501; 10 C. W. N. 874; 1 M. L. T. 199; 3 A. L. J. 525; 16 M. L. J. 300; 2 N. L. R. 130; 33 I. A. 165 (P. C.), explained.

Sitayya v. Rangareddi, 10 M. 259; 3 Ind. Dec. (N. S.) 934, considered.

A suit which is virtually for dissolution of a partnership, though in form one for accounts, is governed by Article 120 and not by Article 106 of the Limitation Act. [p. 91, col. 1.]

Second appeal against the decree of the District Court, Chingleput, in Appeal Suits Nos. 553 and 5629 of 1915, preferred against the decree of the Court of the District Munsif, Conjeevaram, in Original Suit No. 305 of 1914.

Mr. Ramachandra Aiyar, for the Appellant.

Mr. Ananthakrishna Aiyar, for the Respondent.

JUDGMENT.—The suit in terms is one for dissolution of partnership. The Courts below have come to the conclusion that it is barred by limitation, applying Article 106 of the Limitation Act.

Two points have been raised before us by the learned Vakil for the appellant. One is that in the reference to the arbitrators, there was a request to settle the accounts, that is equivalent to an acknowledgment of liability and that, consequently, the suit is not barred by limitation. The other is that to the suit as framed Article 120 applies. As regards the first of these points, the question is as to whether Exhibit D dated 1st December 1912 contains an acknowledgment of liability. It is true that the document says that the account should be looked into, the loss and profits between the parties should be ascertained and that the parties will be bound to take whatever may be settled by the arbitrators. But the reference never fructified into an award. Some of the arbitrators died and as the result the reference came to an end. Whether in these circumstances the letter to the arbitrators could amount to an acknowledgment depends upon the interpretation to be placed on the decision of the Judicial Committee in *Maniram v. Seth Rupchand* (1). The Committee pointed out that there were three classes of acknowledgments: the first is an unconditional undertaking to pay, the second is an unconditional acknowledgment

of liability, and the third is a conditional acknowledgment of liability. As regards the third class it is pointed out that if the condition is not fulfilled there will be no acknowledgment at all: and the case of reference to arbitrators was specially regarded by the Judicial Committee as a case of conditional acknowledgments. This is what is stated by Sir Alfred Wills at page 1058: "There can be no reason for giving a different meaning to an acknowledgment that there is a right to have the accounts settled, and no qualification of the natural inference that, whoever is the creditor shall be paid, when the condition is performed by the ascertainment of a balance in favour of the claimant", that is to say, until there is an ascertainment of the balance by the party to whom the accounts have been referred there will be no acknowledgment of liability. Reliance is placed for this statement of law upon a decision of Mellish, L. J., in *River Steamer Co., In re; Mitchell, Ex parte* (2). In the present case, as we pointed out, the reference fell through and consequently the condition attaching to the enforcement of acknowledgment never was fulfilled. In *Bollapragada Kamamurthy v. Thammanna Gopayya* (3), two learned Judges of this Court have construed the case of *Maniram v. Seth Rupchand* (1) in the sense in which we interpreted it. Mr. Ramachandra Aiyar relies strongly upon the decision of this Court in *Sitayya v. Rangareddi* (4). There was an award which the Court set aside. But the learned Judges referred to the reference itself as containing an acknowledgment of liability. No doubt this case is in favour of the appellant, and although the Judicial Committee in the case of *Maniram v. Seth Rupchand* (1) referred to this case, their Lordships did not regard it as having any reference to a conditional acknowledgment. In this view we would have upheld the decision of the District Judge, but for the fact that we do not agree with him that Article 106 of the Limitation Act applies to the present case. As we stated at the outset, the suit is in terms one for dissolution of partnership and under Order XX, rule 15, it

(1) 33 C. 1047; 4 C. L. J. 94; 8 Bom. L. R. 501; 10 C. W. N. 874; 1 M. L. T. 199; 3 A. L. J. 525; 16 M. L. J. 300; 2 N. L. R. 130; 33 I. A. 165 (P. C.).

(2) (1871) 6 Ch. 822; 25 L. T. 319; 19 W. R. 1130.

(3) 35 Ind. Cas. 57; 31 M. L. J. 231; 4 L. W. 43; 20 M. L. T. 129; 40 M. 701.

(4) 10 M. 259; 3 Ind. Dec. (N. S.) 934.

RAM PIYARE DAL V. NAGESHWAR.

is the Court that has to fix the time from which partnership shall cease to exist. Mr. Ananthakrishna Aiyar has contended that the parties all through understood the plaint as having declared that the partnership had been put an end to and containing a claim for an account of a dissolved partnership. But in the face of the language of the plaint it is impossible to uphold such a view. It may be that Mr. Ananthakrishna Aiyar is justified in saying that this is altogether a new case which was not considered by either of the Courts below; and we cannot say that the point was clearly put in the grounds of second appeal here. In these circumstances, while we think that we cannot uphold the conclusion of the Courts below that Article 106 is applicable, we must hold that Mr. Ananthakrishna Aiyar is entitled to his costs in this Court and that the question as to limitation should be tried in the light of our observation. We reverse the decree of the District Judge and remand the appeals to him for disposal according to law. The appellant must pay the costs of the respondent in this Court. Farther costs will be provided for in the decrees of the Court below.

M. C. P.

Appeal allowed; Case remanded.

ODH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 382 OF 1917.

July 29, 1918.

*Present:—Mr. Lindsay, J. C.*RAM PIYARE DAL—PLAINTIFF—APPELLANT
versus

NAGESHWAR—DEFENDANT—RESPONDENT.

*Co-sharers—Joint property, rule of enjoyment of,
by co-sharers—Exclusive possession by one co-sharer
for long time, effect of.*

The general rule as regards the enjoyment of joint property by co-sharers is that one co-sharer has no right to appropriate to himself a specific portion of the common land and to exclude his co-sharers from all use and enjoyment of the same without a lawful partition. But where a person has been in possession of a piece of joint land for a long time without any let or hindrance by the

other co-sharers, the latter have no right to eject him or his transferee or to disturb his possession or enjoyment otherwise than by seeking partition, and he is entitled to continue in such possession so long as such user does not interfere with the use by other co-sharers of what is in their possession. [p. 92 col. 1.]

Appeal against the decree of the District Judge, Gonda, dated the 27th August 1917, reversing that of the Munsif, Utraula, dated the 19th July 1917.

Babu Basudeo Lal, for the Appellant.

Babu Girja Saran Lal and Mr. S. N. Roy,
for the Respondent.

JUDGMENT.—After hearing the learned Counsel in this case and considering the evidence, I am of opinion that the decision of the lower Appellate Court is erroneous. I think the decree of the Court of first instance ought to be restored.

The plaintiff's case was that he is a Zemindar in the village, that he occupies a house there and that in front of that house there is a piece of land which is used as "*saken darwaza*". In other words, the land is an open space the occupation of which is enjoyed by the plaintiff for the convenience of his house. His complaint was that the defendant, who is also a Zemindar in the village and has his own house some distance away, had come and driven cattle pegs in the land in question and also deposited manure, the result being an interference with his right of enjoyment.

It is perfectly plain from a perusal of the oral evidence in the case that the witnesses on neither side are to be believed. They seem to be partizan witnesses who are ready to swear to anything. The fact, however, remains that there is some documentary evidence which goes to show that the plot in suit in the year 1884 stood in front of the house of a man named Ram Ratan. It is described in this document Exhibit A 3 as being "*saken darwaza*". The defendant's story is that this house now occupied by the plaintiff was once in the possession of a tenant of his. Whether that is so or not appears to me to make no difference. The admitted fact remains that the plaintiff Ram Piyare Lal has now been occupying this house for some years past; indeed some of the defendant's witnesses admit that he has built or re-built the house. If that is so,

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then it seems to me that the plaintiff is entitled to the undisturbed enjoyment of this land in front of his house, provided that in doing so he does not put the other co-sharers to inconvenience and that they are, in a similar way, enjoying the exclusive possession of plots of land in front of their own houses. I do not agree that the case set out in the plaint was a vague case. It is true that there is no claim for an easement; nor again is there any claim to absolutely exclusive possession. The law has, I think, been laid down correctly in a judgment of Pandit Kanhaiya Lal which is reported as *Sobha Singh v. Ganga Bakhsh* (1). The general rule is that a co-sharer has no right to appropriate to himself a specific portion of the common land and to exclude his co-sharers, from all use and enjoyment of the same without a lawful partition. But where a person has been in possession of a piece of joint land for a long time without any let or hindrance by the other co-sharers the latter have no right to eject him or his transferee or to disturb his possession or enjoyment, otherwise than by seeking partition, and he is entitled to continue in such possession so long as such user does not interfere with the user of the other co-sharers of what is in their possession. The law as laid down there seems to me to fit this case exactly. It is not to be doubted that the piece of land in front of the house now occupied by the plaintiff has for a very long period been used by the occupants of the house as "*sahen darwaza*". It is also apparent from the map which was prepared by the Commissioner that the defendant Nageshar has lots of room in front of his own dwelling house for the purposes of making a manure heap and tying up and feeding his cattle. I can only come to the conclusion that he has deposited manure and driven these pegs in front of the plaintiff's house for the purpose of annoying him. If the defendant is not satisfied with the present arrangement, his remedy is to seek partition of this *abadi* area. Probably what has given rise to this suit is the fact that within the last year or two the plaintiff has erected some

sort of *chabutra* on the land in dispute to be used for the purpose of religious recitations. It may be that the defendant objects to this erection, but as I have already said, if he is not satisfied with the arrangements as they are, he is at liberty to apply for partition. As things are at present, it seems to me that the plaintiff is not interfering in any way with the right of the other co-sharers to enjoy for the time being exclusive possession of the pieces of land in front of their houses.

I allow the appeal, set aside the order of the Court below and restore the decree of the Court of first instance. The plaintiff will have his costs both here and in the lower Appellate Court.

Appeal allowed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 57 of 1916.

November 9, 1916.

Present:—Mr. Mittra, A. J. C.

Lala GUNESH PRASAD—DEFENDANT
No. 3—APPELLANT

versus

GHASITILAL—PLAINTIFF—RESPONDENT.

C. P. Land Revenue Act (XVIII of 1881), ss. 64, 65, 108, 116—Sale of malik makbuza plot for arrears of revenue payable to malguzar, effect of—Sale, whether free from incumbrances.

Defendant purchased a *malik makbuza* plot in execution of a decree obtained by the *malguzar* for arrears of revenue payable in respect of the plot. The plaintiff thereupon sued to enforce his mortgage which comprised the *malik makbuza* plot. The defendant urged that the revenue payable under the sub-settlement being, under section 65 of the Central Provinces Land Revenue Act, the first charge on the plot, the plaintiff's mortgage could not be enforced against him as the sale was free from incumbrances:

Held, (1) that as the *malguzar* did not obtain a sale decree nor did he join the plaintiff as a party to the suit for the arrears of revenue, the defendant did not acquire a title free from all encumbrances; [p. 93, col. 2.]

Mangal Prasad v. Chandra Mall, 16 C. P. L. R. 117 followed.

(1) 4 O. & A. L. R. 349.

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(2) that the plaintiff was, however, bound to redeem the defendant's charge, before he could enforce his mortgage by sale of the plot. [p. 94, col. 1.]

Section 108 of the Central Provinces Land Revenue Act applies only when a sale under the provisions of the Land Revenue Act takes place for the recovery of arrears payable directly to Government. It does not apply to sales for the recovery of arrears of revenue payable to the *malguzar* in respect of a *malik makbuza* plot, as section 64 makes it clear that land revenue in respect of a *malik makbuza* plot is paid not directly to Government but through the *malguzar*. [p. 93, col. 2.]

Appeal from the decree of the Court of the District Judge, Jubbulpur, dated the 13th April 1916, in Civil Suit No. 15 of 1915.

Mr. J. C. Ghosh, for the Appellant.

The Hon'ble Sir B. K. Bose, for the Respondent.

JUDGMENT.—The plaintiff sued upon a mortgage of the 12th September 1907 comprising a Malik Makbuza plot in Monza Jubbulpur. On the 28th July 1914 the defendant No. 3 purchased this plot in execution of certain decrees obtained by one Sao Lakhi Chand, Malguzar of the village, for arrears of revenue payable in respect of this Malik Makbuza plot. The defendant No. 3 claimed that as under section 65 of the Central Provinces Land Revenue Act the revenue payable under sub-settlement by the Malik Makbuza was a first charge, the plaintiff's mortgage could not be enforced against him as the sale was free of all encumbrances. The plaintiff denied the sale in favour of the defendant No. 3 operated to extinguish his mortgage and offered in any case to redeem the prior charge in respect of arrears of land revenue. The lower Court has decreed the plaintiff's claim in full and this appeal has been filed by defendant No. 3.

The learned Advocate for the appellant asked for permission to urge a new ground of appeal not taken in the memorandum of appeal and not urged in the lower Court. Upon objection by the respondent I have disallowed this new plea, as it would involve further enquiry into facts and is not based upon any definite allegation on the record.

The decision of the lower Court appears to me to be correct so far as regards the effect of the sale in favour of the defendant No. 3 is concerned. The Malguzar did not obtain a sale decree nor did he join the present plaintiff as a party to the suit for the recovery of arrears of revenue. Under

these circumstances I hold, following the rulings of this Court, that the defendant has not acquired a title free of all encumbrances [see *Mangal Frasad v. Chandra Mall* (1) and the cases cited therein]. Reliance, however, is placed on section 108 of the Land Revenue Act of 1891. That section lays down: "Unless the Chief Commissioner in sanctioning the sale otherwise directs, a purchaser of any land sold for arrears of revenue due in respect thereof acquires the full proprietorship or superior or inferior proprietorship of it, as the case may be, free of all leases, liens and other incumbrances; and all grants or contracts previously made by any person other than the purchaser in respect of such land shall become void as against such purchaser." This forms part of a group of sections under the heading "Realization of Revenue from Malguzars." while sections 115, 116, 117 and 118 form a group of sections under the heading "Realization of Revenue by Malguzars." The sale which is referred to under section 108 obviously refers to section 94, which lays down that an arrear of revenue payable directly to Government may be recovered by selling a Mahal or a share or land of any Malguzar who has not paid a portion of the revenues. In other words, section 108 applies only when a sale under the provisions of the Land Revenue Act takes place for recovery of arrears payable directly to Government. Now section 64 of the Land Revenue Act makes it clear that the land revenue is paid by a Malik Makbuza not directly to Government but through the Malguzar. Therefore, section 108 has no application whatever.

Under section 116 of the Land Revenue Act any Lambardar or Sub-Lambardar entitled to recover an arrear, or any Malguzar to whom such an arrear is due under a sub-settlement, may apply to the Deputy Commissioner to recover such arrear on his behalf as if it were an arrear of revenue payable directly to Government. The Deputy Commissioner may, if he thinks fit, comply with such application, but shall before compliance therewith give, to the persons who would be defendants if a suit were instituted for the recovery of such arrears, opportunity to show cause against the order which he proposes to make. No

(1) 16 C. P. L. R. 117.

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such application, as is contemplated by this section, was ever made to the Deputy Commissioner but a civil suit was filed. I need not, therefore, decide what would have been the effect if the Deputy Commissioner had thought fit to comply with an application under section 116. The case, therefore, so far as this point is concerned has been rightly decided.

It is not disputed that the plaintiff is bound to redeem the prior charge in favour of the appellant. The plaintiff will pay Rs. 175 within six months from this date and redeem the prior charge on the ten anna eight pies share of Malik Makbuza field No. 1 of Mouza Jubbalpur. The plaintiff will be entitled to enforce the sale decree passed in his favour by the Civil Court, so far as the field No. 1 is concerned, only after such redemption. Each party will bear his own costs of this appeal. The decree of the lower Court will be modified accordingly.

Decree modified.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 1 OF 1918.

August 16, 1918.

Present:—Mr. Justice Kumaraswami Sastri.

K. UKKANDAN NAYAR—PLAINTIFF—
PETITIONER

versus

K. S. SANKARA VARMA RAJA—

DEFENDANT—RESPONDENT.

Provincial Small Causes Courts Act (IX of 1887), Sch. II, Art. 31—Suit for money with prayer for looking into accounts, whether suit for accounts—Jurisdiction of Small Cause Court.

A suit to recover money which is cognizable by a Small Cause Court, does not become a suit for an account under Article 31 of the Provincial Small Causes Courts Act merely because accounts have to be looked into in order to ascertain the correctness or otherwise of the amount claimed by the plaintiff.

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the order, dated 6th August 1917, of the Court of the Principal District Munsif, Calicut, in Small Cause Suit No. 679 of 1917.

Mr. K. P. Ramakrishna Ayyar, for the Petitioner.

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JUDGMENT.—The suit is to recover Rs. 51-6-4 paid by plaintiff at defendant's request to remove an attachment. The fact that plaintiff states that there were other transactions in respect of which he reserves his right to sue separately will not alter the nature of the suit. The mere fact that accounts have to be looked into in order to ascertain the correctness or otherwise of the amount claimed by plaintiff would not render the suit one for an account under Article 31 of the Provincial Small Causes Courts Act. *Konduru Runga Reddi v. Subbiah Setty* (1), *Sankara Reddy v. Errama Reddi* (2), *Faradarajulu Chettiar v. Pattri Narayanaswamy Chetty* (3) *Kshetra Nath Bhuiya v. Kali Das Dasi* (4). The allegations in paragraphs 4 and 5 will not affect the jurisdiction of the Court to decide whether plaintiff at the defendant's request made a specific payment sued for. I set aside the order of the District Munsif and direct him to receive the plaint and dispose of it according to law.

Respondent will pay petitioner's costs.

M. C. P.

Order set aside.

(1) 28 M. 394.

(2) 4 Ind. Cas. 618; 19 M. L. J. 113.

(3) 20 Ind. Cas. 518; 24 M. L. J. 693; 14 M. L. T. 46; (1913) M. W. N. 879.

(4) 41 Ind. Cas. 929; 27 C. L. J. 96; 21 O. W. N. 734.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 93 OF 1916.

June 5, 1918.

Present:—Mr. Justice Piggott and Mr. Justice Walsh.

NAIMUL HAQ—PLAINTIFF—APPELLANT

versus

MOHAMMAD SUBHAN-UL-LAH—

DEFENDANT—RESPONDENT.

Mussalmans Waqf Validating Act (VI of 1913), whether retrospective—Muhammadian Law—Waqf, creation of—Dedication, colourable, validity of—Civil Procedure Code (Act V of 1908), s. 92, scope of.

The Mussalmans Waqf Validating Act is not retrospective in its operation. [p. 100, col. 2.]

Where, therefore, before the passing of the Mussalmans Waqf Validating Act, a Muhammadan

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made a colourable dedication of his property, the charitable or religious purpose being so unsubstantial as to give to the settlement merely a colour of piety, the real object of the settlor being to create a family settlement in perpetuity.

Held, that the dedication was not valid and did not create a *waqf*. [p. 99, col. 1.]

Section 92 of the Civil Procedure Code is mandatory, and a suit claiming any of the reliefs specified therein must be brought under, and in conformity with, its provisions or not at all. If a plaintiff sets up a trust, "created for public purposes of a charitable or religious nature," and claims "as a person having an interest in the trust" any of the reliefs specified in section 92 of the Civil Procedure Code, he must do so in accordance with the terms of the section. [p. 101, col. 1.]

First appeal from an order of the Subordinate Judge, Gorakhpur.

Mr. Iqbal Ahmad, for the Appellant.

The Hon'ble Dr. Tej Bahadur Sapru (with him Dr. S. M. Sulaiman), for the Respondent.

JUDGMENT.

PIGGOTT, J.—The plaintiff in this case is the daughter's son and the defendant the son's son of one Maulvi Habib-ul-lah Khan who died on April 3rd, 1891. The plaintiff's case is that the said Maulvi had, in his life-time, made a *waqf*, or dedication for religious and charitable purposes, under the Muhammadan Law of certain property specified at the foot of the plaint; that the defendant is in possession of the said property as *mutwalli*, or trustee of the endowment, but is misconducting himself in various ways, and principally by wasting and alienating the endowed property and by refusing to make payments which he is bound to make under the terms of the endowment. The plaintiff claims to be interested in the trust as a beneficiary under the same, and to be entitled to maintain the suit independently of the provisions of section 92 of the Code of Civil Procedure. The reliefs sought are a declaration that the property specified at the foot of the plaint is "the *waqf* property," the removal of the defendant from the post of *mutwalli*, or managing trustee of the endowed property, and the appointment of a new *mutwalli*, to be selected by the Court in its discretion from amongst the persons entitled to be so appointed under the terms of the alleged deed of endowment. A list of these persons, including the plaintiff himself, is appended to the plaint; but none of the other persons in the list has been

impleaded as a party to the suit. In the defendant's written statement as originally filed the suit was resisted on a variety of grounds; but it was admitted that a valid endowment or *waqf* had been made by Maulvi Habib-ul-lah Khan of the property in suit. At a later stage the defendant applied to the trial Court for permission to amend his pleadings in this respect, his case being that his admission above referred to had been made upon defective legal advice and amounted to nothing more than an erroneous admission upon a point of law. He was allowed to file an amended pleading, in which he denied that Maulvi Habib-ul-lah Khan had ever made a valid *waqf* of any property, and pleaded more particularly that, on no possible view of the facts or the law, could it be held that there had ever been any dedication to religious or charitable purposes of the property specified in the lists (b) and (c) appended to the plaint. The case went to trial on issues framed upon the pleadings as thus amended, and the plaintiff has no valid ground for complaining of the exercise of a discretion undoubtedly inherent in the trial Court. It may indeed be pointed out at once that it has had to be conceded in argument before us that no *waqf* was ever made of the property specified in list (b).

The Court below framed a number of issues, but has dismissed the plaintiff's suit, in the main upon a finding that there was never any valid *waqf*, or dedication of any of the property in suit to religious or charitable purposes. The memorandum of appeal to this Court is a prolix and argumentative document; but in substance three points only are taken and have been argued before us:—

(a) It is contended that the defendant is estopped from denying that there has been a valid *waqf* of the property in suit.

(b) It is claimed that a valid *waqf* under Muhammadan Law was created by three specified documents, admittedly executed by Maulvi Habib-ul-lah Khan; or in the alternative by the first two of these documents; or again in the alternative by the third document, which is the Will of the said Habib-ul-lah Khan.

(c) It is pleaded that, even if the Court should repel the second of the above con-

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tentions, in view of the law as laid down by sundry authoritative decisions prior to the passing of the Mussalmans Waqf Validating Act (No. VI of 1913), the said Act is retrospective in its effect and that the arrangement effected by the Will of the deceased Maulvi Habib-ul-lah Khan amounts to a valid *waqf* under the provisions of this Statute. On behalf of the respondent each of the above propositions is denied, and it is also sought to support the decision of the Court below on a plea decided by that Court against the defendant, namely,

(d) that the suit as brought, for the reliefs specified in the plaint, is one which a person claiming an interest in the alleged trust could only maintain under the provisions of section 92 of the Civil Procedure Code, so that the plaint ought to have been rejected as it stood, on the ground that it contravenes the provisions of that section and was filed without the consent of the prescribed authority.

Strictly speaking, the questions raised in the pleadings (a) and (d) above set forth are in their nature preliminary to the consideration of the appeal on its merits, as the questions raised in pleadings (b) and (c) could not arise if point (a) were decided in favour of the appellant or point (d) in favour of the respondent. The case has, however, been fully argued out before us; and I find it practically more convenient to proceed at once to the consideration of the main questions raised by the appeal.

According to the plaint the *waqf* was created by a deed dated January 30th, 1885, the other two deeds referred to in the plaintiff's pleadings being merely supplementary documents serving to supply omissions in, and to give directions required by, the actual deed of *waqf*. The plaintiff is no doubt entitled to ask that all three documents should be taken into consideration, and even that they should be read together in connection with his contention that the defendant as *mutwalli* has been acting in contravention of the conditions of the trust; but there are two questions which he cannot be allowed to confuse. His case in the Court below was that Maulvi Habib-ul-lah Khan created the *waqf* in question in his life-

time; he never set up a testamentary *waqf* intended to come into operation at the death of the testator. Had he done so, certain questions would have been raised as to which there has been no inquiry in the Court below; it has not been ascertained what heirs Maulvi Habib-ul-lah Khan left him surviving at the moment of his death, or whether the said heirs gave their consent to the *waqf* so as to make it binding in respect of more than one-third of the property of the testator. In the eye of the Muhammadan Law a *waqf* is a transfer of property whereby the transferor or *waqif* divests himself of the ownership of the same in favour of the Almighty: there is consequently a very wide difference between setting up a transfer effected by Maulvi Habib-ul-lah Khan on January 30th, 1885, and alleging a transfer by testamentary bequest, which took effect only on the death of the testator on April 3rd, 1891. If the result of the case turned upon it, which I do not think it does, I should entertain grave doubts as to whether it was open to this Court, in appeal, to find that there had been no *waqf* by Maulvi Habib-ul-lah Khan in his lifetime but a valid testamentary *waqf* taking effect from the date of his death.

With regard to the principles of law applicable to the consideration of the three main documents in this case we were referred to the usual standard authorities, by which the law on the subject was settled prior to the passing of Act No. VI of 1913. I set them down here for convenience of reference.

Mahomed Ahsanulla Chowdhry v. Amarchand Kundu (1), *Rasamaya Dhur Chowdhuri v. Abul Fata Mahomed Ishak* (2), *Abul Fata Mahomed Ishak v. Rasamaya Dhur Chowdhuri* (3), *Mujib-un-nissa v. Abdur Rahim* (4), *Muhammad Munawar Ali v. Razia Bibi* (5), *Abdul Gafur v. Nizamuddin* (6).

(1) 17 C. 498; 17 I. A. 28; 5 Sar. P. C. J. 476; 8 Ind. Dec. (N. s.) 871 (P. C.).

(2) 18 C. 399; 9 Ind. Dec. (N. s.) 267.

(3) 22 C. 619; 22 I. A. 76; 6 Sar. P. C. J. 572; 11 Ind. Dec. (N. s.) 412 (P. C.).

(4) 23 A. 233; 6 C. W. N. 177; 28 I. A. 15; 11 M. L. J. 58; 3 Bom. L. R. 114; 7 Sar. P. C. J. 829 (P. C.).

(5) 27 A. 320; 9 C. W. N. 625; 2 A. L. J. 513; 2 C. L. J. 179; 15 M. L. J. 261; 32 I. A. 86; 8 Sar. P. C. J. 788 (P. C.).

(6) 17 B. 1; 10 I. A. 170; 6 Sar. P. C. J. 239; 9 Ind. Dec. (N. s.) 1 (P. C.).

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Another case of considerable interest, which may also be referred to in connection with the question of the retrospective effect of Act No. VI of 1913, is that of *Ramanadan Chettiar v. Vava Levvai Marakayar* (7). So far as the case now before us is concerned, I do not think I can state the effect of these decisions better than by quoting the words of a learned Judge of this Court in *Mazhar Husain Khan v. Abdul Hadi Khan* (8):—

"A valid *waqf* is created if the owner of the property, the subject of the *waqf*, divests himself of it and appropriates it to charitable or religious purposes. . . .

. . . In order to constitute a valid *waqf* there must be a substantial dedication of the property to religious or charitable uses at sometime or other. . . . There must be a substantial and not merely a colourable dedication of the property; the religious or charitable purpose should not be so unsubstantial or illusory as to give to the settlement merely a colour of piety, the real object being the aggrandisement of the family."

Judged by these tests, the "dedication" said to be effected by the deed of January 30th, 1885, will not bear examination for a moment. There is no substantial and effective alienation of the property; the transaction is "illusory" in the plainest sense of the word. The man who executed that document had no intention whatever of parting, in his own lifetime, with the effective ownership of any property whatsoever. He makes a great parade of piety, learning and liberality, but he is at the utmost pains to take away with one hand all that he purports to give with the other. He specifies no objects for the endowment, appoints himself *mutwalli* for life, and quite explicitly covenants that "I shall during my lifetime spend the profits of the property at my own discretion." This is bad enough; but what absolutely clinches the matter is that the pious executant reserves to himself "exclusive power to transfer" any of the

property ostensibly dedicated. There is a vague suggestion that this will only be done "if I find that it causes loss in any way;" but the learned Maulvi is too careful of his own interests to be satisfied even with this. He goes on to provide in express terms that he is to be at liberty to exercise this power of alienation at his own absolute discretion, "if for some other reason I find it advisable to do so." Here again he makes a half-hearted attempt to keep up the attitude of the pious donor by stipulating that he will "purchase another property in lieu of it and make it part of the property endowed;" but even this limitation of his authority irks him, and he promptly adds that he may also, in the alternative, "spend the consideration for some pious purposes," of the piety of which he is himself of course the sole judge. A document so worded would not operate to transfer ownership in favour of any private individual, and why it should be supposed to do so in favour of the Almighty I cannot imagine. The document is a sham from first to last; it creates no endowment and "dedicates" no property to any purpose whatsoever.

The position is in no way improved by the deed of June 10th, 1889. By this time the Maulvi's scheme for a family settlement had been a good deal upset by the death of his only surviving son. The only possible successor he could think of to the office of *mutwalli* which he had reserved to himself under the first deed was the son of his other son, the present defendant, at that time a mere child. He accordingly supplements the deed of January 30th, 1885, by nominating this defendant to succeed him as *mutwalli*, by putting him under the guardianship of the present plaintiff and by laying down certain rules for his guidance. He is careful to reiterate the fact that he himself retains full control over the property for his own lifetime, under no obligation to do anything but spend the money on "proper objects"; but he refers to his Will, which he was then engaged in drawing up, for a statement of the purposes on which the income of the endowed property is to be spent hereafter by the *mutwalli* who shall succeed him. He also takes occasion to lay down directions as to what is to become of the

(7) 39 Ind. Cas. 235; 44 I. A. 21; 40 M. 116; 32 M. L. J. 101; 15 A. L. J. 139; 5 L. W. 293; (1917) M. W. N. 180; 25 C. L. J. 224; 21 M. L. T. 215; 21 C. W. N. 521; 1 P. L. W. 394; 19 Bom. L. R. 401 (P. C.).

(8) 9 Ind. Cas. 753; 8 A. L. J. 162 at p. 171; 33 A. 400.

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properly when "no descendant of mine, male or female, is left." I am quite clear that, if no *waqf* was created by the deed of 1885, none came into existence with the execution of this document on June 10th, 1889.

There remains for consideration the Will of Maulvi Habib-ul-lah Khan, a portentous document, filling twenty-eight printed pages of our record, commenced by him on June 1st, 1889, and finally executed on October 29th, 1889. The document requires to be considered as a whole. It does undoubtedly make provision for purposes which may fairly be classified as religious or charitable; but in its essence it is a family settlement in perpetuity. The mind of the testator is glaringly apparent from the very outset. He is going to provide for his lineal descendants, in the male and female line, for ever, so long as one of them is left; he is careful to tie up the property against all possibility of waste on their part and to keep it out of the reach of their creditors. What is more, he is going to provide them with a steadily increasing property. The present income of the estate which he thus "dedicates" to their advancement he estimates at Rs. 20,000 per annum, adding that with good management he believes that this "can be much increased." He limits the future *mutwalli* rigidly to a certain scale of expenditure; he reckons that after the *mutwalli* has drawn his own comfortable remuneration, paid all the prescribed allowances to other members of the family, met all the household expenses and all the payments on account of charities or religious observances which he has laid down, "the expenses cannot exceed Rs. 10,000 or Rs. 11,000." The handsome (and of course steadily increasing) surplus is to be regularly invested by the *mutwalli* for the benefit of the endowment. The ingenious old gentleman has even hit upon a plan for stimulating the energies of future *mutwallis* in the matter. Whatever properties they acquire out of the annual surplus they may keep one fourth of the income of the same to themselves, adding it to the prescribed remuneration for their services. The remaining three-fourths, however, of the income of the newly acquired properties must go to swell the endowment by an ever increas-

ing series of fresh investments. In fact, if Maulvi Habib-ul-lah Khan can contrive it, this monstrous estate is to go on growing indefinitely, snowball fashion, the prescribed expenditure on religious and charitable objects bearing an ever decreasing proportion to the total income and the available surplus for re-investment increasing year by year, and the process is to continue so long as any descendant of the testator, in the male or female line, survives. The possible contingency that the number of his lineal descendants might increase until no adequate provision remained for their maintenance in the "compulsory" and "optional" expenses prescribed by the Will does not seem to have been fairly faced by the testator. The one person who would be increasingly well off is the *mutwalli* for the time being, with his remuneration of 25 per cent. of the income of the newly acquired properties. The object of the entire scheme is to create a perpetuity of the most poisonous kind, under which the endowment is to continue growing like some unwholesome excrecence on the body politic, for the benefit of no one in particular except the *mutwalli* for the time being, but for the honour and glory of the testator and of his family, from amongst whose members the *mutwalli* is always to be chosen. In the argument before us the parties were divided as to whether the total provision made for expenditure on objects which could, by any stretch of language, be described as "religious, pious or charitable", amounted to Rs. 1,476 or to Rs. 2,674 per annum. The truth probably lies between the two extremes; but the plaintiff has made up his total by including all the life annuities granted to old servants of the testator, such as any gentleman of position might reasonably and properly desire to make by his Will. I should not be disposed to accept a terminable life annuity of this sort as representing expenditure on a "charitable" object, in the sense in which the word is used even in the Waqf Validating Act of 1913. Many of the other items of expenditure claimed by the plaintiff as of a "religious" or "charitable" nature amount to no more than the incurring of such expenses as any Muhammadan gentleman of position would expect to meet in con-

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nection with the recurring festivals and observances of his religion. The one really substantial item is the annual expenditure on the upkeep of an Arabic School; and I note that one of the controverted points in the Court below was whether this school had not been compulsorily closed for want of pupils. In any case it seems clear to me that the expenditure prescribed in the Will for purposes of a religious and charitable nature was less than 10 per cent. of the testator's estimate of the income of the endowed property, and that this percentage would necessarily be a continually decreasing one if the terms of the Will were carried out. We were told in argument that this is just the kind of family settlement which we may expect under Act No. VI of 1913. I trust that the common sense of the Mubammadan community will protect them from the creation of many *wagfs* such as that purporting to be embodied in the document now in question; if not, I can only say that the Statute will prove as injurious to the true interests of that community as to those of the country at large.

In any case I feel no hesitation in holding that the Will of Maulvi Habib-ul-lah Khan, considered apart from the provisions of Act No. VI of 1913, does not constitute a valid *wagf*. The dedication of property to religious or charitable purposes is "unsubstantial and illusory." The real object of the testator is fully apparent from the terms of the document itself; it is "under a colour of piety" to effect "the aggrandisement of his family." I think that even this object is clumsily and somewhat ineffectively carried out, unless the expression above quoted be enlarged so as to read, "the aggrandisement of the family name," but the question of the testator's object requires to be considered apart from the question of the effectiveness of the methods by which he pursued it.

The evidence as to the subsequent conduct of the parties does not seem to me to carry the case much further. When Maulvi Habib-ul-lah Khan died the defendant was still a boy, apparently only about ten years of age. The plaintiff accordingly took possession of the property

believed to be included in the *wagf* as guardian on behalf of the minor defendant, treating the latter as having succeeded to the *mutwalliship*. This record does not show what heirs of Habib-ul-lah Khan were in existence whose interests were adversely affected by this arrangement, what was the extent of that gentleman's property which he did not purport to include in the family settlement made by his Will, or what was done about this other property. So far as the evidence in this case goes, it would seem that the properties specified in list (b) appended to the plaint, which had devolved on Maulvi Habib-ul-lah Khan subsequently to the month of October 1889, were treated on the same footing as the rest of the alleged trust property, though it has had to be conceded in this Court that these properties were never made the subject-matter of any *wagf*. Under the terms of the Will the plaintiff's guardianship was to continue until the defendant attained the age of twenty-one; but the parties took it on themselves to terminate the arrangement about a year earlier by a deed of July 31st, 1901. It is worth noticing that under the plaintiff's management the endowed property had been increased in ten years by acquisitions bringing in an additional income of Rs. 5,000 a year. Under the terms of the Will the plaintiff was entitled to one-fourth of this income; but he bargained with the defendant for the transfer to himself in proprietary right of certain landed property taken from out of the new acquisitions. He accepted this transfer in lieu of one-fourth of the income of the newly acquired properties and of another allowance to which he was entitled under the Will. In this transaction both parties seem to have arrogated to themselves a freedom in the matter of dealing with the endowed properties not strictly consistent with the idea of a *wagf*; yet they profess in general terms to be acting under the dispositions effected by the Will of their common grandfather. I can see nothing in the conduct of the defendant in this connection by which he can be said to have caused the plaintiff to alter his position to the disadvantage of the latter; there is, therefore, nothing to support the plea of estoppel. The defendant

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did no doubt enter into the possession of the property ostensibly as *mutwalli* of a *waqf*; but neither can it be said that he at any time made any representation to the plaintiff on the subject in consequence of which the latter changed his position to his own disadvantage, nor has either party consistently dealt with the property in suit as held under the alleged trust. The plaintiff had to admit that during his period of management he had incurred expenses (for instance Rs. 10,000 on the wedding of the defendant) not warranted by the terms of their grandfather's Will, and the defendant has been raising money by hypothecation of portions of the property in suit in a manner very difficult to reconcile with any honest belief on his part that it had been made the subject of a valid *waqf*. It has been proved moreover that the largest loan thus raised was arranged with the help of the plaintiff, who signed the mortgage-deed as an attesting witness.

On the first two points set down for determination my findings are that there is no estoppel against the defendant, and that no valid *waqf* was created by any of the deeds executed by Maulvi Habib-ullah Khan, whether considered singly or in combination.

I am also satisfied that no *waqf* came into existence with the passing of Act No. VI of 1913 in consequence of any retrospective action on the part of that Statute. I have already pointed out that a *waqf* under the Muhammadan Law involves a transfer of the ownership of the property which is made the subject-matter of the same; if the Legislature intended to give validity as transfers of property to an unascertained number of past transactions which had no such effect at the time when they were executed, I should have expected it to do so in very clear terms and subject to various conditions and precautions. The utmost that can be said about the terms of the Act as passed is that they involve some ambiguity; and I find no provision made for the rights of *bona fide* transferees for value, and no period laid down within which the documents said to be thus validated must be propounded or claims on the same preferred. In examining the Statute itself

I find nothing decisive on the point in the wording of the preamble, or in the fact that there is no express provision as to the date from which the Act is to come into force. On the other hand the governing words seem to be found at the commencement of section 3—"It shall be lawful"—and these on the face of them imply a power to be exercised in future from the date of the passing of the Act, and repel the suggestion of retrospective action. A difficulty has been raised regarding the expression "shall be deemed to be invalid" in section 4; but the Court below is certainly right in saying that this entire section is controlled by the opening words, "no such *waqf*." It would be unfortunate if the Courts were driven to the conclusion that this one section of this short Act is retrospective, while the rest of the Act is not. I think this contingency can be avoided by interpreting the words "no such *waqf*" in section 4 as equivalent to "no *waqf* hereafter created under the provisions of section 3." I do not say that this is the only interpretation of which the words are capable; but it seems to me a possible and a fairly reasonable one, and it makes sense of the Act as a whole.

Such authority as has hitherto come into existence on the point is wholly against the appellant. The question has been touched upon in argument before the Privy Council in the last of the cases on the list given in an earlier part of this judgment (44 Indian Appeals, page 21) [*Ramanadan Chettiar v Vava Levvai Marakayar* (7)]. It was the respondent in that appeal who stood to win if Act No. VI of 1913 has retrospective effect and Counsel for the appellant repudiated this contention in advance. As it happened, the respondent had won a case independently of the Validating Act, so the point was not pressed; but the words used by their Lordships in disposing of the appeal do not suggest to my mind that they would have looked favourably on the suggestion that the Act operated so as to validate past transactions. In the following cases the point has been considered and opinions have been expressed against the retrospective action of the Statute:—

Rahimunnissa Bibi v. Sheikh Manik

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Jan (8), *Muhammad Bukth Majumdar v. Ajmon Raja* (10) and *Amirbibi v. Azizabibi* (11).

In no one of these cases has the particular difficulty been dealt with which has been pressed upon us with regard to the wording of section 4 of the Act; and in the second case the opinion expressed on the point now in issue is of the nature of an *obiter dictum*. At any rate no High Court has yet ventured to interpret the Act in the sense desired by the present appellant.

There remains only the contention raised by the respondent as to the bearing on this suit of section 92 of the Code of Civil Procedure and this it is not necessary for me to determine now in order to dispose of the appeal. I desire, however, to say a few words on the point. Some of the arguments addressed to us on behalf of the appellant overlooked the fact that there has been a substantial change in the law since the passing of the present Code of Civil Procedure, Act V of 1908. Under the corresponding section 539 of the former Code there was a certain conflict of authority on the question whether the section had any restrictive effect in respect of any right of suit which might exist independently of its provisions. The addition of clause (2) to section 92 of Act No. V of 1908 makes it clear that the section is mandatory. A suit claiming any of the reliefs specified must be brought under and in conformity with its provisions, or not at all. If the plaintiff sets up a trust, "created for public purposes of a charitable or religious nature," and claims "as a person having an interest in the trust" any of the reliefs specified in the section, he must do so in accordance with its terms. One of the objects of the section is that the jurisdiction of our Courts shall not be invoked to control and supervise the administration of public trusts, unless and until a responsible officer of Government has satisfied himself that the matter is one which calls for interference in the public interests. In the present suit the main reliefs sought are those specified in clauses (a) and (b) of section 92 (1), Civil Procedure Code; the additional relief sought by way

of declaration is probably not maintainable at all without a prayer for consequential relief, and is in any case the same relief in substance as is specified in clause (c), besides being included in clause (h) of the same subsection. The present plaintiff, therefore, could only get round the prohibition laid down in section 92 (2) aforesaid by contending that the religious and charitable purposes of the *wagf* which he desires to set up are not "public purposes" within the meaning of the section. An ultimate dedication of property for the benefit of the poor would, I take it, certainly be a "public" purpose. Under the Mussalman Wakf Validating Act (No. VI of 1913) the Muhammadan community has obtained legislative recognition of the claim that, under the religious law binding upon a member of that community, he is entitled to settle property in perpetuity on his "family, children or descendants," provided only he keeps up at least the pretence that some purpose of a "public" nature is served by the endowment. I can only ask whether Muhammadan lawyers generally would be prepared, now that Act No. VI of 1913 is on the Statute book, to turn round and say that in a "family *wagf*" under the said Act the ultimate dedication of the property to public purposes is after all such a mere pretence that trusts or endowments of this nature are not subject to the provisions of section 92 of the Code of Civil Procedure.

Having said this much, I think it fair to add, with reference to the facts of this particular case, that I am far from holding that a suit by the present plaintiff to recover the arrears of the allowance reserved to him under his grandfather's Will, and not bargained away by him in the deed of July 31st, 1901, would not be maintainable. On the facts at present before us I think the defendant would find it hard to resist such a suit. If he has taken this property, or any of it, under the terms of his grandfather's Will, he would seem to have taken it subject to a trust in favour of various persons, including the present plaintiff and the liability could be enforced upon a suit properly framed.

The present suit has, in my opinion, been rightly dismissed by the learned Subordinate Judge, and I would dismiss this

(9) 27 Ind. Cas. 96; 19 C. W. N. 76.

(10) 32 Ind. Cas. 701; 43 C. 158; 19 C. W. N. 967.

(11) 26 Ind. Cas. 906; 16 Bom. L. R. 977; 39 B. 563.

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appeal with costs, including fees on the higher scale.

WALSH, J.—I entirely agree. I very much doubt whether the plaintiff could have maintained this suit in its present form in any case, but the main contention that there was any genuine religious dedication at all has completely broken down. No doubt there are private trusts in the Will the breach of which might form the ground for a claim for relief, but this is not the plaintiff's case. Taking the view we do the retrospective operation of the Act of 1913 does not arise for decision, but after hearing the point fully argued I agree with my brother's opinion about it.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 1596 OF 1917.

March 2, 1918.

Present:—Mr. Justice Shah Din.

RAM PEARA—PLAINTIFF—APPELLANT
versus

RUP LAL AND OTHERS—DEFENDANTS—
RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, r. 1—Appeal, presentation of—Decree of lower Appellate Court, copy of, not containing grounds of appeal to that Court, whether proper copy—Limitation Act (IX of 1908), Sch. I, Art. 10—Pre-emption suit—Possession taken by vendee prior to sale—Limitation, commencement of.

Along with his memorandum of appeal to the Chief Court appellant filed a copy of the lower Appellate Court's decree which did not contain the grounds of appeal to that Court:

Held, that the copy filed by the appellant was a proper copy of the decree within the meaning of Order XLI, rule 1, of the Civil Procedure Code and that the appeal to the Chief Court had been properly presented. [p. 102, col. 2.]

Under Article 10 of the First Schedule to the Limitation Act the time from which the period of limitation begins to run against the pre-emptor is the date on which the purchaser takes, under the sale sought to be impeached, physical possession of the whole of the property sold. [p. 103, col. 1.]

Where, however, under an arrangement with the vendor the vendee takes possession of the property which he intends to purchase before the actual sale of the property to him, the possession cannot be held to be under the sale, and must in law, for the purpose of applying Article 10 of Schedule I of the Limitation Act, be referred to the subsequent

date on which the sale actually takes place, and it is from this subsequent date of the actual sale that the period of limitation prescribed by the said article begins to run against the pre-emptor. [p. 103 col. 2.]

Second appeal from the decree of the District Judge, Rawalpindi, dated the 16th December 1916.

Mr. Govind Das, for the Appellant.

Mr. Bhagat Ram Puri, for the Respondents.

JUDGMENT.—A preliminary objection has been urged by Counsel for the respondents to the effect that the appeal is barred by time. The contention is that the copy of the decree of the District Judge, which was filed along with the memorandum of appeal in this Court, did not contain the grounds of appeal filed by the plaintiff in the District Judge's Court and, therefore, could not be treated as a copy of a valid decree. On the 5th May 1917 the appellant was directed by the Chief Court office to file a copy of the grounds of appeal and the requisite copy was not filed until the 2nd June 1917. It is contended that a proper copy of the decree of the District Judge should be considered as being filed on the last mentioned date and not before, and that such being the case the appeal is barred by time. I am clearly of opinion that the copy of the decree, which was filed by the appellant along with his memorandum of appeal, was a proper copy of a perfectly valid decree of the District Judge, although it did not contain the grounds of appeal, and that the appellant had duly complied with Order XLI, rule 1, Civil Procedure Code. The preliminary objection is, therefore, overruled.

The sole question for decision in this appeal is whether the suit for pre-emption, which was brought by the plaintiff-appellant against the defendants-respondents for possession of 8 kanals 17 marlas of the land in dispute, was barred by limitation or not under Article 10 of the First Schedule to the Indian Limitation Act, which admittedly governs the case. After hearing Counsel on both sides and referring to the registered sale deed, dated the 21st December 1914, and to the oral evidence on the record, I am of opinion that the above question must be answered in the negative.

It is not disputed that the land in suit was sold by the vendor to the vendees

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by a registered sale-deed, dated the 21st December 1914; and it is also conceded that if the period of one year prescribed by Article 10 of the Limitation Act aforesaid began to run from the date of the sale-deed the plaintiff's suit would be within time, as it was instituted on the 20th December 1915. But what is contended on behalf of the vendees is that they had taken actual physical possession of the land in dispute through one of them, Pandit Dina Nath Bali, on the 26th October 1914, i. e., about two months before the sale-deed was formally executed and registered; and that, therefore, the period of limitation must be considered to have begun to run against the pre-emptor from the 26th October 1914, and not from the date of the sale, and his suit which was not brought until the 20th December 1915 was barred by limitation. Both the Courts below have accepted this argument as sound and have thrown out the plaintiff's claim as barred under Article 10 of the Indian Limitation Act.

The plaintiff has preferred a second appeal to this Court; and after hearing arguments, I am of opinion that the view taken by the Courts below is clearly erroneous. Under Article 10 of the First Schedule to the Limitation Act the time from which the period of limitation begins to run against the pre-emptor is the date on which the purchaser takes, *under the sale sought to be impeached*, physical possession of the whole of the property sold.

The crucial point for decision in the present case, therefore, is this: When did the vendees take, *under the sale sought to be impeached*, physical possession of the whole of the property sold? Was such possession taken on the 26th October 1914, i. e., about two months before the sale, evidenced by the registered deed, dated the 21st December 1914, actually took place; or should it be considered in law to have been taken *after* the said sale, the delivery of possession on the 26th October being treated as a convenient arrangement entered into between the parties in anticipation of the intended sale? The matter admits hardly of any doubt, for it is clear beyond question, both from the terms of the registered sale-deed, dated the 21st December 1914, and from the statement made by the vendor

in the lower Court, that the proprietary rights in the land in dispute did not pass from the vendor to the vendees until the said sale deed was duly executed and registered, and, therefore, the vendees could not take, *under the sale sought to be impeached*, physical possession of the property sold before the date of the said sale deed. The finding of the lower Courts that one of the vendees, Pandit Dina Nath Bali, took actual physical possession of the land on the 26th October 1914 must be accepted as final in this second appeal; but accepting it as final, it does not follow that the view of the law of limitation taken by the lower Courts is correct. The taking of possession by one of the vendees on the 26th October 1914 was certainly not taking of possession under the sale which the pre-emptor seeks to set aside, for admittedly the sale had not taken place on that date. The sale took place on the 21st December 1914, and the prior possession of one of the vendees on the 26th October 1914 must in law be referred for the purposes of applying the provisions of Article 10 of the Indian Limitation Act to the subsequent date on which the sale actually took place; and clearly it is from this subsequent date of the actual sale that the period of limitation prescribed by the said Article 10 begins to run against the pre-emptor. The construction placed by the District Judge on Article 10 is not only inconsistent with the plain grammatical meaning of the words of the Article, but would, if adopted, lead to anomalous consequences.

For the reasons given, I hold that the plaintiff's suit for pre-emption is within time; and I accordingly accept this appeal, set aside the judgment and decree of the District Judge and remand the case for decision on the merits. The stamp on the memorandum of appeal will be refunded and other costs will be costs in the cause.

*Appeal accepted;
Case remanded.*

MANIKKATH AMMINI AMMAL v. MANIKKATH PADMANABHA MENON.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 2065 OF 1915.

April 27, 1917.

Present:—Mr. Justice Seshagiri Aiyar and
Mr. Justice Bakewell.

MANIKKATH AMMINI AMMAL AND

OTHERS—PLAINTIFFS—APPELLANTS

versus

NANIKKATH PADMANABHA MENON

AND OTHERS—DEFENDANTS—RESPONDENTS.

Malabar Law—Maintenance, claim for, against tarwad, nature of—Malabar Marriage Act (IV of 1896), ss. 17, 18, scope of—Registration of marriage, effect of—Claim against tarwad, whether forfeited.

The right of a member of a Malabar tarwad for maintenance or an allowance is an incident of co-proprietorship in the property of the tarwad and that right cannot be denied unless circumstances show that the tarwad is not in a position to give a separate allowance. [p. 104, col. 2; p. 105, col. 1.]

Sections 17 and 18 of the Malabar Marriage Act were not intended to deprive a member of a tarwad of his or her rights in the tarwad. The registration of the marriage of a female member of a tarwad, therefore, under the Act does not cause a forfeiture of her rights and cast the duty of maintaining her and her children on her husband. [p. 105, col. 1.]

Section 18 of the Act only provides for personal guardianship and leaves the guardianship of property untouched. [p. 105, col. 2.]

Second appeal against the decree of the Court of the Temporary Subordinate Judge, Palaghat at Calicut, in Appeal Suit No. 849 of 1914, preferred against the decree of the Court of the District Munsif, Palaghat, in Original Suit No. 344 of 1913.

Mr. J. L. Rosario, for the Appellants.

Mr. C. V. Ananthakrishna Aiyar, for the Respondents.

JUDGMENT.—The suit is by a female member of a Tarwad and her children for maintenance against the Tarwad: the defence is that as the 1st plaintiff's marriage has been registered under Act IV of 1896, she and her children should entirely look to the husband of the 1st plaintiff for maintenance, and not to the Tarwad. The question is said to be one of first impression; the learned Vakils on both sides have addressed to us very full arguments on the question. In our opinion the view of the lower Appellate Court is wrong.

At the outset it might be mentioned that the expression "maintenance" is loosely applied to this class of cases. The allowance claimed by an Anandraman of a Malabar Tarwad or by a junior member of a joint Hindu family is not as a dependent upon the owner of the property,

but as one who in his own right is entitled to participate in the income. The Common Law in both cases having vested the management in the senior member, the claim for separate allowance is an *indicia* of proprietorship and not founded upon moral or quasi legal obligations or on inability to maintain himself or herself. The authorities to which Mr. Rosario drew our attention have established this position with practical unanimity. In *Putanvital Teyan Nair v. Putanvital Ragavan Nair* (1) it was held that the possession of separate property should not be taken into account in considering whether a member of the Tarwad was entitled to separate allowance. This decision proceeded on the theory that each member has a right to a share in this income. *Ekanat Thayu Kunji Ama v. Ekanat Shurgunni Valia Kymal* (2) has to some extent qualified the above decision by pointing out that where the Tarwad has not sufficient income to maintain all the members decently, the fact that one of them has other means of livelihood would be a factor that can be taken into account. Here again the right to claim the allowance even where there are other means seems to have been accepted. In *Achutan Nair v. Kunjunni Nair* (3) it was distinctly stated that the right to an allowance should be based on the right of co-ownership of property. *Maravadi v. Pamakkar* (4) accepts this principle as well founded. In *Naku Amma v. Ragava Menon* (5) it was held that a member of a Tavazhi was entitled to sue the Tavazhi for an allowance even though he was being maintained by the main Tarwad. This is another illustration of the principle of co-ownership. This latter decision was affirmed by the Full Bench in *Chakkara Kannan v. Kunhi Pokker* (6). Thus it is clear that the right of a member of a Tarwad for an allowance is an incident of co-proprietorship in the property of the Tarwad and that conse-

(1) 4 M. 171; 1 Ind. Dec. (N. S.) 954.

(2) 5 M. 71; 2 Ind. Dec. (N. S.) 60.

(3) 13 M. L. J. 499.

(4) 14 Ind. Cas. 333; 36 M. 23; 11 M. L. T. 112; 22 M. L. J. 309; (1912) M. W. N. 109.

(5) 18 Ind. Cas. 1; 33 M. 79.

(6) 30 Ind. Cas. 755; 39 M. 317; 29 M. L. J. 431; 13 M. L. T. 255; (1915) M. W. N. 740 (F. B.).

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quently that right could not be denied unless circumstances show that the Tarwad is not in a position to give a separate allowance.

In this appeal the questions whether the plaintiffs were justified in living away from the Tarwad house, whether there are circumstances which would justify the allotment of an allowance when they do not choose to live with the other members and whether the claim for arrears is sustainable have not been gone into. Those questions will have to be dealt with by the lower Appellate Court.

Mr. Ananthakrishna Aiyar mainly relied upon sections 17 and 18 of Act IV of 1896. The learned Vakil argued that the term "maintenance" suggested that it is a subsistence allowance and that if that subsistence is given by another who is bound by law to provide it, the Tarwad is absolved from liability. This argument ignores the weight of the consideration we have set out, namely, that the claim by a Tarwad member is of the character of proprietary right to a share in the income. It is true, as pointed out by the learned Vakil, that clause (2) of section 17 only leaves unaffected the customary right, if any, against the Tarwad but the right secured by clause (1) is a personal right, a right, given by the Statute against persons who comply with certain formalities. Such a right cannot take away the right of property.

Section 18 was relied on as showing that the father or the husband is alone entitled to maintain the children of the wife. That section introduces an exception to the general rule that the natural guardian of an Anandravan is the Karnavan.

The Legislature has recognised that the welfare of the minor wife or the minor children would be safer in the hands of those who are more nearly connected by blood than the Karnavan. It has at the same time imposed a limitation upon the husband or the father by enacting it as a condition precedent to guardianship that they should manifest their interest in the welfare of the minor by making some sacrifice. This section only provides for personal guardianship and leaves property guardianship untouched.

We do not think these provisions were intended to deprive a member of a Tarwad of his or her rights in the Tarwad.

For these reasons we must reverse the decree of the lower Appellate Court and remand the appeal for disposal on the merits.

Costs will abide the result.

M. C. P.

Appeal allowed; Case remanded.

OUDDH JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS APPLICATION NO. 196 OF 1918.
July 22, 1918.

Present:—Mr. Lindsay, J. C.

ASKARAN BAID—DEFENDANT—APPLICANT
versus

BHOLA NATH AND ANOTHER—PLAINTIFFS—
OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 22—Transfer of case—Application for transfer by defendant objecting to jurisdiction of Court, maintainability of—Inconvenience of defendant's witnesses, whether ground for transfer—Plaintiff's choice of forum, interference with.

A defendant in a suit, who takes objection to the jurisdiction of the Court in which the suit has been instituted cannot maintain an application for its transfer to another Court under section 22 of the Civil Procedure Code. [p. 106, col. 2.]

A plaintiff's right to choose his own forum cannot be taken away from him except for very cogent reasons. [p. 106, col. 2.]

The fact that a defendant's witnesses would be very much inconvenienced if the suit continues in the Court chosen by the plaintiff as his forum is not a sufficient ground for taking action under section 22 of the Civil Procedure Code. [p. 106, col. 2.]

Mr. *Mumtaz Husain*, for the Applicant.

Babu *Bisheshwar Nath Srivastava*, for the Opposite Party.

JUDGMENT.—This is an application under sections 22 and 23 of the Code of Civil Procedure. The applicant Askaran Baid is the defendant in a suit which has been instituted by the opposite party Bhola Nath and Murli Dhar in the Court of the Subordinate Judge of Lucknow. After the institution of the latter suit the applicant filed a suit in the High Court at Calcutta, and now he desires to have the suit which is pending in the Lucknow Court transferred to Calcutta under the provisions of section 22 of the Code. The grounds upon which the

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application is made are that in view of the relation between the parties and in view of the scope of the suit which has been brought by the applicant in Calcutta it is not desirable that the trial of the Lucknow suit should continue, inasmuch as the matters involved in the Calcutta suit comprise the single matter which is in dispute in the suit pending at Lucknow.

The plaintiffs in the Lucknow suit are two persons Bhola Nath and Murli Dhar, who describe themselves as being the proprietors of a firm carrying on business under the name of Balgobind-Bhola Nath and the transaction to which the suit relates, is a single transaction regarding a quantity of cloth which it is said the plaintiff firm entrusted to the present applicant for sale on commission in Calcutta. The suit in Calcutta has been filed by the applicant Askaran Baid against these same persons Murli Dhar and Bhola Nath, who are described as carrying on business under two names, namely, Badri Das-Prag Das and Balgobind-Bhola Nath. It has been stated before me by the learned Counsel who opposes this application that these two firms are distinct and carry on different businesses; although it is the fact that Murli Dhar, one of the persons named, is a partner in both the firms. For the applicant it is stated that Murli Dhar has been carrying on business with Askaran Baid for a number of years and that there is an account between the parties for the settlement of which the suit in Calcutta has been filed, and as already mentioned, the applicant's case is that the account between the parties relates to dealings extending over a number of years including the particular transaction which is the subject-matter of the dispute in the Lucknow suit.

It is clear from the pleadings of the parties in both the suits that they are at issue regarding a number of facts. One point to be noticed is that the applicant Askaran Baid has put in his written statement in reply to the plaint filed in the Court at Lucknow. One of the pleas which he has raised is that the Lucknow Court has no jurisdiction to entertain the suit. It has been urged before me by the learned Counsel for the opposite party that in view of this plea the applicant is not competent to maintain the present

application for a transfer of the Lucknow suit to Calcutta; and as an authority for this argument I am referred to a judgment of a Judge of the Allahabad High Court reported as *Punna Chandra Mukerji v. Dhona Kristo Biswas* (1). The correctness of that judgment has been contested before me by the learned Advocate for the applicant, but I am not prepared to accept his argument. It appears to me that on a proper construction of section 22 an order for transfer can only be made in respect of a suit which may be instituted in any one of two or more Courts. If the defendant's case is that the suit is not one of this description because it has been brought in a Court which has no jurisdiction at all, it seems to me that he ought not to be allowed to maintain any application under section 22. Apart from the law on the question, I am not satisfied that any sufficient ground has been made out which would justify the transfer of this case, even if a transfer were possible. The main argument before me is that most of the witnesses who can depose regarding the matters in issue between the parties are people who live and carry on their business in Calcutta and the inconvenience of bringing these people before the Court at Lucknow is appealed to. As pointed out, however, by the other side, the personal attendance of witnesses from Calcutta cannot be enforced in the Lucknow Court and such evidence as may be required from Calcutta can be taken on commission. In any case an application of this kind cannot be dealt with from the point of view of the convenience of the defendant's witnesses. The plaintiff admittedly has the choice of *forum* and his right to choose cannot be taken away from him except upon very cogent grounds. The law on the subject has been laid down in a ruling of the Bombay Court to be found in *Geffert v. Ruckchand Mohla* (2). In that case arguments in favour of a transfer were put forward similar to those which have been advanced before me and were repelled on the ground that no good cause was shown for depriving the plaintiff of

(1) 24 Ind. Cas 318; 12 A. L. J. 896.

(2) 13 B. 178; 13 Ind. Jur. 303; 7 Ind. Dec. (N. S.) 119.

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his right to file his suit in Bombay. I am satisfied that there is no sufficient ground upon which any order for transfer can be made in this case and I dismiss the application with costs.

Application dismissed.

PATNA HIGH COURT.

FIRST CIVIL APPEAL NO. 192 OF 1914.

December 19, 1917.

Present:—Sir Dawson Miller, Kt., Chief Justice, and Mr. Justice Chapman.

KULADA PRASAD TEWARI AND OTHERS

—DEFENDANTS NOS. 9 TO 26 —APPELLANTS

versus

SADHU CHARAN TEWARI AND OTHERS—

PLAINTIFFS AND THE REMAINING DEFENDANTS

—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 151—Execution of decree of High Court at variance with purport of decree—Inherent power of High Court to interfere.

Where it is brought to the notice of the High Court that a decree passed by it is being executed in a manner manifestly at variance with the purport and intention of that decree, the High Court, under its inherent powers of supervision which are expressly saved by section 151 of the Civil Procedure Code, can take such action for the ends of justice as may be necessary to enforce the proper execution of the decree. [p. 108, col. 2.]

Appeal from a decision of the Subordinate Judge, Manbhum, dated the 8th April 1914.

Mr. Atul Krishna Roy, for the Appellants.

Mr. Gour Chandra Pal, for the Respondents.

JUDGMENT.

MILLER, C. J.—This is an appeal from an order of the Subordinate Judge of Manbhum, in which he gave certain directions to the Commissioner as to the manner in which he should proceed in carrying out a decree of the High Court at Calcutta in a partition suit. The plaintiffs were the descendants of one of four brothers who were originally co-sharers of a rent-free estate known as Mauza Kasmar, Pargana Barabhum. The defendants were the descendants of the other three brothers and those claiming through them. In 1910 the plaintiffs instituted a suit for partition before the

Subordinate Judge of Manbhum. Of the other three branches of the family only one, viz., defendants Nos. 9 to 26, offered any serious opposition to the suit. They contended that a partition had taken place between the predecessors of the four different groups some 60 years earlier, when the whole of the *hasil* and certain other plots had been partitioned and that the parties were now in separate and exclusive possession; and further that they (defendants Nos. 9 to 26) had for many years spent money and labour in reclaiming parts of the waste land and in making new cultivable lands and had acquired a title thereto by possession and the plaintiffs' title thereto was barred by limitation. The learned Subordinate Judge decided the suit in favour of the plaintiffs. He found that no earlier partition had taken place and that exclusive possession of the joint lands did not bar the rights of the co-sharers, and ordered a partition accordingly of the whole Mauza except the Kasmar Bandh and Balladhibash lands and gave certain instructions to be followed by the Commissioner in carrying out the partition. The effect of these instructions, broadly speaking, was that the parties found in possession of *bandhs* and *tanks* and lands brought under cultivation by their own labour and at their own expense should be retained in possession of the same, but that they could not retain possession of *ghora* and *danga* lands if the total area in their possession was in excess of the amount they were entitled to as their share in the partition. He further directed that the partition should be based on the map and Khatians of the Survey and Settlement Department except where proved to be incorrect.

On appeal by defendants Nos. 9 to 26 to the Calcutta High Court, that Court varied the lower Court's decision by finding that a partition had taken place between the four branches in equal shares some 60 years earlier of the cultivable lands, but that it was impossible on the evidence to determine the precise lands in respect of which the partition took place. The Court also found that parts of the waste lands formerly left joint had been reclaimed and brought under cultivation by the different branches of the family, which accounted for the fact that defendants Nos. 9 to 26 had ap-

KULADA PRASAD TEWARI v. SADHU CHARAN TEWARI.

parently brought under their control and cultivation more than the share which could be allotted to them upon a partition of the entire village. The High Court agreed with the Subordinate Judge that possession in such circumstances did not give them a good title to *ghora* and *danga* lands as against the plaintiffs. The judgment then proceeded as follows:—"One direction, however, must be given in modification of the decree of the Subordinate Judge. He has rightly held that each of the parties should be retained in possession of the lands upon which they have spent capital and labour. In so far, however, as the appellants are concerned, it must be ascertained in the first instance whether they are really in occupation of more lands than they would be entitled to occupy on a partition. We, therefore, direct the Subordinate Judge to appoint a Commissioner to make a survey of all the *ghora* lands of the village and to ascertain the area thereof. The appellants would be entitled to one-fourth share of the total area. If the area thus determined falls short of the area now in their possession they must surrender the excess." Then followed directions that any excess to be surrendered should be the land last occupied, as to which evidence was to be taken and that rather than divide a compact block, the Subordinate Judge should adjust the matter by the payment of owelty money. This direction applied only to *ghora* and *danga* lands and no party was to be deprived of cultivated lands already in their possession.

When the High Court's decree came to the Commissioner for execution, a dispute arose as to how it should be carried out and he applied to the Subordinate Judge for instructions. An order was then made by the Subordinate Judge purporting to solve the doubt which had arisen as to whether the *ghora* and *danga* lands ordered to be surveyed by the High Court's decree meant those lands only which were not now in occupation or those lands as they originally existed before the partition, and he came to the conclusion that the latter interpretation was correct. But as there might be a difficulty

in distinguishing those lands now, he thought the simplest method would be to ascertain first the total area of the village and then the total area in possession of defendants Nos. 9 to 26, and gave directions to this effect. From this order the defendants Nos. 9 to 26 appealed to this Court. A preliminary objection was taken by the plaintiffs that no appeal would lie from such an order and strictly speaking, this objection is probably well founded, but speaking for myself, it seems to me that if it should be brought to the notice of the High Court that its decree is being executed in a manner manifestly at variance with the purport and intention of that decree—and for this purpose the decree must be regarded as a decree of this Court which has succeeded to the jurisdiction of the High Court at Calcutta in this province—then I think that the High Court under its inherent powers of supervision, which are expressly saved by section 151 of the Code of Civil Procedure, may in a case of this sort take such action for the ends of justice as may be necessary to enforce the proper execution of the decree. We, therefore, decided to examine the order of the Subordinate Judge and the decree of the High Court in order to satisfy ourselves on the point. After reading the High Court's judgment and decree it is quite manifest that whatever the exact meaning of the direction to survey the *ghora* lands, the whole judgment is based upon the assumption that the appellants do not occupy cultivated lands in excess of one-fourth of the area of the whole village and that the remaining lands in possession of the appellants are *ghora* and *danga* lands. Upon this assumption the Court directed the Commissioner to ascertain first whether the whole of the lands occupied by the appellants including *ghora* and *danga* lands exceeded a fourth share of the whole village. Then there is a direction to survey all the *ghora* lands which I take to include *danga* lands as well, and this would involve lands of this description in the appellants' control and possession. A point was raised in the memorandum of appeal that this survey was intended only to comprise *ghora* and *danga* lands as now existing, exclusive of lands originally

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of this description but now brought under cultivation. The judgment is not very clear on this point. It was conceded, however, by the appellants that it was intended that the whole of the *ghora* and *danga* lands, as existing at the time of the previous partition, should be surveyed. It may not, however, be necessary to have a complete survey of these lands if the partition can be effected without this. One matter, however, is beyond dispute. Whatever be the exact intention of the High Court's decree as to the extent of the survey ordered, that decree was based upon the assumption that the appellants were not in possession of more cultivated lands than their 4-annas share which they would be entitled to on a partition, and it must be taken that any excess in their possession beyond their fourth share is to be regarded as *ghora* and *danga* lands which are liable to surrender—those last brought into possession being surrendered first. Once the lands in the appellants' occupation are ascertained, it ought not to be necessary to survey more than the amount which they hold in excess of their proper share, if any. This, however, must be a matter for the Commissioner to determine on the spot. Subject to this modification, I think the Subordinate Judge rightly interpreted the decree in the order appealed from. How the lands in possession of the appellants are to be ascertained is not stated by the High Court and the learned Subordinate Judge directs that in order to determine this the Commissioner should first ascertain the total area of the village and the total area in possession of the appellants. This direction, however, must not be taken necessarily to involve a new survey by the Commissioner of the whole village. He should proceed as far as possible on the maps and Khatians of the Survey and Settlement Department in accordance with clause 4 of the instructions in the Subordinate Judge's judgment, of the 22nd August 1910 and otherwise comply with the same in so far as it is confirmed by the High Court's decree. Each party should bear his own costs.

CHAPMAN, J.—I agree.

Order accordingly.

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER No. 70
OF 1916 AND CIVIL REVISION PETITION
No. 866 OF 1916.

August 15, 1918.

Present:—Mr. Justice Abdur Rahim and Mr.
Justice Oldfield.

KUPPUSAMI IYER AND ANOTHER—APPEL-
LANTS IN APPEAL AGAINST APPELLATE ORDER
No. 70 OF 1916—PETITIONERS IN C.
R. P. No. 866 OF 1916.

versus

K. KUPPUSAMI IYER AND OTHERS—

RESPONDENTS IN BOTH.

Civil Procedure Code (Act V of 1908), s. 47, O. XXI, rr. 2, 53. (6)—Attachment of decree—Adjustment after attachment, effect of, on rights of attaching creditor—Notice, absence of, to judgment-debtor, effect of—Application by decree-holder to record adjustment—Attaching creditor brought on record—Order on application, whether appealable—“Either through Court or otherwise” in O. XXI, r. 53, meaning of.

Where a decree, which is under attachment at the instance of the decree-holder's creditor, is adjusted after the attachment, the adjustment does not bind the attaching creditor, whether notice of the attachment has been issued to the judgment-debtor or not under the provisions of Order XXI, rule 53 (6), Civil Procedure Code. [p. 110, col. 2.]

In such a case, if an application is made by the decree-holder to record the adjustment, it would be open to the attaching creditor to come in and object to the entering of satisfaction and any order passed by the Court would be appealable as one covered by section 47, Civil Procedure Code. [p. 110, col. 2.]

If the attachment was after the adjustment, the attaching creditor has no *locus standi* and it would not be open to him to raise any question within the meaning of section 47. [p. 110, col. 2.]

Quære.—Whether the Court could *suo motu* make the attaching creditor party to the satisfaction or adjustment proceedings. [p. 110, col. 1.]

Per *Abdur Rahim, J.*—The words “either through Court or otherwise” in Order XXI, rule 53, Civil Procedure Code, refer to “payment or adjustment” and not to “notice” preceding it. [p. 113, col. 1.]

The attachment of a decree is complete without notice to the judgment-debtor and the holder of the decree has no right to deal with it after attachment. [p. 113, col. 2.]

Appeal against the decree of the District Court of Tanjore, in Appeal Suit No. 754 of 1914, preferred against the order of the Court of the District Munsif, Valangiman, in Execution Application No. 29 of 1914, in Original Suit No. 343 of 1906.

Petition, under section 115 of Act V of 1908, praying the High Court to revise the order of the Court of the District Munsif, Valangiman, dated the 29th September 1914, in Execution Application No. 29 of 1914, in Original Suit No. 343 of 1906.

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Appeal against Appellate Order No. 70 of 1916 coming on for hearing on the 24th September 1917, the Court delivered the following

JUDGMENT.—The question we have got to determine is whether an appeal lay to the District Judge from the order of the District Munsif. The District Judge has held that there was no appeal as the order in question was not under section 47 of the Code of Civil Procedure. It appears that there was a decree against a certain person, and the decree-holder made an application to the Court for recording satisfaction of the decree which he held against the judgment-debtor. That decree was attached at the instance of two attaching creditors of the decree-holder and the question that arose was whether the attaching creditors had acquired a right to the decree and, therefore, the recording of satisfaction was of no effect against them. It appears that when the application was made for satisfaction of the decree by the decree-holder, the District Munsif of his own accord, finding that the decree had been attached, issued a notice to the attaching creditors and had them brought on the record. Then the question which we have stated was raised. It may be doubted whether the District Munsif was right in making the attaching creditors parties to this application on his own motion. However that may be, the attaching creditors have been made parties and there can be no doubt that the question whether the decree was properly satisfied is one that affects their interest. Rule 2 of Order XXI, sub-rule 1, clause 1, of the Code of Civil Procedure does not provide for any notice being given to the judgment-debtor of an application made by the decree-holder for recording satisfaction and in fact the judgment-debtor in this case was not made a party. No notice was issued to him and he was not on the record either in the Munsif's Court or before the District Judge or even before us. But all the same, the question that was raised was as to the satisfaction of the decree, and that is a question which arises between him as a party to the suit and the attaching creditors who claim an interest in the decree. Order XXI, rule 53, sub-rule (3), of the Code of Civil Procedure says that "the holder of a decree

sought to be executed by the attachment of another decree of the nature specified in sub-rule (1) shall be deemed to be the representative of the holder of the attached decree and to be entitled to execute such attached decree in any manner lawful for the holder thereof", and sub-rule (6) lays down that "on the application of a holder of a decree sought to be executed by the attachment of another decree, the Court making an order of attachment under this rule shall give notice of such order to the judgment-debtor bound by the decree attached; and no payment, or adjustment of the attached decree made by the judgment-debtor in contravention of such order after receipt of notice thereof, either through Court or otherwise, shall be recognised by any Court so long as the attachment remains in force." If the attachment of the decree was before adjustment, then there can be no doubt that the attaching creditor would be justified in coming in and objecting to the entering of satisfaction, thereby raising a question covered by section 47 of the Code of Civil Procedure. On the other hand, if the attachment was after the adjustment, then he would have no *locus standi* and it would not be open to him to raise any question within the meaning of section 47. None of the lower Courts have recorded any clear finding on this matter. We, therefore, call for a finding on the evidence on record from the District Munsif whether the attachment was before or after the adjustment and also whether the judgment-debtor had notice of the attachment, if it was before judgment. Two months will be allowed for findings and ten days for objections.

In pursuance of the order of Court, dated 18th January 1918, the parties were allowed to let in fresh evidence.

In compliance with the order contained in the above judgment, the District Munsif of Velangiman submitted the following

FINDING.

1. I am asked to record findings on the following two issues:—

- (i) Whether the attachment of the decree in Original Suit No. 343 of 1906 on the file of this Court by the decree-holder in Original Suit No. 5 of 1912

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on the file of the Kumbakonam Sub-Court was before or after the adjustment set up by the holder of the decree attached; and

- (ii) whether the judgment-debtor under that decree had notice of the attachment if it was "before judgment"?

I think their Lordships of the High Court mean "before adjustment."

In the order of remand sent by the High Court, the 2nd issue is stated as follows:—Whether the judgment-debtor in Original Suit No. 5 of 1912 on the file of the Court of the Subordinate Judge of Kumbakonam had notice of the attachment if it was "before judgment?" The judgment-debtor in Original Suit No. 5 of 1912, Kumbakonam Sub-Court, is the holder of the attached decree and the question whether he had or had not notice before judgment in Original Suit No. 5 of 1912 is immaterial. The real question is, whether the judgment-debtor in Original Suit No. 343 of 1906, who is the person liable to pay the amount due thereunder to the attaching creditor, had notice of the attachment before he effected the adjustment with his judgment-creditor?

2. Turning to the first question, the alleged adjustment is evidenced by Exhibit A, which is dated the 10th day of October 1913. There were two attachments effected by the decree-holder in Original Suit No. 5 of 1912, Kumbakonam Sub-Court, one before judgment in that suit and the other after judgment. The first of these attachments was of $\frac{2}{3}$ of the decree in Original Suit No. 343 of 1906 and that was applied for on the 28th February 1912. The order to attach seems to have been passed on the same day and the process made returnable on the 12th March 1912. Then after several adjournments the same attachment was made absolute on the 16th April 1912 (see Exhibit I).

3. The decree in Original Suit No. 5 of 1912, Kumbakonam Sub-Court, was passed on the 31st March 1913. It was afterwards transferred to the Sub Court, Negapatam, on a change of jurisdiction. Then at the instance of the decree holder therein the whole decree in Original Suit No. 343 of 1906 was attached by that Court. This

application was made on the 2nd December 1913, the order was passed some days afterwards, and it was received by this Court on the 17th December 1913 (see Exhibit Ib).

4. The decree-holder in Original Suit No. 343 of 1906 then applied to this Court to record satisfaction of it relying on the above-mentioned receipt, Exhibit A. The petition was presented on the 23rd December 1913. This Court held that the alleged adjustment was false and dismissed the petition. In the appeal against the order the District Judge, Tanjore, held that no appeal lay. The same decree-holder thereupon filed C. M. S. A. No. 70 of 1916 in the High Court, and it is in connection with this second appeal that the two issues above referred to have been sent down.

5. The evidence on record does not show that a formal notice of either of the above-mentioned attachments was given to the judgment-debtor in Original Suit No. 343 of 1906, but I think there is sufficient evidence to show that the adjustment under Exhibit A was made after the second attachment by the Negapatam Sub Court. A sum of Rs. 1,600 is said to have been paid in cash on the date of Exhibit A by the judgment-debtor to the decree holder in Original Suit No. 343 of 1906, a portion of the balance being set off against a certain partnership amount said to be due to the same judgment-debtor and the other portion, *viz.*, Rs. 200, being relinquished in his favour. It is admitted that the above sum of Rs. 1,600 was obtained by the decree-holder by a sale of his lands to one Muhamadali, and that the sale-deed in his favour was executed 2 or 3 months after Exhibit A (*vide* petitioner's 1st witness Anantarama Iyer). If, therefore, the said sum of Rs. 1,600 was paid on the date of Exhibit A, it is clear that Muhamadali must have paid the consideration for the sale prior to the execution of the sale-deed—an event which, in my opinion, is extremely improbable. The two or three months mentioned by the above witness take us to December 1913 or January 1914. The sale-deed in question has not been produced and Muhamadali has not been examined. It is, therefore, probable that no money was paid

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to the decree-holder on the 10th October 1913, the date which is seen on Exhibit A, and the receipt itself must have been executed in January 1914, i. e., sometime after the attachment by the Negapatam Sub-Court was effected. This view is supported by the evidence of the 2nd and 3rd witnesses on the side of the respondents, to the effect that the judgment-debtor Anantharama Iyer offered to sell the same properties to the son-in-law of the 2nd witness and that the negotiations for the sale were carried on at Mannargudi in the month of Karthigai 1913, i. e., December 1913. The 3rd witness further states that Anantharama Iyer wanted the sale to be effected soon, as a certain decree had to be certified as satisfied before the Courts closed for the Christmas vacation that year. The negotiations fell through ultimately, but there is, in my opinion, no reason to discredit these witnesses. In these circumstances, I find that Exhibit A was executed after the second attachment by the Negapatam Sub-Court and after also the present petition was put in to record satisfaction.

6. The next question is whether Anantharama Iyer had notice of the two attachments mentioned above. I have already stated that no formal notice appears to have been given through Court, but the circumstances show that he was aware of them and that he entered into the transaction in question collusively and with a view to defeat the decree-holder in Original Suit No. 5 of 1912. The 1st witness on the side of the respondents, who is the eldest son of the said decree-holder, swears that he met Anantharama Iyer at the Mayavaram Railway Station in February or March 1913 and that the latter told him in the course of a conversation that the attachment before judgment effected by the witness' father was a good thing for himself. The witness' father, who obtained the decree in Original Suit No. 5 of 1912, and who effected the attachment before judgment, died on the 3rd November 1913 (see Exhibit II) and Anantharama Iyer went to the witness' house in December 1913 for purposes of condolence.

Then there was a talk about discharging the decree in Original Suit No. 5 of 1912, and Anantharama Iyer is stated to have asked for permission to sell the hypotheca

in Original Suit No. 343 of 1906 and for a remission of part of the amount due under the decree in Original Suit No. 5 of 1912. The witness did not consent to the remission or to the sale of the hypotheca in the way proposed, as it was in his opinion worth much more than the price mentioned by Anantharama Iyer. The witness is a M. A. and B. L. of the Madras University and a practising lawyer in Kumbakonam. Anantharama Iyer is alive, but has not come forward to deny the fact of these two conversations. The second attachment by the Negapatam Sub-Court was effected at about the time of this condolence meeting, and I have already shown that the proposal to sell Anantharama Iyer's lands to the respondents' second witness' son-in-law also took place at about the same time, and that the same lands were sold to Muhamadali about a month afterwards. In these circumstances, I find that Anantharama Iyer had notice of both the attachments at the time when the adjustment in question was effected and that Exhibit A was antedated purposely.

Appeal against Appellate Order No. 70 of 1916 came on for final hearing after the return of the finding of the Court of first instance upon the issues referred by this Court for trial and Civil Revision Petition No. 863 of 1916 on the 15th August 1918.

Mr. S. T. Srinivasa Gopalachariar, for the Appellants.—The judgment-debtor had no notice of the attachment of the decree and until he gets the notice, he is at liberty to make an adjustment. The Court is bound to record it under the provisions of Order XXI, rule 2, without reference to the rights of the attaching creditor. The language of Order XXI, rule 53 (6), makes that position plain.

Mr. Viswanatha Aiyar, for the Respondents.—In this case it is found as a fact that the decree-holder had notice of the attachment when the adjustment was said to have been made. He had no right to deal with the decree after attachment and the attaching creditor is not bound by any adjustment made after the attachment. Notice to judgment-debtor is not necessary to complete the attachment. The Court should issue the notice only if called on by the decree-holder to do so.

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JUDGMENT.

• APPEAL AGAINST APPELLATE ORDER NO.
70 OF 1916.

ABDUR RAHIM, J.—The case arises out of an application by a holder of a decree to enter satisfaction under the rules of the Civil Procedure Code. That decree was attached by certain judgment-creditors of the decree-holder and these attaching creditors have been made parties to the application by the District Munsif and they are on record. The adjustment or payment was made after the decree had been attached, but it appears that no notice of such attachment was issued to the judgment-debtor. The decree-holder must have and, in fact, did have notice of the attachment.

The position taken up on behalf of the decree-holder is that until notice has been issued to the judgment-debtor upon an application made by the attaching creditor, the judgment debtor is entitled to make any payment or adjustment he likes and when once such payment or adjustment is made, the Court is bound under Order XXI, rule 2, to record satisfaction, whether the application therefor is made by the judgment-debtor or by the decree-holder and whatever the rights of attaching creditor may be.

Reliance is placed in support of the argument on clause 6 of rule 53, Order XXI. That clause says "no payment or adjustment of the attached decree made by the judgment-debtor in contravention of such order after receipt of notice thereof, either through the Court or otherwise, shall be recognized by any Court so long as the attachment remains in force." The clause is not very happily worded and I am inclined to think on the whole that the words "either through the Court or otherwise" refer to "payment or adjustment" and not to "notice". It is contended thereupon that the adjustment in this case must be held to be valid and effective. I do not think, however, that this necessarily follows. It is not a case merely between a judgment-debtor and his decree-holder but the attaching creditors of the decree-holder have also been made parties. The question before us is not merely whether the Court shall or shall not record satisfaction under Order XXI, rule 2. We have got to decide upon the rights

of the parties. Here the appellant's decree was undoubtedly attached and he had notice of it. He purports to deal with that decree in spite of the attachment. Supposing instead of a decree, this case was of an ordinary property, moveable or immoveable. The owner of it, after attachment, would have no rights to deal with it and any such dealing would be invalid or ineffective as against the attaching creditor. That is the general law and I do not find anything in rule 53, Order XXI, which has necessarily the effect of overriding it. The notice to the judgment-debtor is not necessary for the purpose of completing the attachment. The attachment is complete before any such notice is issued. The Court has to issue the notice if an application to that effect is made by the decree holder, but without notice, the attachment is undoubtedly complete. Then it is difficult to conceive that the decree holder whose decree has been attached could by dealing with it affect the rights of his own creditor in the attached decree. This appeal must fail and is dismissed with costs.

OLDFIELD, J.—I agree. I have some doubt regarding the proper construction of Order XXI, rule 53 (6), and I prefer to express no opinion in this case on the question whether, as between judgment-debtor and decree-holder, notice from the Court is essential to support an objection to the recording of satisfaction. I, however, adopt unreservedly the broad ground of decision on which my learned brother's conclusion rests.

CIVIL REVISION PETITION No. 866 OF
1916.

The civil revision petition is also dismissed. There will be no separate costs.

M. C. P.

Appeal and revision petition dismissed.

CHUHAR BAI v. RAMA NAND.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1818 of 1914.

February 28, 1918.

Present:—Mr. Justice Scott-Smith and
Mr. Justice Shadi Lal.

Musammât CHUHAR BAI—DEFENDANT

—APPELLANT

versus

RAMA NAND—PLAINTIFF AND LOCHA

RAM—DEFENDANT—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. VI, r. 17
—Amendment of pleadings—Party, whether can resile
from statement of Pleader—Discretion of Court—
Adverse possession—Possession of widow against will of
sons, whether adverse.

Where in a case, after the evidence had been recorded and the case had become ripe for judgment, the Court found that the plaintiff's Pleader had, in the beginning of the trial and as a result of misinformation, made a wrong statement, and allowed the plaintiff to resile from it:

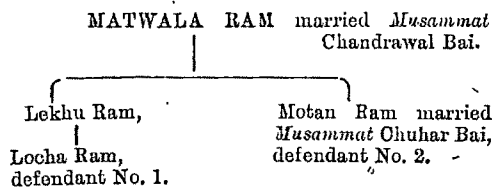
Held, that the Court was justified in exercising the wide discretion conferred upon it under Order VI, rule 17, of the Civil Procedure Code. [p. 116, cols. 1 & 2.]

The possession of a small residential house by a widow, against the will of her sons in exercise of her right of residence, cannot be said to be adverse to the sons. [p. 116, col. 2.]

Second appeal from the decree of the Additional Divisional Judge, Multan, at Muzaffargarh, dated the 24th April 1914, affirming that of the District Judge, Muzaffargarh, dated the 18th of August 1913, decreeing the claim.

FACTS are clearly given in the following extracts from the judgment of the Additional Divisional Judge:—

"The facts appear sufficiently from the judgment of the learned District Judge and need not be recapitulated here. The following pedigree will be of assistance in understanding the case.



"The plaintiff, Rama Nand, who now sues for possession by partition of half a house, the whole said to have belonged originally to Matwala Ram, and described in the plaint, bought this half, the share of Locha Ram, defendant No. 1, on 18th October 1910. The present suit was instituted on 15th December 1911. Defendant No. 1 admitted plaintiff's claim. The main con-

tention by defendant No. 2 was that defendant No. 1's father Lekhu had separated from his father, and had no share in the house, defendant No. 2 being the sole owner. The onus was clearly on defendant No. 2 to show that the house was not joint family property, Lekhu Ram being separated from Matwala Ram. The lower Court has found that the house is the joint property of the family, that it was only because the wives of both brothers, Lekhu Ram and Motan Ram, quarrelled with their mother-in-law, Musammât Chandrawal Bai, that they separated from the latter, but that the house continued to be the family property, Musammât Chandrawal Bai residing in it, having the right to do so during her life-time.

"Matwala Ram died over 30 years ago in Jeth Sambat 1938 (D-11) leaving a widow Musammât Chandrawal Bai, and two sons, Lekhu Ram and Motan Ram. Lekhu Ram died on the 22nd August 1901 (D-1). Musammât Chandrawal Bai died on 11th June 1906 (D-15); and it was about 2½ years after her death that Locha, son of the late Lekhu Ram, sold his alleged share to plaintiff together with land.

"The issues were fixed by Malik Mahram Khan, Munsif, in whose Court the case first was, on 19th January 1912. On that date the plaintiff's Pleader's statement was recorded and he stated clearly that Matwala Ram separated his sons during his lifetime, and divided the house property among them, keeping the house joint. Accordingly the first issue fixed was 'whether Matwala Ram had separated his sons during his life, and kept the property in suit for his own use?' And the 4th issue was 'whether Matwala Ram separated the father of defendant No. 1 from him, and defendant No. 2 continued joint with Matwala Ram?'

"By 2nd April 1912 the plaintiff having produced evidence closed his case. Defendant No. 2's evidence was then called, and when three witnesses had been examined the value of the house was found on plaintiff's application to be over Rs. 1,200, and so the case was transferred to the Court of the District Judge, by order dated 14th October 1912. The evidence already recorded was accepted by the parties, and plaintiff's Pleader asked to be allowed to produce some more witnesses; permission

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was given (though he had already closed his case), and on 17th December 1912 two more of plaintiff's witnesses were heard and then he closed his case. Some of defendant's remaining witnesses were heard on that day and for the remainder the case was adjourned to 4th January 1913, when these witnesses were heard and defendant closed his case, and the case was fixed for 21st January 1913 for arguments. In the meanwhile defendant No. 2, Motan Ram, having died, his widow *Musammāt Chuhar Bai* was brought on to the suit as the deceased's representative.

"From 30th January 1913 the case was adjourned to 3rd February 1913 at the request of the Pleaders, who asked for time to argue the case. It was then adjourned to 10th February 1913, as the parties said there was likely to be a compromise. Further time was given to 14th February 1913. On this date the plaintiff put in an application, saying his Pleader, Lala Nau Nihal Kishan, had made an incorrect statement on 19th January 1912, and plaintiff had corrected it in his application of 16th May 1912. This application of 16th May 1912 was made more than a month after the plaintiff had closed his evidence on the 2nd April 1912 and was to the effect that the two sons of Matwala Ram had really been joint with the latter up to his death; that after the father's death Lekhu only began to live and feed separately and soon after *Musammāt Chandrawāl Bai* separated Motan Das too; that there had been no partition or separation of the joint family by the father; the plaintiff's Pleader did not know the real facts and made the statement without plaintiff's knowledge. The Munsif merely passed the order *shamil misl* on the application of 16th May 1912. On the second application of 14th February 1913 the District Judge, after innumerable adjournments, passed an order on 29th May 1913 authorising plaintiff to correct his Pleader's statement and on payment of Rs. 165 costs to defendant agreed to take further evidence after altering issues 1 and 4 into 'whether Lekhu Ram was separate from his father and the house in suit is not the joint property of the family?'

"For defendant No. 2 it is urged the lower Court was not right in permitting the plaintiff to change from what his Pleader had stated, the plaintiff having been present when the statement was made and his evidence having been closed in the first instance.

"For plaintiff it is urged he is not a member of the family and was unaware of the facts, and that on the authority of *Mrs. Martha Pool v. Secretary of State* (1) the plaintiff was entitled to amend his Pleader's statement.

"After reading the authorities relied on and considering all the circumstances of the present case, I am of opinion the District Judge exercised a mere discretion in accepting the plaintiff's prayer. It is obvious the plaintiff's Pleader made a mistake from misinformation. Plaintiff's witnesses started off from the very beginning saying Matwala Ram and his sons were joint. This clearly shows a mistake was made by the Pleader, and for this mistake plaintiff has been made to pay heavily. In the plaint nothing was said about any separation.

"The evidence leaves no doubt not only that there was no regular separation or breaking up of the joint family but also that the living apart was due to the daughters-in-law not being able to pull on with the mother-in-law. Defendant No. 2 has failed to prove that defendant's father was separated by Matwala Ram and that Motan Ram alone remained joint with Matwala Ram. Admittedly Lekhu Ram and Motan Mal were the sons of two wives of Matwala Ram, and Lekhu Ram's mother died first, so it is very likely Lekhu Ram took up a separate residence from his step-mother, but there is nothing to prove really that his father turned him out and separated him completely from the joint family. No document is forthcoming re any such separation. No separation having been proved, the suit is obviously not barred by limitation. *Musammāt Chandrawāl Bai*, the widow, had right of residence as a Hindu widow. Obviously her possession was not adverse. *Sham Koer v. Duh Koer* (2)

(1) 68 P. R. 1886.

(2) 29 C. 664; 29 I. A. 132; 6 C. W. N. 657; 4 Bom. L. R. 547; 8 Sar. P. O. J. 280 (P. O.).

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relied on by defendant No. 2 is clearly distinguishable. So also *Ram Narain v. Maharaj Narain* (3). In the present case the widow's possession was by mutual arrangement. It is clear from the size of the house too that it was impossible for the whole family, including the wives of Lekhu Ram and Motan Ram, to live in it, so the one who for many reasons lived separately was Lekhu Ram."

Mr. *Nanak Chand* and Dr. *Gokal Chand Narang*, for the Appellant.

Lala Har Gopal, for Pandit *Rajendra Parshad*, for the Respondents.

JUDGMENT.—The lower Appellate Court, concurring with the Court of first instance, has held that the plaintiff's predecessor-in-interest had, at the time of the sale to the plaintiff, a subsisting title in one-half of the house in dispute, and has accordingly decreed the suit. This decree is attacked by Mr. *Nanak Chand* on the following grounds:—

(i) that the Court of first instance was not justified in allowing the plaintiff in May 1913 to resile from the statement made by his Pleader on the 19th January 1912, when the evidence adduced by both the parties had been recorded and the case was ripe for judgment, and

(ii) that the appellant's mother, *Musammam Chandrawal Bai*, was in adverse possession of the house, and that the title of the plaintiff's predecessor-in-interest had been extinguished before the sale in favour of the plaintiff.

On the first point the learned Additional Divisional Judge holds that the statement made by the plaintiff's Pleader in 1912 was the result of misinformation, and that the Court of first instance was, in view of that fact and the testimony of the plaintiff's witnesses, which went to show that the Pleader had made a mistake in giving his statement, justified in exercising its discretion under Order VI, rule 17, Civil Procedure Code. It is to be observed that the District Judge allowed the plaintiff's application on his paying Rs. 165 as costs to the defendant, and that the latter accepted the costs without demur. Having thus taken advantage of the order he is, in our opinion, precluded from impugning its correctness, *vide*

(3) 3 P. R. 1904; 43 P. L. R. 1904.

Banku Chandra Bose v. Marium Begum (4). At any rate, Order VI, rule 17, confers wide discretion upon the Court to allow the alteration or amendment of pleadings, and we see no adequate ground which would justify our interference on second appeal.

As regards the alleged adverse possession of *Musammam Chandrawal Bai*, we find that no plea to that effect was raised at any time during the protracted proceedings taken in the Court of first instance. Further, the Courts below have held that the widow's possession was the result of private arrangement—she being entitled to the right of residence in the house. The judgments in *Sham Koer v. Dah Koer* (2) and *Ram Narain v. Maharaj Narain* (3) are clearly distinguishable, because the property involved in those cases was not only a residential house but several villages, and it is quite clear that the possession of the village could not possibly be attributed to the widow's right of residence or maintenance. In these circumstances, her possession was rightly held to be adverse to the heirs, who were entitled to immediate possession. These considerations are wholly inapplicable to a small residential house, which the widow, as stated above, was undoubtedly entitled to occupy for her residence.

For the aforesaid reasons we decline to interfere and dismiss the appeal with costs.

Appeal dismissed.

(4) 37 Ind. Cas. 804; 21 C. W. N. 232.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 671 of 1914.

May 9, 1916.

Present:—Sir Henry Drake-Brockman, Kt., J. C.

Raja LAXMAN RAO SAHEB—PLAINTIFF
—APPELLANT
versus

BHAU SAHEB—DEFENDANT No. 1—
RESPONDENT.

Hindu Law—Bombay School—Succession—Female heirs—Daughter, estate taken by—Mayukha and Mitakshara.

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It is only under the Bombay School of Hindu Law that a daughter succeeding to her mother's *stridhan* can take an absolute estate and it is peculiar to the Bombay Presidency and Berar that females who belong to the family of the *propositus* by birth as distinguished from marriage, take absolute interests. [p. 118, col. 2.]

There is no ground for holding that only where the Mayukha is paramount is the daughter so favoured. [p. 119, col. 1.]

In the Districts of Satara and Ratnagiri in the Bombay Presidency the Mayukha, though not paramount, is at least of ancillary authority. [p. 119, col. 1.]

(Case-law discussed.)

Appeal from the decree of the District Judge, Nagpur, in Civil Appeal No. 198 of 1913, decided on 4th July 1914.

Messrs. J. Mitter and M. B. Kinkhede, for the Appellant.

Mr. G. L. Subhedar, for the Respondent.

JUDGMENT.—This litigation relates to a field in Mouza Bina of which the plaintiff-appellant is the Malguzar. In or about the year 1894 the field was let to Bhagirathi Bai, the plaintiff's step-sister, and subsequently occupancy right was conferred on her. It is common ground that in Bhagirathi Bai's hands the field was *stridhan* proper. She died in 1909 and was succeeded by her daughter Lala Bai, who died issueless in December 1910. The latter's husband Bhan Sahib, the sole respondent in this Court, took possession on his wife's death, and was, therefore, sued for possession and mesne profits. Two persons who held under Bhan Sahib were joined as defendants, but we are not concerned with them, as in the course of the pleadings Bhan Sahib took on himself responsibility for any mesne profits to which the Court might find the plaintiff entitled, and the plaintiff accepted this offer.

The plaintiff's case is that on Lala Bai's death the rightful tenant was the next heir of Bhagirathi Bai, that no heir of Bhagirathi Bai was in existence in December 1910 and that consequently he as landlord was entitled to eject Lala Bai's husband. In paragraph 3 of his written statement Bhan Sahib pleaded that the field was *stridhan* in his wife's hands, and that he was, therefore, her heir.

In a written reply the plaintiff contended that the holding "could not be *stridhan* in the hands of Lala Bai so as to confer on her absolute title" and that the defendant, therefore, could not be the heir. In supplementary oral pleadings it was admit-

ted by both sides that they (plaintiff and defendant) are governed "by the Mitakshara School of Hindu Law" and that Bhagirathi Bai's marriage was celebrated in an approved form. It is, moreover, common ground that the letting to Bhagirathi Bai took place after her marriage.

The following are the issues, in addition to the general issue, with which we are concerned:—

(b) "Did the holding remain as *stridhan* in Lala Bai's hands after the death of Bhagirathi Bai?"

(c) "Can the defendant Bhan Sahib inherit the same after Lala Bai's death?"

Following the Privy Council decisions in *Sheo Shankar Lal v. Debi Sahai* (1) and *Sheo Partab Bahadur Singh v. Allahabad Bank* (2), the trial Judge held that the field was not *stridhan* in Lala Bai's hands. He also decided that neither under the Hindu Law nor under the Central Provinces Tenancy Act could the defendant Bhan Sahib be Bhagirathi Bai's heir. The plaintiff then obtained a decree for possession and for Rs. 100 as mesne profits in respect of the agricultural year 1911-12.

Bhan Sahib appealed to the District Judge, reiterating his contention that the field was *stridhan* in his wife's hands. The District Judge realised that this could succeed only if Lala Bai was governed by the Bombay School of Mitakshara Law, and considering that the pleadings of the parties were vague on this point, took statements from the legal practitioners engaged and framed the following additional issues:—

(1) By what school of law was Auna Sahib, husband of Bhagirathi Bai, governed before he came and settled in these Provinces?

(2) Did Auna Sahib adopt the Benares School of Law after he settled here?

(3) By what school was Bhagirathi Bai governed at her death and did her daughter inheriting from her take an absolute estate?

(1) 25 A. 463; 13 M. L. J. 330; 5 Bom. L. R. 523; 7 O. W. N. 831; 30 L. A. 202; 8 Sar. P. C. J. 465 (P. O.).

(2) 25 A. 476; 7 O. W. N. 840; 13 M. L. J. 336; 5 Bom. L. R. 833; 30 L. A. 203; 8 Sar. P. C. J. 535 (P. O.).

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The further statements on which these issues were based showed that Anna Sahib belonged to Satara, married Bhagirathi Bai in 1880 and thereupon settled in Nagpur where he died in 1906, and that Bhau Sahib belongs to and resides in the Ratnagiri District. For the plaintiff it was contended that Anna Sahib adopted the *lex loci* of the Central Provinces on settling here and that Bhagirathi Bai was necessarily governed by the same law as her husband. The Bombay School of Law was said to be divided into two sub-schools, (1). where the Mitakshara is paramount; (2) where the Mayukha is paramount, and both Satara and Ratnagiri were alleged to be under (1). A mother's *stridhan* was said to cease to possess the character of *stridhan* on descent to daughter even in sub-school (2).

The trial Judge found on the issues remanded for trial that Anna Sahib was governed by the Bombay School of Law when he first came to the Central Provinces, but subsequently adopted the Benares School and that Bhagirathi Bai was governed by the latter school, both because she was born and bred in it and because she married Anna Sahib. As to Lalu Bai's position no finding was given. Bhau Sahib objected to these findings, and the lower Appellate Court then held that Anna Sahib was governed by the Bombay School at Satara and has not been proved to have changed his law of origin for that of his new domicile in the Central Provinces. The question of Bhau Sahib's position was not separately considered. On the strength of the decision in *Dawlatrao v. Govindrao* (3) Lalu Bai was held to have inherited an absolute estate from her mother, apparently because her parents were governed by the Bombay School of Law. Finally, the plaintiff was pronounced to have no case even if Bhagirathi Bai were regarded as governed by Benares Law, because her husband's father Baba Sahib (P. W. No. 3) is still alive and can succeed her both under the Hindu Law and the Central Provinces Tenancy Act. In this connection *Thamman Singh v. Manjoo Manak* (4) was relied on. The trial Judge's

decree was accordingly set aside and the plaintiff's claim dismissed.

The plaintiff has preferred this appeal, and the first point taken for him is that the defendant should not have been given an opportunity of proving that Anna Sahib was originally governed by the Bombay School of Law. This, however, was not seriously pressed, nor am I prepared to hold that the remand was unjustifiable. I have already set out the written pleadings of the parties on the point whether the field in dispute was or was not *stridhan* in Lalu Bai's hands. It is only in Bombay that a daughter succeeding to her mother's *stridhan* can hold it as such, *i.e.*, as absolute estate: see for Bengal *Julessur Koer v. Uggur Roy* (5) and *Huri Doyal Singh Sarmana v. Grish Chunder Mukerjee* (6) for the United Provinces and Oudh *Sheo Shankar Lal v. Debi Sahai* (1) and *Sheo Partab Bahadur Singh v. Allahabad Bank* (2) and for Madras *Janakisetty Sooryudu v. Miriyala Hanumayya* (7) and *Muttu Vaduganatha Tevar v. Dora Singha Tevar* (8). In spite of the Privy Council decisions in the Allahabad cases just cited, the Bombay High Court still holds on the strength of the *cursus* peculiar to the Bombay Presidency that female heirs who belong to the family of the *propositus* by birth, as distinguished from marriage, take absolute interests. See *Bhau v. Raghunath* (9), *Gulappa v. Tayawa* (10) and *Pandharinath v. Govind* (11). In the second Allahabad case (2) their Lordships of the Privy Council said at pages 492 and 493 of the report:—

"The question may be different in those parts of Bombay which are governed by the Mayukha. An exact examination of the terms of that treatise seems to have led to some diversities of view in the Bombay High Court which need not now be considered."

In *Bhau v. Raghunath* (9) (above cited) Jenkins, Chief Justice, took it for granted that the Allahabad decisions involved no change in the law of the Bombay Presidency (5) 9 C. 725; 12 C. L. R. 460; 7 Ind. Jur. 651; 4 Ind. Dec. (N. S.) 1132.

(6) 17 C. 911; 8 Ind. Dec. (N. S.) 1152.

(7) 3 Ind. Cas. 281; 32 M. 521; 6 M. L. T. 196; 19 M. L. J. 334.

(8) 3 M. 290; 8 I. A. 99; 4 Sar. P. C. J. 239; 5 Ind. Jur. 438; 1 Ind. Dec. (N. S.) 757.

(9) 30 B. 229 at p. 237. 7 Bom. L. R. 936.

(10) 31 B. 453; 9 Bom. L. R. 834.

(11) 32 B. 59; 9 Bom. L. R. 1305.

(3) 1 Ind. Cas. 243; 5 N. L. R. 13.

(4) 11 C. P. L. R. 22.

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which gives to a daughter inheriting from either parent an absolute estate: that was a case from Nasik and there seems to be no ground for holding that only where the Mayukha is paramount is the daughter so favoured—see *Dawlatrao v. Govindrao* (3) and Trevelyan's Hindu Law, page 451. The legal position then being clear that except in Berar and the Bombay Presidency a daughter could not take an absolute estate in *stridhan* inherited from her mother, I think the lower Appellate Court was justified in holding that the trial Judge should have examined the parties as to the school of law by which Auna Sahib and Lalu Bai were governed and in itself making good the omission.

The second point raised is a new one, namely, that the law of the Bhonsla family should be followed in determining the succession to Lalu Bai, inasmuch as both lessor and original lessee (Bhagirathi Bai) belonged to it. For this no authority is cited which can be regarded as at all in point. The nature of the estate which Lalu Bai took must surely be settled by her own personal law and that is the Bombay Law, whether the succession to her mother opened before or after her marriage, Auna Sahib came from Satara and the plaintiff has failed to establish that after migration he abandoned his personal law of origin. Bhan Sahib the defendant-respondent still belongs to Ratnagiri. In both districts the Mayukha, though not paramount, is of at least ancillary authority; see *Jankibai v. Sundra* (12), *Bhagirathibai v. Kahnuijirav* (13), Mayne on Hindu Law and Usage, page 29 (8th Edition) and Banerjee's Hindu Law of Marriage and Stridhan, page 396 (4th Edition).

I was referred to my own decision in *Narayan Vithal v. Govind Narayan* (14), as showing that the Bhonsla family who came to the Central Provinces in the 18th century cannot be regarded as influenced by decisions of the Bombay High Court delivered in 1859 and later. In my opinion, as already stated, we are not concerned with the personal law of the Bhonsla family.

Nor is the position of Auna Sahib, who did not settle in the Central Provinces till 1880, fairly comparable with that of the parties to the local case just cited, whose ancestors came to the Central Provinces in 1800 or even earlier.

Holding as I do that Lalu Bai must be regarded as having an absolute estate in the field to which this litigation relates, I need not decide the questions raised in the 7th and 8th grounds of appeal, which would arise only if her estate were a limited one. The appeal accordingly fails and is dismissed with costs. In the Courts below costs will be paid as already ordered.

Appeal dismissed.

COUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 96 OF 1917.

July 31, 1918.

Present:—Mr. Lindsay, J. C.

HARPAL SINGH—PLAINTIFF—APPELLANT
versus

Musammatt SUKHRANI AND OTHERS—
DEFENDANTS—RESPONDENTS.

Registration Act (XVI of 1903), s. 17—Compromise deed settling family dispute, whether requires registration—Civil Procedure Code (Act V of 1903), O. XXXII, r. 7, applicability of, to revenue proceedings—Compromise in mutation proceedings on behalf of minor without leave of Court, validity of.

The question whether or not a document in the nature of a compromise requires registration depends upon whether or not it purports to create a fresh title in favour of any of the parties to it. Where there is in reality no creation of a fresh title but merely an acknowledgment from each of the parties of a title pre-existing in the others, the compromise does not require to be registered [p. 122, col. 2.]

The provisions of the Code of Civil Procedure do not apply *en bloc* to proceedings in Courts constituted under the Land Revenue Act. [p. 122, col. 2.]

A minor was represented in certain mutation proceedings by his elder brother, who *bona fide* entered into a compromise with the other party. The leave of the Court as required by Order XXXII, rule 7, of the Civil Procedure Code was, however, not obtained for this settlement:

Held, that the compromise was not bad merely for want of such leave. [p. 122, col. 2.]

Appeal against the decree of the Subordinate Judge, Unao, dated the 19th July 1917,

(12) 14 B. 612; 7 Ind. Dec. (N. S.) 875.

(13) 11 B. 285; 6 Ind. Dec. (N. S.) 187 (F. B.).

(14) 1 N. L. R. 164.

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Mr. *Mumtaz Husain* and *Babu Puttu Lal*, for the Appellant.

Babus Bisheshwar Nath Srivastava and *Rudra Datta Sinha*, for the Respondents.

JUDGMENT.—This appeal has sprung out of a suit brought by the plaintiff Harpal Singh, the object of which was to set aside a certain compromise or arrangement which had been arrived at in the beginning of the year 1907. The suit was filed on the 15th of September 1916.

In order to explain the matters in issue it is necessary to refer in the first instance to the pedigree attached to the plaint. There were two brothers who, according to the finding of the Court below, were members of a joint Hindu family. This finding is, not now in dispute, although in the Court below the plea was taken on behalf of the defendants that Lal Singh and Sheoraj Singh were separate.

Sheoraj Singh died first without having any issue. He left a widow *Musammat Phul Kuar*, who was impleaded in the suit as defendant No. 2. It is proved beyond all reasonable doubt that before his death Sheoraj Singh executed a Will by which he left his interest in the property to his brother Lal Singh, with the exception of 10 *bighas* of *sir* land which he appointed by way of maintenance for his wife *Musammat Phul Kuar*.

On the finding that Sheoraj Singh and his brother Lal Singh were joint it necessarily follows that this Will could not have any operation in law, but in view of the questions in issue between the parties it is of some importance to notice the fact that Sheoraj Singh did make a Will. Lal Singh died about a year after his brother leaving two sons Harpal Singh and Sheopal Singh, and a widow *Musammat Sukhrani*. This lady is the step-mother of the two sons whose names have just been mentioned. At the time her husband died she had two daughters *Musammat Beti* and *Musammat Bitti*, the latter of whom has since died.

The documentary evidence on the record shows that a dispute arose between these various parties after the death of Lal Singh as to the manner in which mutation should be made. It is clear that *Musammat Phul Kuar* the widow of Sheoraj

Singh put forward a claim on her own behalf. She desired to have mutation made in her favour in respect of all the property which had belonged to her deceased husband. This claim of course was based on the assumption that Sheoraj Singh was separate from his brother. Then again there seems to have been a dispute between *Musammat Sukhrani* and her step-sons regarding mutation. The sons and *Musammat Sukhrani* both of them put forward allegations for the purpose of showing that Lal Singh before his death had made an oral disposition of his property. *Musammat Sukhrani* insisted that under this Will she was entitled to have mutation of a one-third share of the whole property. Sheopal Singh on the other hand put forward two versions of the oral Will made by his father. One of these versions agreed with the story told by *Musammat Sukhrani*, the other did not. In the end, however, Sheopal Singh seems to have made common cause with *Musammat Sukhrani*, and he and *Musammat Sukhrani* filed a petition in Court by which they agreed to have mutation made in the manner suggested, that is to say, a one third share entered in the name of *Musammat Sukhrani* and two-thirds in favour of the sons.

At the time these mutation proceedings were going on, the present plaintiff Harpal Singh was a minor and was represented in the proceedings by his elder brother Sheopal Singh, who is the defendant No. 3 in the case. After the statements of the parties had been recorded before the Tahsildar, the case finally came up for disposal before an Assistant Collector. He passed an order which was not exactly in accordance with the agreement just referred to, for it allotted to *Musammat Phul Kuar* a one-fourth share in one of the Mahals of a village called Dewara in which Sheoraj Singh and Lal Singh had a share. The rest of the property was divided as arranged in the compromise between *Musammat Sukhrani* on the one hand and Sheopal and his brother on the other. It may be mentioned that *Musammat Sukhrani* was to have no powers of alienation over the property and that it was agreed that after her death the property should devolve upon Sheopal Singh and his brother Harpal Singh. All this took place in the year

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1907. The present suit has arisen by reason of a claim made by *Musammât Sukhrani* in the Rent Court. In the month of August 1916 Sukhrani filed a suit for profits against the plaintiff and defendant No. 3 in respect of the share which stands recorded in her name. This act has led the present plaintiff to bring a suit, which was framed originally as a suit for declaration asking the Court to declare that *Musammât Sukhrani* had no proprietary interest in the property. Put shortly, the case for the plaintiff appellant is that he is not bound by the compromise which was filed in the Revenue Court in the year 1907. He mentions the fact (which may be taken to be proved) that he was a minor at the time, and he says he is not bound by the act of his brother Sheopal Singh who purported at that time to be his guardian. The learned Subordinate Judge has dismissed the claim, holding that on the evidence before him the proper view to take is that there was in the year 1907 a family settlement between all the parties interested in the property. This settlement according to the Subordinate Judge was a reasonable settlement of a genuine dispute between the parties to the present case, and consequently he has held that the plaintiff is not now entitled to avoid it. He has found that ever since the year 1907 all these parties have been living together amicably and that the arrangement which was come to in the mutation Court has been accepted all along up till the year 1916, when *Musammât Sukhrani* thought fit to bring a suit for profits.

The question, therefore, which I am called upon to decide is, whether the lower Court was justified in holding that the dealing between the parties after the death of Lal Singh amounted to a family arrangement, and if the finding is that there was such a settlement then the plaintiff, although he was a minor at the time, would in my opinion be bound. It is not denied, I may mention, that Sheopal Singh was the only adult member of the family left after the death of his father Lal Singh and the family being joint, the presumption must be that he was the managing member and was in a position to represent his brother Harpal Singh in the mutation proceedings.

The learned Counsel for the appellant has attacked the decision of the Court below on various grounds. He argues in the first place that there was no *bona fide* settlement of a family dispute, that there could not have been in fact any *bona fide* claim put forward by the widows and then when Sheopal Singh made statements in the mutation proceedings (a copy of which is Exhibit A 4), he was only admitting a claim which he and everybody else knew to be a false claim. After a perusal of the evidence I am not prepared to take this view of the facts at all. It is quite true that Sheopal Singh made conflicting statements which were recorded by the Tahsildar. As already mentioned, he stated in the first place that his father Lal Singh had made an oral Will by which one-third of the property was to go to *Musammât Sukhrani*, while the remaining two-thirds was to go to himself and his brother. Subsequently he altered this statement by saying that his father had directed that a one fourth share in one of the Mahals of Dewara Kalan should be given to Phul Kuar. *Musammât Sukhrani* on the other hand was pressing the case that her husband had made an oral Will in favour of herself and his two sons. It may be noted here that while these proceedings were going on and after the document of compromise had been filed, the present plaintiff Harpal Singh attempted to intervene. He put a petition into Court saying that he repudiated the compromise to which his brother had agreed. He claimed to be of full age and to be entitled to be heard on his own account. The Court before which the proceedings were pending asked him to produce some reliable evidence to show that he was of full age. He was unable to do so and the consequence was that his petition was rejected. Subsequently he expressed his assent to the arrangement into which his brother had entered. I have already mentioned the fact that *Musammât Phul Kuar* was also putting forward a claim in these mutation proceedings and it is noteworthy that when Harpal Singh put in his first application it was by way of supporting *Musammât Phul Kuar's* claim.

To say that there was no *bona fide* claim on the part of Phul Kuar or of *Musammât Sukhrani* because it is now proved that

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Sheoraj Singh and Lal Singh were members of a joint family, seems to me an argument which cannot be accepted. While it has now been made to appear that as a matter of fact Sheoraj Singh and his brother were joint, there still remains the fact that Sheoraj Singh before his death executed a Will, a fact which was altogether inconsistent with his status as a member of a joint family, and it may very well be that *Musammatt* Phul Kuar, who is Sheoraj Singh's widow, may have thought that Sheoraj Singh was as a matter of fact separate from his brother by reason of his having made a disposition of his property by Will. As for the position of *Musammatt* Sukhrani she, as I have already stated, was relying upon an oral Will of her husband. The question as to whether or not Lal Singh made an oral Will was put in issue in this case. The Subordinate Judge has found that it was not proved that Lal Singh did make an oral Will. It seems, however, from the judgment that this part of the case was really not pressed and so far as I can see, the Subordinate Judge seems to have thought that it was quite possible that Lal Singh did make an oral disposition of his property. Be that as it may, the fact remains that *Musammatt* Sukhrani was the second wife of Lal Singh and that she had two daughters by her husband. She was certainly entitled to look to the estate for maintenance for herself and her two daughters and if she put forward a claim in the mutation Court, I am not prepared to hold that it was not a *bona fide* claim merely because her husband was a member of a joint family. In short the situation appears to me to be this, that Phul Kuar on the one hand and *Musammatt* Sukhrani and her two daughters on the other were persons who had claims on the estate left by Lal Singh. In these circumstances it appears to me perfectly natural that the parties should have come to an agreement by which the rights of these ladies were recognized. I must dismiss altogether the argument that these ladies were putting forward claims for which there was no foundation at all and, I think, the Subordinate Judge was quite justified in coming to the conclusion that there was before him a clear case of a

family settlement in which each of the disputing parties had a case and in which there was a reasonable and proper decision of all the conflicting claims. As he points out, there is no allegation of any fraud or collusion in the matter and the evidence clearly establishes that ever since the mutation was made the parties have been all living together as members of a joint family. Another point which he makes is that there is no evidence to show that Phul Kuar is now in possession of the 10 *bighas* which her husband purported to leave her by Will, and so there is reasonable ground for thinking that the share of Mauza Dewara which was allotted to her in the year 1907 was given to her in lieu of the maintenance which her husband had desired her to have.

The next argument is that the compromise embodied in the document required registration. This argument cannot, I think, succeed. The question whether or not a document in the nature of a compromise requires registration depends upon whether or not it purports to create a fresh title in favour of any of the parties to it. Here I think the reasonable interpretation of the document is, that there was in reality no creation of a fresh title but merely an acknowledgment from each of the parties of a title pre existing in the others.

The last point which has been raised is that inasmuch as one of the parties to the case was a minor, the compromise required the sanction of the Revenue Court, and in this connection section 432 of the old Code of Civil Procedure is referred to. With regard to this all I need say is that it has not been made to appear to me that the provisions of the Code of Civil Procedure apply *en bloc* to proceedings in Courts constituted under the Land Revenue Act. There is in my opinion no force in this contention.

It has been pointed out that *Musammatt* Phul Kuar was no party to the compromise to which assent was given by Sheoraj and *Musammatt* Sukhrani. That is so. On the other hand there was evidence before the Subordinate Judge to show that the other parties accepted the arrangement by which *Musammatt* Phul Kuar was put in possession of a small share in Mauza Dewara. It is proved by documentary

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evidence on the record that subsequent to the year 1907 *Musammatt* Phul Kuar mortgaged this share to one Sheoratan Lal and that subsequently the mortgage was redeemed by Sheopal and his brother Harpal. I think the Subordinate Judge was entitled to rely upon this fact for the purpose of showing that although *Musammatt* Phul Kuar was not formally a party to the compromise proceedings, nevertheless the order for mutation which was made in her favour was accepted by the brothers and acted upon for a considerable period after the date on which it was made.

To sum up, my conclusion is that the Subordinate Judge was right in holding that there was before him a genuine case of family settlement in which *bona fide* claims had been put forward. The settlement is in every way a reasonable one and must be given effect to. Affirming the judgment of the Court below I direct that this appeal be dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 1210 OF 1917.

August 1, 1918.

Present:—Mr. Justice Spencer and
Mr. Justice Krishnan.

KASI VISVANATHA CHETTIAR
AND ANOTHER—DEFENDANT NO. 4 AND LEGAL
REPRESENTATIVE OF DEFENDANT NO. 5—
APPELLANTS

versus

RAMASWAMI ATHITHA NADAR

AND OTHERS—PLAINTIFFS NOS. 1 AND 3 TO 6
AND DEFENDANTS NOS. 1 TO 3—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 64, scope of—Award made rule of Court—Attachment, prior, of properties allocated by award to persons other than judgment-debtors, whether avoids award—Purchase subsequent to decree on award, effect of.

Section 64, Civil Procedure Code, avoids only private transfers and not awards which have become merged in a decree of Court. [p. 124, col. 1.]

A dispute between the plaintiffs and defendants Nos. 1 to 3 having been referred to arbitration, the arbitrator passed an award directing the delivery of certain properties to the plaintiffs. The award

was filed in Court and a decree was passed in terms thereof. The properties had been attached by defendants Nos. 4 and 5 as the properties of their judgment-debtors, defendants Nos. 1 to 3, before the passing of the award, but were purchased by them in Court-auction after the decree. In a suit by the plaintiffs for possession of the properties:

Held, that as the attachment created no title in the defendants Nos. 4 and 5, it could not invalidate the award, but must be taken to be subject to the rights created by it, and that as the sale took place after the decree which was passed in terms of the award, it was subject to that decree. [p. 124, col. 1.]

Second appeal against the decree of the Court of the Subordinate Judge, Tinnevely, in Appeal Suit No. 88 of 1916, preferred against the decree of the Court of the Additional District Munsif, Tinnevely, in Original Suit No. 176 of 1915.

FACTS.—The plaintiffs and defendants Nos. 1 to 3 and several others were Pangalis in some villages but were enjoying their lands separately for several years. The defendants Nos. 4 and 5 obtained a decree against defendants Nos. 1 to 3 in Original Suit No. 23 of 1911 on the file of the Sub-Court, Tinnevely, and in execution of it brought the suit properties and several others to sale and purchased them themselves. The plaintiffs preferred claims against the attachment of plaint B and C schedule properties, on the ground that they were the separate properties of themselves and were in their separate enjoyment, but the claims were disallowed. They preferred no claim against the attachment of the D schedule property. They filed the present suit to get rid of the effect of the claim orders in respect of the plaint B and C schedule properties and of the attachment and sale of the D schedule property by establishing their title thereto.

Defendants Nos. 1 to 3 were *ex parte*. Defendants Nos. 4 and 5 pleaded that the suit properties were the separate properties of defendants Nos. 1 to 3 and enjoyed by them as such till Court delivery to themselves as Court auction-purchasers.

It transpired in the evidence that plaintiffs and defendants Nos. 1 to 3 and the other Pangalis referred their disputes to the arbitration of a Pleader, Mr. Joseph Nadar, who passed an award declaring plaintiffs' title to and possession of plaint B schedule items Nos. 1 to 4. Originally Suit No. 13 of

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1913 was filed in the Tuticorin Sub-Court to file the award and all the Pangalis were parties to it. The decree, Exhibit B. in the suit, was passed in the terms of the award.

The trial Court decreed for plaintiffs in respect of items Nos. 1 to 4 of B schedule and disallowed their claim in respect of the other properties.

On appeal, the Sub-Judge held that the C schedule properties were allotted to the plaintiffs by the award, though, by some mistake, it was omitted in the decree Exhibit B, and so he varied the decree by including the C schedule properties in the decree to the plaintiffs.

The 4th defendant and the legal representative of the deceased 5th defendant preferred a second appeal to the High Court.

Messrs. E. S. Chidambaram Pillai and P. N. Marthandam Pillai, for the Appellants.

Messrs. S. Ramaswami Aiyar and Gopalswami Aiyangar, for the Respondents.

JUDGMENT.—Though the appellants' attachment was before the date of the award which allotted the properties to the plaintiffs, their purchase was long after. Unless they are entitled to rely on their attachment as invalidating the award they must fail, as an attachment creates no title and their purchase must be taken to be subject to the rights created by the award. Section 64, Civil Procedure Code, avoids only private transfers and not awards such as the one we have here; such an award cannot be treated as a private transfer as it really only recognised plaintiffs' prior title. Furthermore, before the appellants' purchase, application had been made to the Court for passing a decree in terms of the award and a decree was so passed. The purchase was, therefore, subject to that decree.

The decree of the lower Court is right and the second appeal is dismissed with costs.

M. C. P.

Appeal dismissed.

ALLAHABAD HIGH COURT.

PRIVY COUNCIL APPLICATION NO. 3 OF 1918.

July 25, 1918.

Present:—Sir Henry Richards, Kt., Chief Justice, and Mr. Justice Tudball.

CHIRANJI LAL AND ANOTHER—PLAINTIFFS

—APPELLANTS

versus

BEHARI LAL AND OTHERS—DEFENDANTS—

RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 110—Appeal to Privy Council—Cross-appeals to High Court—High Court affirming part of decree and reversing part—Leave, whether can be granted.

Plaintiff's suit was decreed in part by the trial Court. There were cross-appeals to the High Court and the latter dismissed the plaintiff's appeal and accepted that of the defendant. The plaintiff applied for and obtained leave to appeal to the Privy Council against the decree by which the defendant's appeal had been accepted. He then applied for leave to appeal against the decree by which his own appeal had been dismissed and the trial Court's decree had to that extent been confirmed.

Held, that no substantial question of law being involved in the case and the trial Court's decree having been confirmed, leave to appeal to the Privy Council could not be granted. [p. 125, col. 1.]

Application for leave to appeal to His Majesty in Council under section 109, Civil Procedure Code.

Mr. B. E. O'Connor (with him the Hon'ble Dr. Tej Bahadur Sapru), for the Appellants.

The Hon'ble Dr. S. M. Sulaiman (with him Messrs. Baldev Ram Dave and Haribans Sahai), for the Respondents.

JUDGMENT.—This is an application for leave to appeal to his Majesty in Council. It appears that the Court below decided partly in favour of the plaintiff and partly against. Both parties appealed. In so far as the Court below decided in favour of the plaintiff, this Court set aside the decree of the Court of first instance and dismissed the plaintiff's suit. There has been an application to this Court for leave to appeal against this decree of the High Court and by our order this day delivered we have given the usual certificate. The present application is for leave to His Majesty in Council against the decree of this Court which affirmed the decision of the Court below and dismissed the plaintiff's suit. It has been argued that inasmuch as both the appeals arose out of the same suit and that this Court did not affirm in its entirety the decree of the Court of first instance, leave should be granted to appeal to His

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Majesty. It seems to us that inasmuch as the decree, which it is sought to appeal against, confirms the decision of the Court immediately below this Court, we have no power to grant a certificate unless we can certify that the appeal involves some substantial question of law. In the present case we are unable to certify that any substantial question of law is involved and it was not contended that any such question was involved. The proposed respondents appear and oppose the application, contending that they ought not to be put to the expense of a second appeal unless the plaintiff is entitled to appeal as a matter of right. For the reasons stated above, we are unable to certify that the case fulfils the conditions prescribed by section 110 of the Code of Civil Procedure, and we reject the application with costs.

Application rejected.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 209 OF 1917.

July 31, 1918.

Present:—Mr. Justice Heaton and
Mr. Justice Hayward.

RAMA SANTU RANDIVE—DEFENDANT

—APPELLANT

versus

DAJI NARU RANDIVE—PLAINTIFF

—RESPONDENT.

Hindu Law—Widow, decree against, whether binds reversioners—Consent decree—Award—Collusion.

Every case in which the reversioners of a deceased Hindu are sought to be bound by a decree obtained against the widow of the deceased, must be decided on its own particular circumstances, and the person who claims that the decree amounts to a bar against the reversioners must establish that the decree was fairly obtained either after a contest, or, if by consent, in such circumstances that the decree ought to be regarded as having been fairly and properly obtained. [p. 126, col. 1; p. 127, col. 2; p. 128, col. 1.]

Second appeal from the decision of the First Class Subordinate Judge, A. P., at Satara, in Appeal No. 77 of 1915, confirming the decree passed by the Subordinate Judge, Karad, in Civil Suit No. 427 of 1912.

Mr. D. R. Patwardhan, for the Appellant.

Mr. Ishvarlal K. Vakil, for the Respondent.

JUDGMENT.

HAYWARD, J.—The only question pressed in argument before us in this second appeal is whether the plaintiff's claim for the land in suit is barred by an award decree between his predecessor-in-interest, a widow, and the defendant, claiming by a Will from the last male owner. It has been contended on behalf of the defendant that the claim is so barred, relying upon the principle laid down by the Privy Council in the case of *Katama Natchier v. Rajah of Shivagunga* (1), in which their Lordships ruled at page 604 that a decree fairly obtained against the widow would bind reversioners. That principle was followed by their Lordships of the Privy Council in the subsequent cases of *Bhagbutti Devi v. Bholanath Thakoor* (2) and *Jugul Kishore v. Jotendro Mohun Tagore* (3) and was extended to a daughter holding a limited estate in the case of *Hari Nath Chatterjee v. Mothurmohun Goswami* (4).

The contention was not accepted by the First Class Subordinate Judge, relying upon the case of *Jeram Laljee v. Veerbai* (5) in which Batty, J., declined to apply principle either to a compromise or an award decree. This limitation of the principle was subsequently adopted by the Allahabad High Court in the cases of *Gobind Krishna Narain v. Khunni Lal* (6) and *Mahadei v. Baldeo* (7). In a later case [*Gur Nanak Prashad v. Jai Narain Lal* (8)] it was, however, held that a decree fairly obtained against the widow, even though the widow did not contest the suit, would bind the reversioners. This limitation of the principle suggested by Batty, J., was again rigidly laid down by a Bench of the Calcutta High Court in

(1) 9 M. L. A. 539 at p. 604; 2 W. R. P. C. 31; 1 Suth. P. C. J. 523; 2 Sar. P. C. J. 25; 19 E. R. 843.

(2) 2 L. A. 256 at p. 261; 1 C. 104; 24 W. R. 168; 3 Sar. P. C. J. 528; 3 Suth. P. C. J. 186; 1 Ind. Dec. (n. s.) 65 (P. C.).

(3) 11 L. A. 66 at p. 73; 10 C. 985; 8 Ind. Jur. 465; 4 Sar. P. C. J. 553; 5 Ind. Dec. (n. s.) 657 (P. C.).

(4) 20 L. A. 183; 21 C. 8; 17 Ind. Jur. 481; 6 Sar. P. C. J. 234; 10 Ind. Dec. (n. s.) 638 (P. C.).

(5) 5 Bom. L. R. 885.

(6) 29 A. 487 at p. 492; 4 A. L. J. 385; A. W. N. (1907) 151.

(7) 30 A. 75; 5 A. L. J. 43; A. W. N. (1908) 16.

(8) 14 Ind. Cas. 814; 34 A. 385; 9 A. L. J. 375.

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the case of *Rajlakshmi Dasee v. Katyayani Dasee* (9). On the other hand the Judges of the Madras High Court appear to have contemplated the possibility of a compromise decree against the widow binding the reversioners, though they did not act on that contemplation in the case of *Bhogaraju v. Adapalli* (10). The only other decision examined before us which has any bearing on this point was that of *Ghelhabai v. Bai Javer* (11), in which a decree fairly obtained against a widow was held to be binding on reversioners although the widow had withdrawn her appeal. It seems to me that this limitation of the principle appearing in these decisions has been founded upon the necessity of determining in each case, whether the decree could properly be said to have been fairly obtained against the widow as representing the whole estate including the rights of the reversioners, and upon the necessity of proceeding with special caution where the decree was a compromise or award decree, on the same grounds upon which it has been held that legal necessity must definitely be proved in the case of purchases from Hindu widows and that transactions must definitely be shown to have been explained and fully understood in the case of *pardah* women, as observed by Jenkins, C. J., in *Sumsuddin v. Abdul Hussein* (12). It is not necessary for the purposes of this case to go beyond this and consider whether this limitation has not been too rigidly laid down by the learned Judges of the Calcutta High Court in *Rajlakshmi Dasee v. Katyayani Dasee* (9) contrary to the general principle enunciated by the Privy Council.

Now it is necessary to look at the award decree to determine whether it could properly be said to have been fairly obtained against the widow as representing the whole estate including the rights of the reversioners. It there appears that the plaintiff's predecessor-in-interest, the widow Tai, was seeking to assert her claim to full ownership of the land in suit against the defendant, who was setting up title by

a Will alleged to have been obtained from her deceased husband Joti. The result of the arbitration was that the widow Tai's claim was dismissed, but ample provision was made for her maintenance during her life by actual residence with the defendant or, in case she found that inconvenient, by enjoyment of a separate dwelling-house and a cash maintenance allowance of Rs. 36 a year. It was in the latter case decided that after her death even that dwelling-house should become the absolute property of the defendant. That award was by consent of the parties and in their actual presence made a decree of the Court. It seems to me that the defendant, who produced and relied upon this award decree, had not merely to produce it but, in accordance with the principles already discussed, to prove further that it was fairly obtained against the widow, as representing not only her own interests but those of the reversioners as prescribed by the Privy Council. The defendant, however, failed to prove any such thing. On the contrary the award decree is open to the obvious criticism that the widow obtained practically all that she would be likely to need during her lifetime and would not appear to have paid particular attention to the interests of the reversioners. But there is, moreover, nothing in the award decree to indicate that the matter in dispute between the parties was actually contested before the arbitrator. There was in fact no such guarantee that due regard was had to the rights of the reversioners as there would have been, had the case been actively contested in regular proceedings in the Civil Court. It would not, in my opinion, be right in such circumstances to accept this award decree as a decree fairly obtained against the widow as representing the whole estate and so binding on the reversioners. It was, therefore, in my opinion, correctly disregarded by the First Class Subordinate Judge, as not falling within the general principle enunciated by the Privy Council.

It follows that the award decree bound the widow only and not the reversioners and that as the claim here is not under the widow but by right of purchase from the last reversioner, there can be no question of *res judicata* under the provisions of section 11 of the Civil Procedure Code.

(9) 12 Ind. Cas. 464; 38 C. 639 at pp. 672, 674.

(10) 12 Ind. Cas. 123; 35 M. 560 at pp. 561, 564; 10 M. L. T. 179.

(11) 17 Ind. Cas. 866; 14 Bom. L. R. 1142; 37 B.

172.

(12) 31 B. 165 at p. 175; 8 Bom. L. R. 781.

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The decision of the First Class Subordinate Judge ought, in my opinion, for these reasons to be confirmed and the appeal to be dismissed with costs.

HEATON, J.—I agree. But as the case is one of importance, I will state my conclusions in my own words. The case is of importance, because we have to determine whether the principle applied in *Shivagunga's case* (1) applies to the facts of this case. The principle is the prevention of a multiplicity of suits on the same cause of action. It applies at least in this particular: there is no doubt that in the litigation which took place between the widow of the last male holder and the present defendant, who was also the defendant in the earlier suit, the widow did represent the estate and not merely herself or her own interest. For she sought to recover the property as the estate of her deceased husband, that is to say, she was fighting or professing to fight the battle not only of herself but of her daughter and her daughter's son, who, next to the widow herself, were those most nearly interested. Therefore, it is that we have to see whether the principle applied in *Shivagunga's case* (1) applies in other particulars also.

The reason for applying the principle is stated in these words, which appear at pages 603 and 604 of 9 Moore's Indian Appeals: "It seems, however, to be necessary, in order to determine the mode in which this appeal ought to be disposed of, to consider the question whether the decree of 1847, if it had become final in Anga Mootoo Natchiar's lifetime, would have bound those claiming the Zamindari in succession to her. And their Lordships are of opinion that, unless it could be shown that there had not been a fair trial of the right in that suit—or, in other words, unless that decree could have been successfully impeached on some special ground, it would have been an effectual bar to any new suit in the Zillah Court by any person claiming in succession to Anga Mootoo Natchiar." Now it appears from what is stated at page 595* in the same report that the decree of 1847 was arrived at in a suit in which a large body of evidence had in fact been given by each side and it was, therefore, quite clear that, unless something

*Page of 9 M. I. A.—Ed.

to the contrary was made out, it was a really contested suit: a suit which had really been fought out. Those being the facts, their Lordships said, "in their opinion the decree must be binding not only on the widow but on the reversioners." Now here we have a case in which it is not shown that the suit between the widow and the present defendant was a really contested suit. I will mention six circumstances which clearly appear from the judgments and which as facts are not now contested by either side. The first circumstance is that the plaintiff in the suit was a Hindu widow. The second is that the defendant was next to the widow's own grandson the nearest reversioner, was a member of her husband's family and amongst the agnates of that family was actually the nearest of all to her deceased husband. The third is that the defendant based his claim to the property on a Will of which he never obtained Probate and which has never, so far as appears, been produced in a Court of Justice. The fourth circumstance is that an arbitrator was appointed by the parties and an award was made. The fifth is that there was an unopposed decree made by the Court according to the award; and the sixth and last circumstance I mention is that by this decree the widow had her residence and maintenance assured. Where you have circumstances such as these, it seems to me that you have at once the clearest indication of a probability that the decree was not a contested matter but was arrived at by either collusion or consent. When the interests of an agnate come into conflict with those of a Hindu widow, we know very well from experience that the interests of the widow are likely to find very slender protection.

These being the facts then it seems to me that although the Judge in appeal did not base his decision on them, his decision was perfectly correct.

In conclusion, I should merely like to add that I entirely agree with what my learned brother has said that in each case where the principle applied in *Shivagunga's case* (1) comes to be considered, we must deal with the circumstances of the particular case; and also that when a person produces a judgment and claims, on the principle applied in *Shivagunga's case* (1), that the judgment amounts to a bar against the rever-

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sioners, he has not done enough. It still remains for him to establish, where one of the parties was a Hindu widow, that the judgment has been fairly obtained either after a contest or, if by consent, in such circumstances that the consent decree ought to be regarded as a decree fairly and properly obtained.

I agree that this appeal should be dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 382 OF 1918
AND CIVIL MISCELLANEOUS PETITION No. 1178
OF 1918.

April 23, 1918.

Present:—Mr. Justice Oldfield.

In re N. N. KRISHNASWAMI IYER—

PLAINTIFF—PETITIONER.

Madras District Municipalities Act (IV Mad. of 1884), ss. 21, 27—Municipal Council, powers of—Disbursement of funds—Acquisition of lanes—Interference by Court, limits of—Civil Procedure Code (Act V of 1908), s. 115—Revision—High Court, powers of interference of—Error of law or fact.

The High Court will not interfere, in revision, with the finding or decision of a subordinate Court, under section 115 of the Civil Procedure Code, on the ground that it erred in law or fact in its appreciation of the merits. To justify the High Court's interference, there must be a want of, or a failure to exercise, jurisdiction by the subordinate Court. [p. 128, col. 1.]

Amir Hassan Khan v. Sheo Baksh Singh, 11 C. 6; 11 I. A. 237; 4 Sar. P. C. J. 559; Rafique & Jackson's P. C. No. 83; 5 Ind. Dec. (N. S.) 760, followed.

Under section 21 of the Madras District Municipalities Act a Municipal Council is a Corporation with power to contract and to do all things necessary for the purpose of its constitution, the Municipal fund being held by it under section 27 for the purposes of the Act. If the Council keeps within its authorization and acts *bona fide*, the Court will not interfere with its operations. It will be deemed the best judge, not only of what is most conducive to its own interest, but also of what is proper and fitting as regards third parties, and it will be left unchecked to take or not to take lands for promoting sanitation, etc. The Corporation is, however, protected only if it acts *bona fide*. [p. 128, col. 2; p. 129, col. 1.]

Petition, under section 115 of Act V of 1908, praying the High Court to revise the order of the District Court, South Malabar, dated the 23rd March 1918, in Civil Miscellaneous Appeal No. 13 of 1918, preferred

against the order of the Court of the District Munsif, Palghat, dated the 9th January 1918, in Miscellaneous Petition No. 4098 of 1917, in Original Suit No. 536 of 1917.

Mr. K. R. Guruswami Aiyar, for the Petitioner.

JUDGMENT.—In this petition, which comes before me for admission, I am asked to revise the order of the District Judge, South Malabar, dissolving an injunction granted by the District Munsif, Palghat, restraining the Palghat Municipal Council from making a certain payment from its funds pending decision of a suit for a permanent injunction in the same terms.

The first objection to this petition is that it discloses no ground for revision, fulfilling the requirements of section 115, Civil Procedure Code. The District Judge undoubtedly had the jurisdiction, which he exercised, to set aside the District Munsif's order, and no argument has been based on his commission of any material irregularity in that exercise. If, as is alleged, he erred in law or fact in his appreciation of the merits, that is not material [*Amir Hassan Khan v. Sheo Baksh Singh* (1)]. On this ground alone the petitioner must fail.

But further the learned District Judge does not appear to me to have erred in law. The payment above referred to is to be made for land acquired for a scavenging lane. It is not alleged before me that the Council's sanction for the expenditure is not formally regular or that the provision of such a lane is not within its power and duty. The injunction is claimed on the sole ground that the lane could be opened more cheaply and conveniently in another way, suggested by petitioner. The learned Judge has held that the District Munsif had not sufficient evidence before him to justify even a provisional conclusion to that effect and, though this is only suggested at the end of his paragraph 7, that interference with the Council's discretion exercised *intra vires* cannot be justified.

Only the second of these reasons calls for notice in revision. Under section 21 of Act IV of 1884 the Council is a Corporation with power to contract and to do all things necessary for the purpose of its constitution,

(1) 11 C. 6; 11 I. A. 237; 4 Sar. P. C. J. 559; Rafique & Jackson's P. C. No. 83; 5 Ind. Dec. (N. S.) 760 (P. C.)

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the Municipal fund being held by it under section 27 for the purposes of the Act, of which, it is not denied, the promotion of sanitation by the provision of lanes is one. And the law applicable to it, like other Corporations, is that "if it is keeping within its authorisation and acting *bona fide* the Court will not interfere with its operations. It will be deemed the best judge, not only of what is most conducive to its own interest, but also of what is proper and fitting as regards third parties and it will be left unchecked to take or not to take lands, etc." Brice on Corporations, 3rd Edition, 475. This statement of the law is supported by the learned author by reference to English authority and the cases relied on before me, *Dundee Harbour Trustees v. Nicol* (2) and *Vaman Tatyani v. Municipality of Sholapur* (3) afford no reason for distrusting it, since they deal only with the right of particular persons to sue, not the validity of their causes of action. "No doubt a Corporation is protected in accordance with the foregoing, only if its act is done *bona fide*. But this is not the test applied by the District Munsif's judgment or proposed on behalf of the petitioner here, except in so far as both depend on the illegitimate assumption that any *bona fide* opinion as to the acquisition must coincide with their own; and this assumption is particularly marked in connection with the former's refusal to consider the propriety of this acquisition in connection with the further one, which the Council alleged that it contemplated. In the absence of any attempt by the District Munsif to consider the Council's project as a whole and to decide whether this part of it was sanctioned, rightly or wrongly, in good faith, the injunction cannot be supported and the learned District Judge was right in setting it aside.

The civil revision petition is dismissed.

M. C. P.

Petition dismissed.

(2) (1915) A. C. 550; 84 L. J. P. C. 74.

(3) 22 B. 646; 11 Ind. Dec. (N. S.) 1012.

PATNA HIGH COURT.

APPEAL FROM ORIGINAL ORDER NO. 46 OF 1917

WITH CIVIL REVISION NO. 140 OF 1917.

December 21, 1917.

Present:—Mr. Justice Roe and

Justice Sir Ali Imam, KT.

DHANINDER DAS—APPELLANT

versus

Bakhshi HARIHAR PRASAD SINGH

—RESPONDENT.

Civil Procedure Code (Act V of 1908), ss. 47, 115 O. XXI, r. 96, O. XLVII, r. 1—Execution of decree—Delivery of possession, proceedings for, nature of—Order directing delivery of possession—Review—Jurisdiction of Court—Revision, whether lies.

Proceedings for delivery of possession are not proceedings in connection with the execution of a decree, and, therefore, no appeal lies against an order passed in such proceedings. [p. 129, col. 2.]

Where, through no fault of the judgment-debtor, the fact that an application for delivery of possession is barred by time is kept from the knowledge of the Court, and an order is passed directing delivery of possession, the Court has, on the fact being brought to its notice, jurisdiction to review its previous order and to bring it in accordance with law, and the High Court has no power to interfere in revision with the order passed on review. [p. 130, col. 1.]

Appeal from the order of the Subordinate Judge, Shahabad, dated the 6th February 1917.

Mr. Rajendra Prasad, for the Appellant.

Mr. Mirtunjay Lal, for the Respondent.

JUDGMENT.

Roe, J.—The facts of this case are briefly that on the 8th January 1917 the learned Subordinate Judge of Shahabad made an order for delivery of possession of property purchased in execution of a decree. On the 26th January 1917 the judgment-debtor applied to have that order set aside on the ground that the application for delivery of possession was on the face of it barred by limitation.

The matter was taken up on the 6th February 1917, and the learned Subordinate Judge, finding that the order for delivery was barred by limitation, ordered it to be cancelled. His order runs: "Objection is allowed and the delivery of possession is cancelled."

An appeal has been laid to this Court. But that appeal is obviously incompetent, for it is now settled law for this province that proceedings for delivery of possession are not proceedings in connection with the execution of a decree. We are asked, however, under section 115 to set aside the learned Subor-

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dinate Judge's order on the ground that it is made without jurisdiction. It is to be noted that the whole of the proceedings, both as conceived by the judgment debtor and by the learned Subordinate Judge, were taken under section 47 of the Code of Civil Procedure, a section which had nothing whatever to do with the matter: but it is urged before us that the Court had jurisdiction under Order XLVII to review its own order.

For the applicant reliance is placed on *Sasibhushan Mookerjee v. Radhanath Bose* (1). It was never suggested in that case that the Munsif had no power to review his own order erroneously made delivering possession. All that was said was that he had no power to review an order of his predecessor. It is clear from the decision in *Hadjee Abdollah Rent Hessein v. Hadjee Abdollah* (2) that this is a type of case in which a Court should review its own order. Through no fault of the judgment-debtor the important fact was kept from the knowledge of the learned Subordinate Judge that this application was time-barred. On the fact being brought to his notice by the judgment-debtor, the learned Subordinate Judge was, in our opinion, right in correcting his order and making it in accordance with law. We, therefore, decline to interfere. The appeal is dismissed with costs in accordance with the scale laid down. We make no order as to costs upon the application for revision.

IMAM, J.—I agree.

*Appeal dismissed;
Application rejected.*

(1) 25 Ind. Cas. 267; 19 C. W. N. 335; 20 C. L. J. 433.

(2) 2 C. 131; 3 I. A. 221; 26 W. R. 50; 1 Ind. Dec. (N. S.) 380 (P. C.).

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL NO. 115 OF 1917.

July 23, 1918.

Present:—Mr. Justice Heaton and
Mr. Justice Hayward.

SHIVBAI BABYA SWAMI—DEFENDANT
—APPELLANT

versus

YESU CHEOO NAYAKIN—PLAINTIFF—
RESPONDENT.

Civil Procedure Code (Act V of 1908), ss. 47, 144,

151—Decree, ex parte, set aside—Sale in execution of decree, whether can be set aside—Limitation Act (IX of 1908), Sch. I, Art. 181—Limitation for application to set aside sale, commencement of.

Plaintiff obtained an *ex parte* decree against the defendant and caused the latter's house to be sold in execution and purchased it himself. The defendant subsequently got the *ex parte* decree set aside but on a retrial of the case a decree was again passed against him. He then applied to have the previous sale of the house set aside:

Held, (1) that the *ex parte* decree having been set aside, the sale which was held in execution of that decree ought itself to be set aside as being no longer based on any solid foundation; [p. 131, col. 1.]

(2) that the application to set aside the sale could be treated as one under section 47, or section 144 or section 151 of the Civil Procedure Code; [p. 131, col. 1.]

(3) that the application was governed by Article 181 of Schedule I of the Limitation Act and that limitation began to run from the date on which the *ex parte* decree was set aside. [p. 131, col. 2.]

Appeal against the decision of the District Judge, Ratnagiri, in Appeal No. 44 of 1915, reversing the decree passed by the Subordinate Judge, Rajapur, in Miscellaneous Application No. 26 of 1914.

Mr. Nilkanth Atmaram, for the Appellant.

Mr. P. B. Shingne, for the Respondent.

JUDGMENT.

HAYWARD, J.—The plaintiff Yesu got an *ex parte* decree for Rs. 86 against the defendant Shivbai in 1906. Shivbai's house was sold in execution of that decree in 1910, but she succeeded in subsequently getting the *ex parte* decree set aside and in having the case retried. The plaintiff Yesu succeeded in the retrial in obtaining a decree against the defendant Shivbai for a sum of Rs. 87 in 1914. But Shivbai then applied to have the previous sale of the house in execution set aside. That application was granted by the Court of first instance, but was rejected by the Court of first appeal, which appears to have treated the application as one under section 47 of the Civil Procedure Code. Shivbai has accordingly come to get that decision set aside in second appeal.

The substantial point argued has been whether in the circumstances stated the previous sale of the house in execution could be set aside, and reliance has been placed for the finding in the negative upon the case of *Shivlal v. Shambhuprasad* (1). But it has been replied to that argument

(1) 7 Bom. L. R. 555; 29 B. 435.

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that that case referred particularly to the equities arising in favour of a third party being a *bona fide* purchaser for value without notice at the Court-sale. It seems to me that there is force in this argument, particularly in view of the remarks of the Privy Council in the case of *Zain-ul-abdin Khan v. Muhammad Asghar Ali Khan* (2), in which their Lordships of the Privy Council pointed out at page 172 that "there is a great distinction between the decree-holders who came in and purchased under their own decree, which was afterwards reversed on appeal, and the *bona fide* purchasers who came in and bought at the sale in execution of the decree, to which they were no parties, and at a time when that decree was a valid decree, and when the order for the sale was a valid order." That distinction has recently been again referred to in the case of *Set Umimal v. Srinath Ruy* (3). It seems to me, therefore, upon the equities and upon the authorities that the previous sale of the house in execution under the previous decree which had been set aside ought itself to be set aside, as being no longer based on any solid foundation.

There was also some argument as to the particular rule under which such an order could be made. It seems to me that the order must be held to be made, as decided without subsequent objection by the first appeal Court, under section 47 of the Civil Procedure Code, and if any further authority for such an order should be required, then it seems to me that a reference could be made either to section 144 or section 151 of the Civil Procedure Code. It has been urged that the former section does not cover a case in which an *ex parte* decree has been set aside. But it seems to me that the words used are sufficiently wide to cover even such a case, though the use of the word 'varied' or 'reversed' and the reference to 'the Court of first instance' would appear on first sight to have had primarily in view proceedings in appeal. But however that may be, the case would, in my opinion, undoubtedly be covered by section

(2) 10 A. 166 at p. 172; 15 I. A. 12; 5 Sar. P. C. J. 129; 6 Ind. Dec. (N. S.) 112 (P. C.).

(3) 27 C. 810; 4 C. W. N. 692; 14 Ind. Dec. (N. S.) 580.

151 of the Civil Procedure Code. There can, in my opinion, be no real doubt in such a case as to there being a second appeal, because the proceedings were, as already stated, under section 47 to which it has merely become necessary by reference to apply the provisions of section 144 or 151 of the Civil Procedure Code.

It was also suggested that the application ought to be regarded as time-barred under Article 166 of the Schedule to the Limitation Act. But that Article appears to be hardly applicable to the facts of this particular case. The cause of action accrued upon setting aside the *ex parte* decree in 1914 and taking that as the date from which limitation ran, the application would clearly be within time under the provisions of Article 181 of the Schedule to the Limitation Act.

We ought, therefore, in my opinion, to set aside the order of the first appeal Court and to direct that the previous sale of the house in execution should be set aside, but subject in all the circumstances to this condition that Shivbai pays up the amount now due from her under the second decree within three months of the decision of this second appeal.

Each party to bear his own costs throughout.

HEATON, J.—I have very little to add to the judgment just delivered. I would, however, add this. We have here a case of a wrong which has been done to the applicant, because her property was sold under an *ex parte* decree wrongly obtained. She was ignorant of the decree and even of the sale which thereafter took place under it and, therefore, was unable within the period allowed by limitation to get the sale set aside by the ordinary application, which must be made within one month. And if she is to get it set aside at all, it can only be either by suit or by an application of another kind. It has been decided by the District Court, and against this decision there was no appeal, that this application should be treated as one under section 47. We are, therefore, only concerned with the question whether the Court has the power to set aside the sale. That question my learned brother has dealt with and I agree to the order proposed.

Order set aside.

VADDIPARTHI MANGAYYA v. VADDIPARTHI VENKATABAMANAMURTHI.

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS PETITION NO. 1142 OF 1918.

August 15, 1918.

Present:—Justice Sir William Ayling, Kt.,
and Mr. Justice Seshagiri Aiyar.VADDIPARTHI MANGAYYA AND
ANOTHER—RESPONDENTS NOS. 1 AND 3—
PETITIONERS

versus

VADDIPARTHI VENKATA-
RAMANAMURTHI AND OTHERS—APPELLANT AND RESPONDENTS NOS. 2, 4, 6,
AND 9—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 109—
Appeal to Privy Council—Remand by High Court for
retrial—Leave, grant of, conditions determining—
Final judgment, test of—Judgment on merits on one
issue and remand on another—Certificate, grant of,
in respect of portion of judgment, propriety of.

Where a High Court, on appeal, remands a case
for retrial by the lower Court, there is no final
judgment against which the High Court can
grant a certificate to appeal to the Privy Council
under section 109, Civil Procedure Code. [p. 133, col. 1.]

Where every issue of fact has been found by the
Appellate Court and the remand is directed solely
with a view to give the consequent reliefs depend-
ent on the conclusions of the Appellate Court, the
judgment must be regarded as final within the
meaning of that expression in section 109 (a), Civil
Procedure Code [p. 133, col. 1.]

The mere fact that a judgment has not been
given on a preliminary point will not render it
necessarily a final adjudication. The question in
each case will be whether the pronouncement by
the Appellate Court has given a final decision upon
all the rights litigated [p. 133, col. 1.]

Saiyid Muzhar Hossein v. Musammat Bodha Bibi,
17 A. 112; 5 M. L. J. 20; 2 I. A. 1; 6 Sar. P. C. J. 590;
8 Ind. Dec. (N. S.) 397 (P. C.), explained.

Tirunarayana v. Gopalasami, 3 M. 344; 4 Ind. Dec.
(N. S.) 356; *Nayari Venkataranga v. Venkatarama
Narasimha*, 2 Ind. Cas. 842; 38 M. 509; 26 M. L. J.
93; 14 M. L. T. 540; (1914) M. W. N. 4; and *Nuri Mian
v. Ganges Sugar Works Limited*, 32 Ind. Cas. 360; 38
A. 150; 4 A. L. J. 50 F. B.), followed.

Where a final decision is given on one of the
issues on the merits and a retrial is ordered in
respect of the other points or issues, the judgment
is not final under section 109 a, Civil Procedure
Code, and leave cannot be granted to appeal to the
Privy Council in respect only of the adjudication on
the merits [p. 133, col. 2]

Petition, presented under section 110 of
the Code of Civil Procedure, praying that,
in the circumstances stated therein, the
High Court Court will be pleased to grant
a certificate to enable the petitioners to
appeal to His Majesty in Council against
the decree of the High Court in Appeal
No. 79 of 1917, preferred to the High Court
against the decree of the Court of the

Temporary Subordinate Judge, Cocanada, in
Original Suit No. 39 of 1916.

Mr. P. Narayanamurthi, for the Peti-
tioners.

Mr. P. Somasundaram, for the Respondents.

ORDER.—We uphold the preliminary
objection that leave should not be granted
in this case. The suit was for partition.
There are two sets of properties. As
regards the first of them, the defence was
that the defendants were the holders of
the service in respect of which the *inam*
was granted, that they were enjoying the
property by doing the service, and that
consequently plaintiff was not entitled to
claim his share in it. As regards the
second set of properties, it was contended
that the parties had become divided in
respect of it long ago and that it was
not open to the plaintiff to claim a re-
partition. Issues one and two relate res-
pectively to the two sets of properties. The
other issues were general in their nature,
and raise questions of limitation and *res
judicata*. The Subordinate Judge held that
the first set of properties was not divisible,
that the claim of the plaintiff was barred
by limitation and *res judicata* and dismissed
the suit. He gave no specific finding on
the second issue. On appeal we differed
from the Subordinate Judge on the ques-
tion of the divisibility of the *inam* lands
and overruled him on the questions of
limitation and *res judicata*. In this view
we remanded the suit for disposal on the
merits. The two outstanding questions on
which findings of fact had to be arrived
at by the Subordinate Judge related to
the re-partition of the second set of pro-
perties and to the accountability of the
defendants for the income of the first set of
properties.

This application has been made for leave
to appeal against our judgment. It was
opposed on the ground, among others, that
as we directed a retrial on remand, there
is no final judgment against which an
appeal can be preferred to the Privy
Council. We think this contention is
right. Mr. Narayanamurthi places strong
reliance on the observations of the Judicial
Committee in *Saiyid Muzhar Hossein v.
Musammat Bodha Bibi* (1). It is true that,

(1) 17 A. 112; 5 M. L. J. 20; 22 I. A. 1; 6 Sar. P. C.
J. 590; 8 Ind. Dec. (N. S.) 397 (P. C.).

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where every issue of fact has been found by the Appellate Court and the remand is directed solely with a view to give the consequential reliefs dependent upon the conclusions of the Appellate Court, the judgment must be regarded as final within the meaning of that expression in section 109, clause (a) of the Civil Procedure Code. At the same time we are unable to agree with the learned Yakil that, unless the judgment of the Appellate Court proceeds upon a preliminary point, it should be regarded as a final adjudication. For example, there may be reversal upon a question of adoption decided by the first Court and a consequent remand for the purpose of ascertaining the extent and nature of the properties to be decreed in favour of the plaintiff. It may be that, on remand, notwithstanding the finding in favour of the plaintiff on the question of adoption, he may fail to obtain any relief whatsoever in the suit. Under such circumstances it would be futile to grant leave to appeal to the Privy Council. The decision of this Court in *Tirunarayana v. Gopalasami* (2) supports the view we have taken. The question in each case will be whether the pronouncement by the Appellate Court has given a final decision upon all the rights litigated. *Nayari Venkataranga v. Venkatarama Narasimha* (3) quotes with approval the earlier Madras case and we see no reason to differ from these two decisions. The Allahabad High Court considered the matter very fully in a recent Full Bench decision in *Nuri Mian v. Ganges Sugar Works, Ltd.* (4) and our conclusions are in accordance with that decision.

Mr. Narayanamurthi argued that as the judgment is final within the meaning of the Judicial Committee in *Saiyid Muzhar Hussein v. Musammam Bodha Bibi* (1) in respect of the first set of properties, he is entitled to prefer an appeal in regard to it. The result of upholding this contention would be to split up a suit into a number of claims and to give the party against whom a judgment has been given upon one of them a right of appeal to the Judicial Committee. Such a course would

be obviously wrong. We have, therefore, come to the conclusion that the judgment appealed against, notwithstanding that it gave a decision on the merits in respect of one set of properties, is not a final judgment contemplated by section 109 (a) of the Civil Procedure Code and that the leave asked for should be refused. No costs.

M. C. P.

Leave refused.

PATNA HIGH COURT.

CIVIL REVISION No. 300 OF 1917.

January 11, 1918.

Present :—Sir Dawson Miller, Kt., Chief Justice, and Mr. Justice Mullick.

AGABEG—PETITIONER

versus

Musammam SUNDARI—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. XL, r. 1, O. XLIII, r. 1 (s)—Receiver, appointment of—Objection by person in possession, dismissal of—Appeal, whether lies.

The applicant advanced money to one T., and in consideration of that was appointed manager of T.'s estate and was put in possession of it. Subsequently certain creditors of T. obtained a decree against him and in execution of that decree a Receiver was appointed and put in possession of T.'s estate. Thereupon the applicant preferred an objection to the appointment of the Receiver and to the delivery of possession of the estate, which was dismissed:

Held, that the order dismissing the applicant's objection came within Order XL, rule 1 of the Civil Procedure Code, and was appealable under Order XLIII, rule 1 (s) of the Code. [p. 134, col. 2.]

Revision against an order of the Subordinate Judge, Deoghur, dated the 27th September 1917.

Messrs. *Susil Madhab Mullick and Bama Charan Lahiri*, for the Petitioner.

Mr. *Pugh* (with him Mr. *Nares Chandra Senha*), for the Opposite Party.

JUDGMENT.—In this case an application is made on behalf of Mr. Alfred A. Agabeg asking us to exercise our powers under section 115 of the Code of Civil Procedure and review a decision of the Subordinate Judge of Deoghur, dated the 27th September 1917. It appears that the applicant advanced money to one Thakur

(2) 13 M. 349; 4 Ind. Dec. (N. S.) 956.

(3) 21 Ind. Cas. 842; 38 M. 509; 26 M. L. J. 96; 14 M. L. T. 560; (1914) M. W. N. 64.

(4) 32 Ind. Cas. 360; 38 A. 150; 14 A. L. J. 50 (F. B.).

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Ashutosh Deo, Ghatwal of Rohini, and in consideration of that he was appointed manager of his estate on the 4th May 1914, put into possession, and Thakur Ashutosh Deo received apparently a monthly allowance. A little later on the applicant was served with a notice of discharge. Thereupon he instituted a suit and obtained a declaration to the effect that he was entitled to remain in possession and to collect the rent to pay off the debt in accordance with the terms of the agreement, which was a written agreement entered into on the 4th May 1914. Subsequently he appears to have advanced some further money and got a usufructuary mortgage in respect of Basuri Mahal, which was the same or part of the same property. On the 17th July Musammam Sundari and Debi Prasad Marwari obtained a decree against Thakur Ashutosh Deo for a sum of Rs. 4,725, and in execution of that decree a Receiver was appointed and he was put in possession of the property in respect of which the present applicant was already exercising, or claimed that he was exercising, rights of possession. Thereupon a written objection was filed by the applicant to the appointment of the Receiver, and to the delivery of papers and demanding a return of the papers already delivered. This objection came on before the same Court, that is, the Court of the Subordinate Judge at Deoghur, and was decided on the 27th September 1917, and the objection by the present applicant was dismissed. Now the question arises whether we are entitled under section 115 of the Civil Procedure Code to exercise our powers of revision upon that order passed by the Subordinate Judge of Deoghur dismissing the objection of the applicant. The parties appear to have been somewhat uncertain themselves, whether they were entitled to come before us by way of revision or whether there was in fact an appeal from the order of the Subordinate Judge, and, therefore, an appeal has also been lodged, but the appeal would, in the ordinary course, come before the District Judge. The question as to which is the proper procedure to adopt depends upon Order XL, rule 1. If the order dismissing the applicant's objection comes within Order XL, rule 1, then no doubt there is an appeal from such an order, and we have

got to consider in this case whether it does come under that order or not. It seems to us that the order made by the Subordinate Judge of Deoghur was clearly within the terms of Order XL, rule 1. It did in effect remove the applicant from possession or custody of the property, and that being so, the exact wording in which the order was made does not seem to be very material if it did in effect carry out the powers provided by Order XL, rule 1. In a case which was recently before this Court which has not been reported but which has been brought to our attention, an objection was taken that no appeal lies in a similar sort of case. We are informed that although the objection was taken the point was not seriously argued and the question was not thoroughly gone into before the Court, but it appears that the Court in that case seems to have said quite shortly: "This objection must be given effect to as Deo Narain was not a party to the suit" (he was the applicant) "and therefore he has no right of appeal to this Court." Thereupon the Court assumed jurisdiction under section 115 to exercise its powers of revision and issued a Rule, but that decision was given, I understand, without any real argument upon the point and I do not think the authorities were considered. But the High Court of Calcutta in the case of *Rowland Hudson v. John Pierpont Morgan* (1) considered this question, and in a considered judgment they came to the conclusion that in a case on all fours with the present case a right of appeal did lie. It was said in that case, as it has been said here, that as the appellant was not a party to the order, that is the order appointing the Receiver, he had no right of appeal. That point was duly considered amongst others and the Court determined that in cases of this sort a right of appeal did lie. We entirely agree with that decision and that being so, we think that the application before us to-day to review the decision of the learned Subordinate Judge cannot be entertained. The case will go in the ordinary course before the District Judge on appeal, the subject-matter of the appeal will be determined by him and this application will be dismissed. There

(1) 1 Ind. Cas. 353; 36 C. 713; 13 C. W. N. 654; 9 C. L. J. 563.

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is also an application made to us to transfer the case from the file of the Subordinate Judge to this Court, but we do not think sufficient grounds have been made out for granting that application and it will accordingly be refused. The Rule will be discharged with costs.

Rule discharged.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL NO 1051 OF 1916.

July 24, 1918.

Present:—Sir Basil Scott, Kt., Chief Justice,
and Mr. Justice Shah.

MORU NARSU GUJAR—PLAINTIFF—

APPELLANT

versus

HASAN FATTEKHAN JUMMAL—

DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 47, O. XXI, r. 2—Execution of decree—Payment out of Court not certified—Adjustment, whether can be recognised—Sale, whether fraudulent—Transfer of Property Act (IV of 1882), s. 52—Mortgage suit—Transfer, pendente lite, validity of.

Plaintiff obtained a mortgage decree on foot of an unregistered mortgage and purchased the mortgaged property in execution of the decree. He obtained formal possession but not actual possession, which was with the defendant who was a subsequent mortgagee of the property. During the pendency of the suit the mortgagor executed another mortgage in favour of the defendant. Subsequently the plaintiff brought a suit to redeem the earlier mortgage executed in favour of the defendant and the latter set up the plea that the Court sale under which the plaintiff claimed title was fraudulent, inasmuch as the decree had been satisfied before the sale was held:

Held, (1) that under section 47 of the Civil Procedure Code the question as to the satisfaction of the decree was a question arising in execution, which should have been tried by the executing Court under that section or, at the discretion of that Court, by suit; [p. 136, col. 1.]

(2) that in either case the Court would be precluded from recognising an uncertified adjustment; [p. 136, col. 1.]

(3) that under section 52 of the Transfer of Property Act, the mortgagor who was a party to the plaintiff's mortgage suit could not transfer the property by way of mortgage so as to affect the rights of the plaintiff to bring the property to sale free from such burden. [p. 137, col. 1.]

(4) that, therefore, the plaintiff was entitled to redeem the earlier mortgage held by the defendant and was not affected by the mortgage executed during the pendency of his suit. [p. 136, col. 2; p. 137 col. 1.]

Second appeal from the decision of the Assistant Judge, Thana, in Appeal No. 152 of 1914, reversing the decree passed by the Subordinate Judge, Mahad, in Civil Suit No. 383 of 1912.

Messrs. Bahadurji and Jayakar, (with them Mr. V. B. Virkar), for the Appellant.

Mr. Ceyajee (with him Mr. P. B. Shingne), for the Respondent.

JUDGMENT.

SCOTT, C. J.—The plaintiff sues for possession of Survey No. 87, plot No. 1, from the defendant No. 2 or in the alternative for possession after redemption of a mortgage or mortgages upon it now vested in the defendant No. 2.

The plaintiff's father advanced Rs. 30 upon mortgage of the land in question from one Mariam, one of two female co-owners of the property. The mortgage was unregistered.

A decree was obtained on this mortgage in Suit No. 153 of 1899. The property was put up for sale by the Court in execution and on the 9th of January 1901 was purchased with the Court's permission on account of the 2nd plaintiff, then a minor, who claimed as heir of the original mortgagee.

Formal possession under the purchase was obtained on the 19th of April 1901. Actual possession could not be obtained, for the land was in possession of the father of the defendant No. 1 under a subsequent but registered mortgage by Mariam or her co-owner Zuleika. Two further mortgages in favour of the 1st defendant were effected by Mariam pending the prosecution of the proceedings in Suit No. 183 of 1899. Zuleika had died prior to the Court-sale in 1901 and Mariam as her heir and in her own right was thus entitled to the whole outstanding equity of redemption. In 1903 Mariam purported to sell to the father of defendant No. 1 her interest in, *inter alia*, the land in suit and the defendant No. 2 claims as purchaser from the defendant No. 1.

The defendants in their written statement alleged that the decree and sale in the suit of 1899 were fraudulent.

In the trial Court the plea of fraud was negatived and the plaintiff was given a decree for redemption of the land in suit on payment of a sum of Rs. 420 as the proportion of the mortgage debt of Mariam to the defendant No. 1 applicable to the suit land, on the footing that the mortgages

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pendente lite were not effectual against the plaintiff.

On appeal the lower Appellate Court found that the Court sale under the decree of 1901 was fraudulently obtained, inasmuch as money of the judgment-debtor held for satisfaction of the decree was in the hands of those appearing for the 2nd plaintiff at the time of the sale and the plaintiff's suit was dismissed. From that decree this appeal has been preferred.

It is contended that the question of fraud in the execution of the decree ought not to have been investigated upon a vague plea of fraud in the written statement in a redemption suit and that the plea of satisfaction of the mortgage decree prior to the Court-sale should not have been entertained since the adjustment had not been certified, in view of the provisions of Order XXI, rule 2.

It is contended on the other side that it is only the Court executing the decree, and not the Court trying the suit for redemption, that is precluded from recognising an uncertified adjustment. If, however, the provisions of section 47 are observed, it becomes apparent that a question relating to the satisfaction of the decree is a question arising in execution which must be tried by the executing Court under that section or, at the discretion of that Court, by suit. In either case the Court would be a Court precluded from recognising the adjustment: see *Prosunno Kumar Sanyal v. Kali Das Sanyal* (1). It is, I think, very undesirable that a defendant should, by a plea, such as we have in this suit, be permitted after the lapse of many years to call in question a title acquired at a Court sale which was never challenged by the judgment-debtor, though she was alive at the time of the trial of this suit and may still be alive. I am not prepared to acquiesce in the suggestion that this should be treated as a suit in which the question of satisfaction, whether fraudulent or otherwise, before the Court sale may now be raised. The diametrically opposite conclusions arrived at by the trial and Appellate Courts upon the recorded evidence, relating, as it does, to events of eleven or twelve years ago, demonstrate the advantage

of allowing no deviation from the strict rules of procedure in connection with the issue in question. Nothing in this judgment must be taken as throwing doubt upon the propriety of the Court in the exercise of its inherent powers allowing the investigation of a question of fraud in order to prevent injustice. Here there is no question of injustice. Any investigation of title prior to the defendant No. 1's purchase in 1903 would have disclosed the decree and Court sale in the mortgage suit of 1899. The defendants, therefore, cannot complain if redemption is allowed on the footing of their interest, as mortgagees still subsisting. The trial Court was right in holding that the mortgages effected during the prosecution of proceedings in the suit of 1899 were ineffectual as against the plaintiff.

We set aside the decree of the lower Appellate Court and restore that of the trial Court with costs in the lower Appellate Court and this Court on the defendants.

SHAH, J.—I entirely agree.

I desire to add that, apart from fraud, there can be no doubt about the plaintiff's right to redeem the mortgages now vested in defendant No. 2. The mortgage of 1884 was unregistered and, therefore, not entitled to priority over the subsequent registered mortgages in favour of defendant No. 1's father, according to the provisions of section 50 of the Indian Registration Act. The plaintiff should have joined the subsequent mortgagees as a party to the suit of 1899 in view of section 85 of the Transfer of Property Act then in force; but the omission to join him does not involve the consequence that he loses his rights as a purchaser at the Court-sale with the leave of the Court in execution of his decree. It is needless to refer to the cases cited in the course of the arguments. On the facts it is clear that the plaintiff is entitled to redeem the mortgages in favour of defendant No. 1 as the purchaser of the right, title and interest of Mariam, who was undoubtedly entitled to redeem them at the date of the Court sale.

The last two mortgages out of the five in favour of defendant No. 1's father were effected during the pendency of the plaintiff's suit of 1899 and of the execution proceedings in that suit. It is clear that

(1) 19 C. 683; 19 I. A. 166; 6 Sar. P. C. J. 209; 9 Ind. Dec. (N. S.) 898 (P. C.).

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the plaintiff was actively prosecuting the suit and the execution proceedings from the date of the suit to the date of the Court sale. Under section 52 of the Transfer of Property Act, Mariam, who was a party to the suit, could not transfer the property by way of mortgage so as to affect the rights of the plaintiff to bring the property to sale free from such burden. These mortgages clearly affected the plaintiff's right under the decree, which he could resist as a purchaser at the Court sale in execution of that decree. The decisions in *Shivjiram Sahebram Marawadi v. Waman Narayan Joshi* (2) and *Rachappa v. Mangesh* (3), though not under section 52 of the Transfer of Property Act, clearly support this view.

Appeal accepted.

(2) 22 B. 939; 11 Ind. Dec. (N. S.) 1209.

(3) (1598) P. J. 386.

PUNJAB CHIEF COURT.
CIVIL MISCELLANEOUS PETITION No. 45
OF 1918.

July 22, 1918.

Present:—Mr. Justice Scott-Smith and Mr. Justice Wilberforce.

NEKI AND OTHERS—PLAINTIFFS—RESPONDENTS
—PETITIONERS

versus

CHAJJU RAM AND OTHERS—DEFENDANTS—
APPELLANTS—RESPONDENTS.

Pre-emption, suit for—Plaintiff suing for himself and others—Suit, whether liable to be dismissed—Civil Procedure Code (Act V of 1908), O. XLI, r. 27 cl. (2), O. XLVII, r. 1—Appeal—Additional evidence, admission of—Review—Decree, whether can be set aside on happening of subsequent event—Procedure.

The mere fact that a pre-emptor is suing not only for his own benefit but also for the benefit of persons who are not entitled to pre-empt the property, does not disentitle him from exercising his right of pre-emption [p. 139, col. 1.]

Poor and rich alike are equally entitled to the privileges of pre-emption and to hold that a poor man cannot seek the financial assistance of others in prosecuting his suit would be, in many cases, to disqualify him from the exercise of his rights. [p. 139, col. 1.]

A mere omission to comply with Order XLI, rule 27 clause 2, of the Civil Procedure Code, does not render the additional evidence taken in second appeal inadmissible especially when no objection is taken by the opposite party. [p. 138, col. 1.]

Section 23, Civil Procedure Code of 1882, does not authorize a review of a decree which was right when it was made on the ground of the happening of some subsequent event. The proper course in such cases is to request the Court to accept additional evidence regarding the subsequent event and the Court is

justified in taking such evidence into consideration. [p. 138, col. 2.]

Civil miscellaneous petition for review of the decree and judgment of the Punjab Chief Court, in Civil Appeal No. 2739 of 1914, reported as 43 Ind. Cas. 177, decided by Mr. Justice Scott-Smith and Mr. Justice Leslie Jones on 3rd November 1917.

The Hon'ble Pundit Sheo Narain, Messrs. Munohar Lal, Duni Chand and Morton, for the Petitioners.

The Hon'ble Mr. Muhammad Shafi, Dr. G. C. Narang and Mr. Nanak Chand, for the Respondents.

JUDGMENT.—The plaintiffs, who are 20 in number and occupancy tenants of their village, sued for pre-emption in respect of a sale of 4,493 *bighas* 14 *biswas*, being the whole of the village of Kagsar. They stated the market price to be Rs. 15,000, which they were willing to pay. The first Court granted them a decree for Rs. 23,000, which was duly deposited and a final decree was granted in their favour. The vendee appealed to the Chief Court and additional evidence being put in to show that plaintiffs were not suing for their own benefit alone, but also on behalf of other non-agriculturists, the appeal was accepted and the suit dismissed with costs. Against this decision an application for review was preferred and has been argued at length before us. To understand the points involved, it is necessary to refer to the original pleadings of the parties.

In reply to the plaint the vendee stated in paragraph 8 of the *jawab-i-dawa* that the plaintiffs were not entitled to relief as they had brought the suit at the instigation of other persons, who had supplied them with funds, and that they were litigating for the sake of other persons. The plaintiffs totally deny these allegations, stating that they had not instituted the suit at the instigation and for the benefit of other persons, and that under any circumstances, if they had taken money from other persons, this could make no difference in their rights. An issue was duly framed; but no evidence was produced on the question involved and the decision thereon was in favour of the plaintiffs. The decision of the lower Court was dated 13th August 1914. After the institution of the appeal to this Court, mutation was about to take place in favour

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of the plaintiffs, when they requested that it should be effected also in the names of other persons on the ground that these persons were partners with them in the pre-emption suit. This application was at first refused but finally sanctioned by the Commissioner. The net result has been that approximately one-third of the land in suit has been mutated in the names of the plaintiffs and the remainder in the names of non-agriculturists of their village. The defendant vendee, on obtaining information of these proceedings, requested permission on 9th July 1917 to put in an additional ground of appeal to the effect that the suit had been brought in the interests of third persons, who were non-agriculturists and had no right of pre-emption. In support of this ground of appeal the vendee put in subsequently on 17th December 1917 copies of the mutation proceedings. This additional evidence was admitted subject to all just exceptions. The appeal came on for hearing in due course, and Counsel for the plaintiffs-respondents having been recently engaged, and being inadequately prepared, asked for time especially to consider the new evidence put in. He was granted an adjournment for one hour and then proceeded to argue the case. It is admitted that he made no objection to the admission of the new evidence tendered; and it was on this evidence that the decision of the appeal was based.

It is now sought to review the previous judgment on the grounds (1) that the additional evidence should not have been admitted; and (2) that the decision of the Bench is opposed to the well-accepted law on the subject. On the first point Counsel for the petitioners first referred to the fact that the Appellate Court had not complied with the provisions of clause 2, Order LII, rule 27. This objection was not seriously pressed; and we do not consider that mere omission to comply with the rule renders the evidence inadmissible, especially in view of the fact that no objection was taken by Counsel for the respondents. Counsel then proceeded to refer to various authorities, in which the admission of additional evidence was disallowed. The first three authorities were *Kessou i Issur v. G.*

I. P. Railway (1), *Krishnama Chariar v. Narasimha Chariar* (2) and *Garden Reach Spinning and Manufacturing Co. v. Secretary of State* (3). The first two authorities are not in point, as the additional evidence desired to be produced was in existence at the time of the decree and it was held that under such circumstances the proper remedy was under section 623 of the old Civil Procedure Code by way of review. As for the 3rd case, the additional evidence had come into being after the decree, and though this fact was noted by Fletcher, J., it was apparently overlooked at the time of writing judgment. On the other hand, the Privy Council in *Kotagiri Venkata Subbamma Rao v. Vellanki Venkatorama Rao* (4) has clearly laid down that section 623 of the old Civil Procedure Code does not authorise review of a decree which was right when it was made, on the ground of the happening of some subsequent events. It is clear, therefore, that the appellants took the proper course in requesting the Court to accept additional evidence regarding the subsequent events and that the Court was justified in taking such evidence into consideration. The strongest ground, however, for not accepting the application for review on this point is that at the hearing of the appeal no objection whatever was made to the admission of this evidence by Counsel for the respondents.

As for the merits of the case, we have no doubt that the decision sought to be reviewed did not give a correct exposition of the law. The judgment was based on certain *obiter dicta* contained in *Brij Nath v. Jita* (5) and on *Ramsukh Das v. Faizuddin* (6) and it was held that as plaintiffs, according to their own admission, were not suing for themselves alone but for themselves and other persons, they were not entitled to a decree. It is clear that the remarks of Bullocks, J., in *Brij Nath v. Jita* (5) were in no way necessary for the decision of the suit; and it is also to be noted that his

(1) 31 B. 381; 9 Bom. L. R. 671; 11 C. W. N. 721; 6 C. L. J. 4; 4 A. L. J. 461; 17 M. L. J. 347; 34 I. A. 115; 2 M. L. T. 435 (P. C.).

(2) 31 M. 114; 3 M. L. T. 308.

(3) 28 Ind. Cas 865; 42 C. 675; 19 C. W. N. 401.

(4) 21 M. 1; 4 C. W. N. 725; 27 I. A. 197; 10 M. L. J. 221; 2 Bom. L. R. 771; 7 Sar. P. C. J. 674 (P. C.).

(5) 135 P. R. 1894.

(6) 19 P. R. 1898.

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learned colleague did not share his opinion. In the Punjab Record No. 19 of 1898 [*Ramsukh Das v. Fazl-ud din* (6)] the head-note is misleading and moreover that judgment could only be referred to as an authority in the case of a *benami* plaintiff, viz., a person suing entirely for the benefit of another. In the present case, it is clear that the plaintiffs were suing mainly, at any rate, for their own benefit. Both of these judgments were discussed in *Mahmud Bakhsh v. Hassan Bakhsh* (7), which contains, in our opinion, a correct exposition of the law. There are many other authorities on the same point, e.g., *Ramsukh Das v. Fazl-ud-din* (6), *Jiwan Singh v. Sher Singh* (8), *Manohar Lal v. Pars Ram* (9) and *Ahsan-ullah v. Jowahir Lal* (10). It is argued on behalf of the vendee-respondent that the main object of pre-emption being to exclude strangers from the village and non-agriculturists from purchasing land and plaintiffs, having joined with themselves persons disentitled to pre-empt, have made themselves parties to the defeat of the principles for which they contend, and that if the other partners had been made plaintiffs, they could not have succeeded. We are not impressed with the force of this argument. At the worst, if the other partners in the litigation had been made plaintiffs, the plaint would have been ordered to be amended by the exclusion of their names, vide *Murad v. Mine Khan* (11) and *Hira Lal v. Ibrahim* (12), or a decree would have been granted in favour of the entitled pre-emptors alone, vide *Sharaf v. Pir Baksh* (13). Nor do we consider that the action of the plaintiffs in joining with them other persons as purchasers can be considered as defeating the principles on which the pre-emptive right is based. Poor and rich alike are equally entitled to the privileges of pre-emption, and to hold that a poor man cannot seek the financial assistance of others in prosecuting his suit would be, in many cases, to disqualify him from the exercise of his rights. This is not the inten-

tion of the law, nor is there any authority of this Court to this effect.

We hold, therefore, that the previous decision of this case proceeded upon an incorrect exposition of the law and that the plaintiffs' suit should not have been dismissed on the ground that other persons were helping them in the litigation. We, therefore, accept the application for review and as all the grounds of appeal were not dealt with in the previous judgment, we direct the appeal to go before the Bench for their decision. Parties can bear their own costs of to-day's hearing.

Petition accepted.

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS PETITIONS NOS. 627 AND 628 OF 1918 CONVERTED INTO CIVIL REVISION PETITIONS NOS. 398 AND 399 OF 1918.

April 18, 1918.

Present:—Mr. Justice Oldfield and Mr. Justice Bakewell.

A. V. RAMACHANDRA AYYAR—

PLAINTIFF—PETITIONER IN BOTH

versus

RAJU *alias* VYTHIANATHAN, MINOR
REPRESENTED BY S. AYYASWAMI AYYAR,
AND ANOTHER—DEFENDANTS NOS. 1

AND 2—RESPONDENTS IN BOTH.

Civil Procedure Code (Act V of 1908), s. 115—Receiver, appointment of—Court, refusal of, to help Receiver to discharge his duties—Jurisdiction, refusal to exercise—Revision—High Court, power of interference of.

A Court is bound to assist the Receiver appointed in a suit in the execution of his duties by issue of all necessary orders to the parties and by enforcing them, if necessary, by contempt proceedings, and its refusal to take action or postponement of it is a refusal to exercise jurisdiction within the meaning of section 115 of the Civil Procedure Code. [p. 140, col. 2.]

Where, therefore, a Receiver was appointed in a suit to have custody of certain jewels and on his representing to the Court that the jewels were with the respondent, the Court directed him to sue the latter and when the Receiver filed the suit, the Court postponed the trial of the suit:

Held, that the Court failed to exercise a jurisdiction vested in it by law within the meaning of section 115, Civil Procedure Code. [p. 140, col. 2.]

C. M. P. No. 627 of 1918

CONVERTED INTO C. R. P. No. 398 of 1918.

Petition, under section 107 of the Government of India Act, praying the High Court to direct the Subordinate Judge, Mayavaram, to take steps to recover the jewels mentioned in schedules (C) and (C 5)

(7) 11 Ind. Cas. 708; 7 P. R. 1912; 239 P. L. R. 1911; 155 P. W. R. 1911.

(8) 10 P. R. 1902; 172 P. L. R. 1901.

(9) 67 P. R. 1907; 38 P. W. R. 1907; 51 P. L. R. 1907.

(10) 87 P. R. 1896.

(11) 94 P. R. 1895.

(12) 102 P. R. 1894.

(13) 83 P. R. 1893.

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attached to the plaint in Original Suit No. 1 of 1916 on its file, revising the order of the Court of the Sub-Judge, Mayavaram, dated the 6th November 1917, on the Receiver's application, dated the 11th October 1917, in the said Original Suit No. 1 of 1916.

C. M. P. No. 628 of 1918

CONVERTED INTO C. R. P. No. 399 of 1918.

Petition, under section 107 of the Government of India Act, to direct the Court of the Sub-Judge, Mayavaram, to take proceedings against the 2nd respondent herein for contempt of Court in having unauthorisedly dealt with the said jewels in the said Original Suit No. 1 of 1916.

Mr. K. S. Jayarama Aiyar, for the Petitioner in both.

Messrs. N. Chandra Sekara Aiyar and E. Vinayaka Row, for the Respondents in both.

JUDGMENT.—In Civil Miscellaneous Petition No. 627 of 1918 we are asked to direct the lower Court to take steps for the recovery from the 2nd counter-petitioner of certain jewels in order to their delivery to plaintiff, a Receiver appointed, *inter alia*, to have the custody of them pending disposal of Original Suit No. 1 of 1916 on the lower Court's file.

A preliminary objection has been taken to the form of the petition, on the ground that this Court's order appointing plaintiff Receiver provided that he should work under the lower Court's direction and that this Court consequently cannot itself issue directions to him or the lower Court in the matter and can interfere with the directions given by the lower Court only by way of revision and within the limits prescribed by section 115, Civil Procedure Code. It is true that, although the judgment directing appointment was passed in appeal against the lower Court's order refusing to appoint, the formal order drawn up contained the provision relating to the Receiver working under the lower Court's direction, as though the Receiver had been appointed as this Court's Receiver in a proceeding pending before it. There was, however, nothing corresponding with that provision in the judgment and, since, strictly read, it would clearly have been inappropriate, we think that it must be construed as entailing nothing beyond what would follow from the appointment which we made in appeal, the Receiver's subordi-

nation to the lower Court. So reading it, we think ourselves at liberty to deal with the petitions before us as presented in revision and to consider them with reference to section 115 of the Code of Civil Procedure.

The petitioner was appointed Receiver to take charge of certain jewels. His allegations are that he could not get possession of them, though 2nd respondent had them, and that when he moved the lower Court to enquire into those allegations, it told him, he could sue and on his suing postponed enquiry until the trial of the suit, in which the appointment was made.

Authority is clear that the lower Court was bound to assist the petitioner in the execution of his duties by issue of all necessary orders to the parties to the litigation and by enforcing them; if necessary, by contempt proceedings, and its refusal to take action or postponement of it was, therefore, a clear refusal to exercise jurisdiction, such as section 115 contemplates. This is not disputed. The object of the Receiver's appointment was that he should have custody of the jewels pending the trial, and, unless he obtains them, his appointment will be useless. In these circumstances we set aside the lower Court's order, dated 6th November 1917, and direct it to restore petitioner's petition to file and proceed to enquire into it and dispose of it according to law in the light of the foregoing without further delay. Respondent will pay petitioner's costs in Civil Miscellaneous Petition No. 627 of 1918 (Civil Revision Petition No. 398 of 1918) in this Court. His costs to date in the lower Court will follow the result of his petition.

Civil Miscellaneous Petition No. 628 of 1918 (Civil Revision Petition No. 399 of 1918) is for a direction to the lower Court to take proceedings against 2nd respondent for contempt and is premature at present. It is dismissed.

Petition No. 627 allowed;
Petition No. 628 dismissed.

M. C. P.

JAGGARNATH PERSHAD v. CHITRAGUPTA NARAIN SINGH.

NARAYAN, GANESH GHATATE v. BALIRAM.

PATNA HIGH COURT.

CIVIL REVISION No. 178 of 1917.

January 15, 1918.

Present:—Mr. Justice Roe and

Mr. Justice Jwala Prasad;

JAGGARNATH PERSHAD—PETITIONER

versus

CHITRAGUPTA NARAIN SINGH—

OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. XXI, r. 66—Execution of decree—Sale proclamation—Valuation of property to be sold, method of.

Where an executing Court directed that the value of the property to be sold should be reckoned at twenty times the Government Revenue:

Held, that this was only a colourable pretence of exercising the jurisdiction vested in the Court by law to ascertain the actual value of the property and record it in the sale proclamation and that the Court should ascertain the value of the property by a reference to the rent-roll and to the Record of Rights showing the extent of the *zirais* and *bekasht* lands of the village.

Appeal against an order of the Subordinate Judge, Muzaffarpur, dated the 14th April 1917.

Mr. Chandra Sekhar Banerji, for the Petitioner.

Mr. Harnarain Prasad, for the Opposite Party.

JUDGMENT.—In this case the learned Subordinate Judge has directed that the value of the property should be reckoned at twenty times the Government Revenue. This we can regard only as a colourable pretence of exercising the jurisdiction vested in him by law to ascertain the actual value of the property and record it in the sale proclamation. We should have been willing to ascertain the value for ourselves, but the learned Vakil for the decree-holder asks for a remand that the matter may be properly enquired into. We, therefore, direct the learned Subordinate Judge to ascertain the value of this property by a reference to the rent-roll and to the Record of Rights showing the extent of the *zirais* and *bekasht* lands of the village. The application is allowed. The decree-holder will pay the costs of the hearing.

Application allowed.

PRIVY COUNCIL.

APPEAL FROM NAGPUR JUDICIAL COMMISSIONER'S COURT.

May 9, 1918.

Present:—Lord Sumner, Sir John Edge, Mr. Ameer Ali and Sir Walter Phillimore, Bart.

NARAYAN GANESH GHATATE—

PLAINTIFF—APPELLANT

versus

BALIRAM AND ANOTHER—DEFENDANTS—

RESPONDENTS.

C. P. Tenancy Act (XI of 1898), s. 45, applicability of—Sir lands—Mortgage registered before commencement of Act—Award of Conciliation Board after passing of Act, effect of.

A mortgagee of certain villages including *sir* lands obtained the usual preliminary decree for foreclosure in a suit on the mortgage on 30th June 1899. The matter was then referred to a Conciliation Board which made its award on 20th February 1905, which provided that the amount payable under the said decree should be considerably reduced, that the reduced amount should be paid in the manner therein stated, and that in default of payment only seven of the mortgaged villages should be foreclosed. No mention was made of *sir* lands. The award was filed in Court under section 525 of the Code of Civil Procedure, 1882, and a decree was passed in terms of the award, and on 18th June 1910 that decree was made final as the foreclosure decree, in which the names of the seven villages to be foreclosed were given, but no mention was made of the *sir* lands. In execution the mortgagee decree-holder claimed actual possession of the *sir* lands in the seven villages:

Held, (1) that the conciliation award was a fresh origin of rights between the parties, and that although it came into existence in consequence of the registered mortgage and the transactions thereunder, it was, both for the purpose of enforcement and for the purpose of the application of section 45 of the Central Provinces Tenancy Act, 1898, as amended by Act XXI of 1899, the transaction between the parties which was the foundation of their rights; [p. 146, col. 2; p. 147, col. 1.]

(2) that sub-section 1) of section 45 of the Central Provinces Tenancy Act must be applied to the case and that, therefore, in spite of the terms of the award, the mortgagor could not so transfer his right to occupy *sir* lands as to divest himself of his right as an occupancy tenant under the Act: [p. 147, col. 1.]

(3) that consequently, the mortgagee could only obtain symbolical or constructive possession of the *sir* lands, the actual possession remaining with the mortgagor as occupancy tenant of the lands. [p. 147, col. 1.]

Appeal from the judgment and decree of Mr. Batten, A. J. C., and Mr. Stanyon, A. J. C., Nagpur, dated the 8th May 1911, in First Appeal No. 94 of 1910.

FACTS appear from the following judgment of Mr. Batten, A. J. C., and Mr. Stanyon, A. J. C.:—

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"It is expedient to state, as far as possible in chronological order such facts of this case as are material to the question raised by this appeal.

On the 17th January 1881 a deed of mortgage by way of conditional sale was executed by two brothers Ganpati and Tukaram in favour of Gopal Narayan Ghatate and Gopal Hari Bhide. The consideration for this deed was a debt of Rs. 16,000 and the property mortgaged comprised 15 villages, and some cattle and grain. Again, on the 11th December 1884 the same mortgagors executed another deed of mortgage by way of conditional sale in favour of the same mortgagees, whereby they incumbered practically the same property with another Rs. 2,000 as principal. The original mortgagors are now represented by their sons, the present respondents Baliram and Parashram; and the original mortgagees are now represented by the son of one of them, Ganpat Gopal Ghatate, the present appellant. On the 16th February 1898 the mortgagees sued to enforce the said mortgages, and obtained a foreclosure decree nisi on the 30th June 1899—also dated 8th July 1899—for Rs. 86,106-8-0 due on the mortgages, and Rs. 2,177-11-0 as costs. Future interest at 6 per cent. per annum was also awarded. The *dies datus* was 30th December 1899. The decree in gave effect to the mortgage, by including the property governed thereby the cultivating rights of the mortgagors in the *sir* and *khudkasht* lands. The judgment-debtors sought by appeal (Appeal No. 52 of 1899 in the Court of the Judicial Assistant to the Commissioner) to have the decree modified, at least as to some of the villages, so as to secure for the mortgagors an ex-proprietary tenant right in *sir* lands under section 42 of Act IX of 1883. The appeal was dismissed on the 6th November 1899. An application by the judgment debtors for an extension of time having been refused by the first Court, was allowed in appeal (Appeal No. 30 of 1900 in the Court of the Divisional Judge, decided on 27th November 1900). Time was extended to the 15th May 1901. No payment having been made, the decree-holder applied on the 17th June 1901 for an order absolute, and this was

granted to him on a date which, from the order sheet, we find was the 24th July 1901. An appeal (No. 84 of 1901) was made to the Divisional Court, which, in view of impending proceedings by a Conciliation Board, set aside the order absolute on condition that the mortgagee-decree-holder should remain in possession of the mortgaged estate, and be accountable for the profits, pending disposal of the case by the said Board. Subsequently the Board dealt with the matter, and, having obtained a proper reference from the parties, made an arbitration award on the 20th February 1905.

This award showed the liability of the judgment debtors, up to the 31st December 1902, to be as follows:—

	Rs.	a.	p.
Decretal sum ...	88,281	3	0
Interest ...	19,409	10	6
Total ...	1,07,693	13	6
Costs of village management ...	2,592	10	6
Total ...	1,10,286	8	0
Amount realised ...	39,821	15	3
Gross Balance ...	70,464	8	9
Struck off by Board...	56,714	8	9
Net balance ...	13,750	0	0

Future interest on this sum was settled at 6 per cent. per annum, and the scheme for re-payment was as follows:—

(1) The debt to be paid in nine annual instalments commencing from the 1st May 1905.

(2) The first three instalments to consist of interest on the above sum only. The 4th instalment to be Rs. 6,750 *plus* interest on the whole debt. The remaining five instalments to be Rs. 1,400 each *plus* interest on the whole sum outstanding due.

(3) In default of any two instalments the whole sum to become exigible, and if not

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paid, the mortgaged property mentioned in the award to be foreclosed.

(4) Interest at 6 per cent. per annum to run on instalments in default from the date of default.

The following condition was also entered in the award, the word *sahukar* having reference to the decree-holder:—

"That the *sahukar* has the same right to the mortgaged property which he had before the award by virtue of the mortgage deed. In case of default of the instalments entered in the award, the conditions of the mortgage deed shall be enforced in connection with such debt as has been entered by us in column 5 of the award."

The award having been signed by the arbitrators, the following 'Notes' were appended to it:—

NOTE 1. This award is exempt from stamp duty under Government of India Resolution No. 2305 of May 1903.

2. In accordance with section 525, Civil Procedure Code, this award will have to be filed in the Court of competent jurisdiction within 6 months of the date of receipt thereof for obtaining a decree.

As regards the collateral security, the terms of the award ran thus:—

"On failing to pay any two instalments, the whole sum to be paid at once, and the villages mentioned below to be foreclosed. The remaining villages, in which the *sahukars* had an interest under their mortgage deeds, be excluded from the claim."

The villages named in the award are: (1) Garada, (2) Malkazari, (3) Kambazari, (4) Arabkasa, (5) Chorkhamara, (6) Pindkepar, and (7) Sukli. It was in the course of these proceedings that the present appellant bought out his co mortgagee and decree-holder, and became the sole owner of the mortgagees' rights under the award.

On the 12th August 1905 the decree-holder applied that the award be filed under section 525 of the Code of Civil Procedure, 1882, and a decree be passed under it. This was done by the District Court on the 18th September 1905, when a decree *nisi* in terms of the award was made and delivered. The sanguine hopes of the philanthropic administrators which had led to conciliatory proceedings between debtors and creditors were not realized in the present case, and, on the 14th August 1908,

the decree-holder applied for an order absolute as a sequel to the decree *nisi* of 18th September 1905. The judgment-debtors remaining absent, the decree was made absolute, in their absence, on the 19th September 1908. A subsequent application by the judgment-debtors to re-open the case having been disallowed on the 21st November 1908, the judgment-debtors appealed to this Court—Miscellaneous Appeal No. 53 of 1908. On the 21st September 1909, Skinner, Additional Judicial Commissioner, set aside the decree absolute and extended time for payment of the decretal sum, now over Rs. 20,000, till the 6th October 1909. No payment was made, and a further application to Skinner, Additional Judicial Commissioner, for time, made by the judgment-debtors, was referred down, with certain observations, for disposal by the lower Court. Eventually, on the 16th June 1910, the decree of 18th September, 1905, based on the award, was once more made absolute. Against this latest decree, Baliram, one of the judgment-debtors, made an appeal—First Appeal No. 65 of 1910—to this Court, and we dismissed that appeal on the 5th instant.

Meanwhile, on the 11th January 1909 (under the previous decree absolute which Skinner, Additional Judicial Commissioner, set aside), the decree-holder had applied for possession of the foreclosed estate. These execution proceedings were stayed on the 3rd March 1909, in obedience to an order from this Court issued by Skinner, Additional Judicial Commissioner. After the decree had again been made absolute, warrants for possession were once more ordered to issue on the 23rd July 1910. These warrants directed possession of the villages, but made no express mention of any *sir* or *khudkasht* lands or of any houses. The decree-holder construed them as excluding, from the property to be delivered to him, the dwelling houses and home farms of the judgment-debtor. He, therefore, paid no process fees, and the warrants did not issue. When the case came up for hearing on the 6th August 1910, the decree-holder filed an application which we reproduce so far as it refers to the question now before us:—

1. The Court had on 16th June 1910 ordered the decree-holder to take possession of

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the mortgaged property, and accordingly a warrant for possession of the mortgaged property was issued. But the Nazir refused to give the decree-holder possession of the villages with *sir* and *khudkasht* fields or houses (as they) were (not) mentioned in the warrant. The decree-holder, therefore, declined to take possession of the villages excluding *sir* and *khudkasht* fields and houses. The decree-holder's agent then orally requested the Court to issue warrant for possession of the villages with *sir* and *khudkasht* fields and houses mortgaged with him. But the Court refused the decree holder's prayer, and again on 23rd July 1910 ordered warrant to issue for possession of the mortgaged villages excluding *sir* and *khudkasht* fields and houses.

2. The villages together with *sir* and *khudkasht* lands and houses were mortgaged with the decree-holder. The decree-holder had obtained decree for foreclosure in respect of the same. The Conciliation Award gave to the decree-holder the same rights as he possessed under the mortgage and original decree obtained by him. The Court's decree based on award could not affect his rights under the mortgage or the original decree. The decree-holder is, therefore, entitled and prays to be placed in possession of the whole of the property inclusive of the right to cultivate *sir* and *khudkasht* lands and houses of the different villages foreclosed in his favour.

'The decree-holder prays further that the decree based on award, if decided to be ambiguous and not consistent with the terms of the award, may be amended and the specific terms be embodied in the decree.'

On presenting this application, the agent for the decree-holder added that, unless *khās* possession of the *sir* and *khudkasht* lands was ordered, he did not want any possession of the villages at all.

Under these circumstances the Court below passed the following order:—

'The decree does not specify transfer of the villages with the *sir* and *khudkasht* land. It mentions only the villages, and the decree-holder cannot, therefore, be put in possession with the *sir* and *khudkasht* rights. Hence possession of the villages without these rights was ordered. As, however, the decree-holder declines to take

such possession, the application is struck off. Costs on the decree-holder.

'As regards the prayer for amending the decree, the decree-holder must make a separate application. Such an application cannot be entertained in these proceedings. 'Struck off as wholly infructuous.'

It is against this order that the present appeal is made, upon the single ground that 'upon a right interpretation of the decrees, mortgage-deeds, and award, the decree-holder was entitled to possession of the *sir* and *khudkasht* lands, and the houses, as prayed for.'

There can be no doubt that if the rights of the parties, *inter se*, were governed only by the contract of mortgage and the decree which had replaced it, the complete success of this appeal would be inevitable. The deed of mortgage, and the original foreclosure decree based thereon, gave the mortgagees, *inter alia*, a contingent right to physical possession of the *sir* and *khudkasht* lands and all the houses of the mortgagors. The Conciliation Award expressly preserved for the mortgagees all their rights under the original mortgage, in respect of the seven villages to which the mortgage was confined; and the decree absolute now standing is intended to be in accordance with the award.

But the matter does not rest entirely upon the contract between the parties and the decree of the Court in enforcement thereof. We have to consider how far, if at all, it is affected by section 45 of Act XI of 1898. Sub-sections (1) and (6) thereof are those with which we are concerned. They are as follows:—

(1) Notwithstanding any agreement to the contrary, and save where sanction has been given under sub section (2); a proprietor who, after the commencement of this Act, temporarily or permanently loses (whether under decree or order of a Civil Court or a Revenue Officer or otherwise), or transfers his right to occupy *sir* land as a proprietor, shall, at the date of such loss or transfer, become an occupancy tenant of that *sir* land, and the rent payable by him, as such, shall be the sum determined at the current settlement as the rental value of such land, unless and until, on the application of either landlord or

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tenant, the rent is fixed by a Revenue Officer.

* * * * *

'(6) Nothing in this section shall affect a document duly registered before the commencement of this Act; and, on any surrender or transfer, such as is described in sub-section (1), being made, decreed, or ordered, in pursuance of such a document, the rights of the parties to occupy the *sir* land shall accrue as if this Act had not been passed.'

An explanation suffixed to the section provides that 'for the purposes of this section a transfer includes a mortgage and a lease.'

The effect of these statutory provisions upon the rights of the parties to the present case is not free from difficulty. The language of the enactment leaves something to be desired. There is no mention of any surrender in sub-section (1), and we assume that the word 'surrender' contained in sub-section (6) is singularly misused as synonymous with what is called 'loss' in the former sub-section. It is clear that subject to the saving provisions of sub-section (6), the only condition necessary for the application of sub-section (1) to cases where sanction under sub-section (2) has not been obtained is that the loss or transfer of the proprietary interest should have taken place after the 21st October 1898, when the enactment embodying it came into force. It is also manifest that the mortgage deeds of 1881 and 1884, in this suit, and the foreclosure decree of 30th June 1899 made in pursuance of them were covered by the proviso contained in sub-section (6). But those deeds and that decree were extinguished by the Conciliation Award of February 1905, which had the same legal effect as an entirely fresh contract. The fact that some of the terms of the previous contract or decree were repeated would not keep such contract or decree in legal existence. The award became as much a fresh starting point as a novation would have been. Suppose, instead of resorting to arbitration, the parties had adjusted the foreclosure decree of 30th June 1899 by the execution of a fresh deed of mortgage, executed in February 1905, duly registered and embodying all the terms contained in the award. From the date of such deed,

the rights and liabilities of the parties, *inter se*, would rest upon this deed, without power of reversion to the decree extinguished by it. For the purpose of subjection to Statute Law, the contract would date from February 1905. In the same way, the mortgage rights of the decree-holder now arise out of, and rest on, the award and, whether we treat the proprietary interest of the mortgagors as transferred on the 20th February 1905—the date of the award—or as lost on the 16th June 1910—when the final decree was made—the change took place after commencement of the Act, and sub-section (1) aforesaid operated to create an ex-proprietary occupancy tenant right in favour of the mortgagors. It makes no difference that neither the Conciliation Board nor the parties were aware of this, and intended to preserve the original rights. Such preservation, on novation in 1905, was beyond the power of contract, and, therefore, beyond the power of arbitration award. The decree-holder did not realize that, in giving up his decree of 30th June 1899, for an entirely new arrangement made in 1905, he was finally giving up his right to obtain cultivating rights in the *sir* land; and the loss of such rights, by application of sub-section (1), may even be inconsistent with the practice of the Legislature in regard to vested interests if the decree-holder's right over *sir* land under the decree of June 1899 could be called a vested interest: but there is the Statute, and we are bound to give effect to it. The award of February 1905 was neither 'a document duly registered before the commencement' of Act XI of 1898: nor did it make, decree, or order, any surrender or transfer 'in pursuance of such a document.' It substituted something for that which died with its birth, and we think that it cannot by any straining of language be brought within sub-section (6) of the said section 45, so as to prevent the application of sub-section (1).

We, therefore, hold and declare that from and after the 20th February 1905 the judgment-debtors became entitled to occupancy tenure of the *sir* fields in the mortgaged villages, and though this tenure remained merged while they held proprietary right in such fields, it emerged

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into active life on the 16th June 1910 when the proprietary interest passed to the decree-holder by foreclosure absolute. Hence the decree-holder can only obtain symbolical or constructive possession of the *sir* land in the mortgaged villages, physical possession remaining with the judgment-debtors as occupancy tenants. The order of the lower Court is inaccurate and misleading, because it does not distinguish between the proprietary possession of the decree-holder and the occupancy tenure under him of the judgment-debtors.

The inclusion of *khudkasht* lands with *sir* land by the lower Court is quite unwarranted by law. The decree-holder's claim to possess such *khudkasht* lands as are not *sir* is of course irresistible, and the District Judge ought to have seen that. This error must be corrected in any future execution proceedings.

Then as regards houses. As to these the order appealed against is silent, and it appears advisable to point out the law. Such houses as stand on the *sir* land remain with the judgment-debtors as occupancy tenants of those lands. Though the decree-holder, as the landlord, is now the proprietor of them, they remain subject to the occupancy tenure of the judgment-debtors. As regards houses in the *abadi*, the rights of the judgment-debtors now rest on the *wajib-ul-arz*, and the decree-holder, though undoubtedly owner of the soil and possibly, by operation of the law of mortgage, owner also of the houses standing on the soil, cannot evict them while they remain occupancy tenants. As to houses neither in the *abadi* nor on *sir* land, the decree-holder's claim for possession cannot be resisted, and the Court must, when required, give effect to it.

We have endeavoured to point out the rights of the parties *inter se* as a result of the final decree of 16th June 1910; but though the lower Court was in error concerning the *khudkasht* lands and houses, this appeal must nevertheless fail. The lower Court rightly refused to order *khas* possession of the *sir* land, and the decree-holder abandoned his execution application unless, *inter alia*, that was given to him. Therefore his application

was validly dismissed, and cannot be restored in appeal. If and when the decree-holder is ready to accept possession of the villages which have passed to him, subject to the judgment-debtors' rights under the Tenancy Act and the *wajib-ul-arz*, he may apply again for execution.

We dismiss this appeal, but under the circumstances we direct that each party do bear his own costs thereof as incurred."

Mr. De Gruyther, K. C. (with him Mr. J. M. Parikh), for the Appellants, submitted that the two registered mortgages of 1881 and 1884 and the decree, dated the 30th June 1899, were not extinguished, and all further proceedings, *viz.*, reference to the Conciliation Board, their award, the decree on the award, were all proceedings under that decree. Only the two mortgages could be foreclosed and they expressly included *sir* land. Reference was made to Act XI of 1898, section 2; Central Provinces Land Revenue Act, 1881 (Act XVIII of 1881), section 4, and the Transfer of Property Act, 1882 (Act IV of 1882), sections 67, 86 and 87.

The respondents did not appear.

JUDGMENT.

LORD SUMNER.—This is an appeal against a judgment of the Court of the Judicial Commissioner of the Central Provinces, which affirmed an order of the District Judge made in execution proceedings on a foreclosure decree. The point has been very clearly argued, but their Lordships do not think it necessary to take time to consider the matter further.

The history of the case, which is rather complicated, is set out chronologically and very conveniently in the judgment appealed against. The point for decision is one dependent on the construction of section 45 of the Central Provinces Tenancy Act of 1898, Chapter IV, "Of Occupancy Tenants", and particularly sub-section 6 of that section.

The substance of the decision of the Court below was that the Conciliation Award of February 1905 was, for the purposes of this case, a fresh origin of the rights between the parties, and that although it came into existence in consequence of the mortgages of 1881 and 1884 and transactions thereunder, it was, both for the

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purpose of enforcement and for the purpose of the application of this particular section, the transaction between the parties which was the foundation of their rights. Accordingly they concluded that the transfer made or decreed by the proceedings under review could not be said to be in pursuance of the older mortgages of 1881 and 1884 which, as documents expressly providing for the transfer of the right to occupy *sir* land as a proprietor within sub-section 6, would have been saved from the operation of sub-section 1, but that in truth sub-section 1 of section 45 must be applied, and that, therefore, in spite of the terms of the award, which in virtue of the agreement of reference became the agreement of the parties, the mortgagor could not so transfer his right to occupy *sir* land as to divest himself of his right as an occupancy tenant under the Act.

The reasons, their Lordships think, are sufficiently and fully given in the judgment appealed against and do not require repetition. It is a question of construction, not incapable of being argued and even decided either way, but their Lordships see no reason to differ from the decision appealed against, and will humbly advise His Majesty that the appeal be dismissed, but without costs, as the respondents have not appeared.

Appeal dismissed.

Solicitor for the Appellant.—Mr. E. Dalgado.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2145 OF 1917.

July 26, 1918.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

CHINNASWAMI PILLAI AND ANOTHER—
PLAINTIFFS—APPELLANTS

versus

APPASWAMI PILLAI AND ANOTHER—

DEFENDANTS—RESPONDENTS.

Hindu Law—Surrender of life-interest by limited owner—Surrender by widow and daughter in favour of next reversioner with reservation for maintenance, validity of.

A surrender by a Hindu widow and her daughter of their life-interest in the property of the last male owner in favour of the next reversioner, with a condition that they should be maintained by the latter, is valid and operative and accelerates the inheritance of the reversioner making him full owner of the property on that date. [p. 148, col. 2; p. 149, col. 2; p. 150, col. 2.]

Per *Sadasiva Aiyar, J. (Napier, J. dubitante)*.—The principle that onerous obligations attached to a surrender by a widow will invalidate the surrender does not apply to the case of a daughter who inherits as next heir. The only condition which can be imposed on principle upon any female heir other than the widow is that the surrender should be of the whole estate. The act of a daughter who, being the next heir, surrenders the whole estate, vests the absolute inheritance in the next male heir, even if she reserves as consideration for her surrender the full enjoyment of the property during her lifetime. [p. 149, cols. 1 & 2.]

Per *Sadasiva Aiyar, J.*—A stipulation for her own maintenance by the widow will not affect the legal result of the surrender. [p. 148, col. 2.]

A Hindu female who surrenders an estate does not become civilly dead from the date of the surrender for any purpose, except for making the person in whose favour the surrender is made heir to her husband's estate. [p. 149, col. 1.]

Per *Napier, J.*—A surrender by a limited female owner need not necessarily be in favour of the next heir if that heir agrees to be passed over, and it is immaterial whether the next heir is a party to the deed of surrender or executes a deed of surrender for herself or simply consents to being passed over. [p. 149, col. 2.]

Where an arrangement made at the time of surrender, though retaining a benefit for the person surrendering or even conferring a benefit on some person not entitled, is an obviously fair and just arrangement for the maintenance and benefit of the person surrendering, then the surrender is not vitiated by the arrangement. [p. 150, col. 1.]

Second appeal against the decree of the District Court, Trichinopoly, in Appeal Suit No. 376 of 1916, preferred against the decree of the Court of the District Munsif, Ariyalur, in Original Suit No. 542 of 1915.

FACTS appear from the judgment.

Mr. T. B. Ramachandra Aiyar (with him Mr. T. R. Krishnaswami Aiyar), for the Appellants.—The surrender by the widow in this case is not to the next heir, who is the daughter, so as to fall within the principle upholding the validity of a surrender by a limited owner to the next reversionary heir. Nor is it an unconditional surrender. There is a benefit retained to the surrenderors, viz, the provision for their maintenance. The condition or reservation falls within the mischief of the rule in *Sriramulu Naidu v. Andalarn*

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mal (1). It is not a surrender in good faith. The widow must become civilly dead on the date of the surrender.

Mr. P. Nagabhusanam, for the Respondents.—The surrender does not militate against any principle of Hindu Law. It is immaterial that another limited owner entitled to succeed next after the widow joins in the surrender. The reservation as to maintenance is not an onerous condition so as to vitiate the surrender. It was a fair arrangement seeing that one of the surrenderors, the daughter, was entitled to be maintained by the surrenderee who is her own son. The whole estate was surrendered and there was no provision for a return of the property to the persons surrendering.

JUDGMENT.

SADASIVA AIYAR, J.—The plaintiffs are the appellants. On the date of the suit they were the reversionary heirs of one Chandram Pillai who died in about 1890, leaving a widow as his next heir and a daughter as the next expectant heir after the widow. A son was born to the daughter in 1893. When he was a year old the widow and the daughter executed the surrender deed Exhibit I, dated 2nd April 1894, in his favour, he being represented by his father and guardian, the 1st defendant. That document was a complete surrender of all the rights of the two executants in the estate of the last male owner Chandram Pillai. But there is a provision in the document that the 1st defendant as guardian of his infant son and the infant himself after he attained majority, should protect the two executants, meaning evidently that they should be maintained. The infant died about 2 years afterwards, say in 1896, and the plaintiffs now sue for the recovery of the properties from the 1st defendant, the widow and the daughter having died. The question is, whether the deed of surrender, Exhibit I, accelerated the inheritance to Chandram Pillai's estate of the 1st defendant's infant son and made him the full owner of the property on that date.

That a widow could surrender her limited interest in her husband's estate to the next reversioner so as at once to vest the property in the next reversioner is now settled

law, provided that the whole estate is surrendered. The point argued for the appellants is, that the present case is not a surrender by the widow to the next reversionary heir but it is a surrender by the widow and the next reversionary heir, who is also a female, to the second reversionary heir. Even regards the question I think there are observations in *Mulugu Kotayya v. Mudigonda Chandramowli Sastri* (2). See also *Prolab Chunder Roy Chowdhry v. Sreemutty Joy Monee Dabee* (3), which establishes the rule of law that a surrender by a widow with the consent of the next female heir to the secondary male heir can be treated as a joint surrender by both and that such a joint surrender might be treated as a surrender by the widow to the next female heir, which vests the property in the next female heir for a moment, and an immediate surrender of the property so vested for a moment in the next female heir by the latter to the next male heir, the result being to vest an absolute title in the secondary male heir. Next, it is objected that if the widow reserves any benefit for himself when making the surrender, the surrender is not one made in good faith in consonance with the principles of Hindu Law and hence it is invalid. In the present case the widow stipulated that the male reversioner's guardian and the male reversioner after attaining majority should support herself and her daughter. Taking first the provision for her own maintenance I do not think that a stipulation for her own maintenance by a widow can affect the legal result of the surrender. The language of the judgment in *Sriramulu Naidu v. Andalammal* (1) suggests that if a widow making a surrender imposes on the reversioner nothing more onerous than the obligation to maintain the widow, such a surrender would be valid and would vest the title in the reversioner. This is also in conformity with the principles of Hindu Law, a surrender being allowed by that law, as stated by Seshagiri Aiyar, J., in *Nachiappa Gounden v. Rangasami Gounden* (4), in order to give relief to female heirs (supposed to be incapable of prudent management) in respect

(2) 36 Ind. Cas. 407; 31 M. L. J. 406; 20 M. L. T. 148; 4 L. W. 149; (1916) 2 M. W. N. 137.

(3) 1 W. R. 98.

(4) 26 Ind. Cas. 757; 28 M. L. J. 1 at p. 24; 17 M. L. T. 87; 2 L. W. 69; (1915) M. W. N. 53 (F. B.).

(1) 30 M. 145; 17 M. L. J. 14.

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of the management of the property. The theory that a widow becomes civilly dead when she makes a surrender has no basis in any text of Hindu Law. The loose expressions in some judgments as to a widow being civilly dead, when read with the context, can mean only that the next reversioner succeeds in such a case as if the widow died at the moment of surrender. She neither actually nor civilly dies then. This is also clear from the expression about civil death being followed in one of the judgments by the illustration based upon the widow's re-marriage. A woman who surrenders is clearly not civilly dead for any other purpose than for the purpose of bringing in the next reversioner as heir at once to her husband's estate. She continues to own her Stridhanam and the obligation of all persons who take her husband's estate to maintain her, which is an absolute obligation thrown by the Hindu Law, cannot be destroyed by her surrender thereof. She does not become a Sanyasi, because she surrenders her husband's estate. She is entitled to acquire properties, to retain her Stridhanam and to bring suits, and she remains competent to enter into contractual and other legal obligations.

Then coming to the provision for the maintenance of the daughter, the daughter is not (like the widow) under the Hindu Law obliged even as a moral obligation to starve and stint herself because her father is dead and she inherits her father's property. The extension of the doctrine of the so-called life-estate from the widow to the other female heirs is itself an unwarranted extension of the commentators which, however, being the present law could not be criticised to any useful purpose. When a daughter surrenders to the next reversioner, it is arguable that even she should surrender the whole estate and should not retain any portion of the estate of the last male owner to herself in order to vest the full ownership in the next reversioner. But the principle on which it was held in *Sriramulu Naidu v. Andalammal* (1) that if the widow imposes any onerous obligations upon the surrenderee for her own benefit or for the benefit for her servants or for charity, the surrender is not valid, does not apply to the daughter who inherits as heir. The

only condition which can be imposed on principle upon any female heir other than the widow is that the surrender should be of the whole estate. Whether, therefore, the case in *Chilla Subbiah Sastri v. Palury Pattabhiramayya* (5), which went further than the decision in *Sriramulu Naidu v. Andalammal* (1) and which held that the imposing of an obligation upon a reversioner to convey back a portion of the property to the widow's brother did not invalidate the surrender, can be supported or not—in parenthesis I may here state that that case and the case of *Karetti Brahmanai-kudu v. Kareti Mahalakshmi* (6) have been followed even to that extent by a very recent case, *Gopala Krishnayya v. Gangayya* (7), decided by Abdur Rahim and Srinivasa Aiyangar, JJ.—I am clear that the act of a daughter who, being next heir, surrenders the whole estate, vests the absolute inheritance in the next male heir even if she received consideration for her surrender of the full enjoyment of the property during her lifetime.

It follows that the second appeal fails and is dismissed with costs.

NAPIER, J.—I agree that this second appeal fails.

I have had considerable difficulty during the hearing of this appeal in ascertaining what are the true limits laid down in the cases to the right of surrender. I think that it is clear on the latest authorities that the surrender need not be definitely to the next heir if that next heir agrees to be passed over. That has been decided in *Mulugu Kotayya v. Mudigonda Chandramowli Sastri* (2) and in *Satyalakshmi Narayana v. Jagannadham* (8), and it seems to me to be immaterial whether the next heir is a party to the deed of surrender or executes a deed of surrender for herself or simply consents to being passed over. The difficulty I have found is on the question whether an agreement for maintenance by the person who is passed over is sufficient to invalidate the transaction. Now, it is perfectly clear that, according to the school of

(5) 31 M. 446.

(6) 17 Ind. Cas. 487; (1913) M. W. N. 433; 24 M. L. J. 533; 13 M. L. T. 458.

(7) Appeal No. 373 of 1915.

(8) 4 Ind. Cas. 939; 34 M. L. J. 229; 6 L. W. 765; (1917) M. W. N. 854; 22 M. L. T. 498.

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thought which is to be found in the reasoning of Mr. Justice Sankaran Nair in *Challa Subbiah Sastri v. Palury Pattabhiramayya* (5), it is absolutely immaterial what reservations are made at the time of surrender by a widow or indeed by any person surrendering. The view taken by him is that you have to treat the document of surrender by itself and when once the estate is vested, it is immaterial whether or not by a contemporaneous agreement provision is made for returning even a greater portion of the estate to a person who may not even be in any way connected with the original holder. Sankaran Nair, J., treats it as being analogous to an adoption with a contemporaneous agreement to transfer. Whether that analogy is sound,—and arguments by analogy are frequently dangerous—I cannot but view with alarm the proposition which comes to this, that a person holding a limited interest can enter into an arrangement with the then existing next heir, who may be in impecunious circumstances and prepared to lend himself to any arrangement for the sake of some ready money, by which the greater part of the property will be diverted from the person who at the falling in of the estate would be entitled to the whole. As my learned brother has pointed out, this view has been accepted in the cases reported as *Karetti Brahmaiahkudu v. Kareti Mahalakshmi* (6) and in *Gopala Krishnayya v. Gangayya* (7). Speaking for myself, if such an invasion on the whole doctrine of surrender is to receive the sanction of the Court, I should like to see it so laid down by a Full Bench of this Court. There is, however, a modified rule to be spelt out from these cases which might be that where the arrangement, although retaining a benefit for the person surrendering or even conferring a benefit on some person not entitled, is an obviously fair and just arrangement for the maintenance and benefit of the person surrendering, then the doctrine that such a surrender is not vitiated by the arrangement should be upheld. But that is not the view taken by a very eminent Hindu Judge of this Court, Subramania Aiyar, J., in *Sriramulu Naidu v. Andalammal* (1). He never considers this aspect of the case at all

and he lays down that if the surrender is coupled with onerous conditions thrown on the person whose estate is accelerated, liabilities which are not such as would naturally devolve on him, in connection with persons to be benefited, that surrender is bad. The cases he mentions are conditions not only for the maintenance of the transferor, who was in that case a widow, but also a condition to pay a sum of money to certain dependants and to maintain a charity for all time at a certain expense and on her death to make payments of different amounts aggregating to $\frac{1}{4}$ th of the estimated value of the properties. This, as far as I gather from the language used by him in his judgment in *Challa Subbiah Sastri v. Palury Pattabhiramayya* (5), would have been upheld by Sankaran Nair, J., as a good surrender. Taking, therefore, this narrower view of Subramania Aiyar, J., and applying it to this case as we are asked to do, do the facts fall within the mischief of the doctrine? My learned brother is of opinion that a surrender by a daughter reserving the right of maintenance would be good, although there is not the direct legal liability for the support of a daughter incumbent on the estate. I hesitate to express a definite opinion on that point. But the facts of this case being that the reservation was made by both the widow and the daughter in the deed of surrender and that it was for the protection and maintenance of the mother of the infant child in whose favour the surrender was made, I am inclined to think that such a reservation is not within the mischief of the doctrine laid down by Mr. Justice Subramania Aiyar, and it would certainly be covered by the suggested modification of the rule laid down in *Challa Subbiah Sastri v. Palury Pattabhiramayya* (5).

For these reasons I concur in holding that the appeal should be dismissed with costs.

Appeal dismissed.

M. C. P.

INDER BAHADUR SINGH v. BECHAN SINGH.

OUDH JUDICIAL COMMISSIONER'S
 COURT.

SECOND CIVIL APPEAL No. 333 OF 1917.

July 23, 1918.

Present:—Mr. Lindsay, J. C.

Thakur Inder Bahadur Singh—

PLAINTIFF—APPELLANT

versus

BECHAN SINGH—DEFENDANT—

RESPONDENT.

Construction of document—Transaction evidenced by deed, nature of—Lease or mortgage.

Where a document, which was described as a "patta qaul qarar birt rahni", recited that the taluqdar had received a certain sum from the grantee and that the latter had been put in possession of the lands described in the document, for which he had to pay a certain annual rent:

Held, that the document was nothing more than a lease and did not create any relationship of mortgagor and mortgagee between the parties. [p. 151, col. 2.]

Appeal from the decree of the District Judge, Gonda, dated the 12th May 1917, confirming the order of the Munsif, Tarabganj, dated the 19th March 1917.

Babu Ram Chandra, for the Appellant.

The Hon'ble Pandit Gokaran Nath Misra, for the Respondent.

JUDGMENT.—The only question for disposal in this appeal is whether or not the Courts below should have given the plaintiff-appellant a decree for ejectment of the defendant respondent from certain lands which were in dispute. The suit arose out of ejectment proceedings which were taken in the Revenue Court. The taluqdar, who is the plaintiff-appellant, issued a notice against the defendant-respondent on the footing that he was a tenant who was liable to be ejected by notice. In the Revenue Court the defendant relied upon a document which had been executed in his favour in the year 1901 by a lady, Thakurain Ikhlas Kuar, who was at that time in possession of the taluqi for a life-estate. This lady died in the year 1911. The Revenue Court cancelled the notice apparently on the basis of entries which had been made in the revenue papers, entries which went to show that the defendant Bechan Singh was a mortgagee of the lands in dispute. The result is that the taluqdar has now brought a suit asking for a declaration that the defendant has no proprietary or under-proprietary rights in the lands. Amongst the other reliefs sought is the ejectment of the defendant,

The Courts below have given the plaintiff a declaration that Bechan Singh has no proprietary or under-proprietary rights in the lands in dispute, and this finding has not been contested. Both Courts, however, refused to make an order for ejectment, on the ground that the Civil Court was not competent to make such an order having regard to the position of the parties.

Now in second appeal it is contended that a decree for ejectment ought to have been made on the ground that the defendant is a trespasser, being in possession without title.

The whole question turns upon the nature of the relation now existing between the parties. If it is found that the relation of landlord and tenant exists, then it is obvious that the Civil Court has no power to order ejectment. The nature of the legal relation between the parties has to be determined with reference to the document upon which the defendant bases his rights. This document, as I have already said, was executed in the year 1901 by Thakurain Ikhlas Kuar. It is a matter of some difficulty to ascertain what the document really purports to be. In the opening words the document is described as "patta qaul qarar birt rahni." The document then goes on to recite that the taluqdar has received a sum of Rs. 300 from the grantee and that the latter has been put in possession of lands described in the document, for which he has to pay an annual rent of Rs. 12 8 0. So far as I am able to see, it is quite impossible to describe this document as a document of mortgage and I have no doubt that the decision of the Revenue Court on this point was erroneous. The Assistant Collector merely relied upon some entry which was made in the village papers. It is true that the use of the expression *birt rahni* does *prima facie* indicate the creation of some relation of mortgagor and mortgagee, but having regard to the language of the document as a whole, I am unable to understand what the significance of these particular words is. Read in its entirety, the document appears to me nothing more than a lease; and it is to be noted that it is also described as a lease or *patta*,

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The lessee paid a premium of Rs. 300, and in consideration of this payment he was given a tenancy of the land subject to a rental of Rs. 12-8-0 a year. There is not a word in the document to indicate that the grant was being made by way of security for any loan. There is no undertaking to repay any mortgage money, and altogether it seems to me that this document must be construed as a lease and nothing else. In this view, therefore, I must take it that the relation of landlord and tenant exists. It is, of course, the fact that the lease was granted by the lady who had only a life estate in the property, but it is not open to the plaintiff-appellant here to contend that Bechan Singh is a mere trespasser. Once Bechan Singh was admitted to a tenancy, it follows that his ejection can only be had in a Revenue Court on one or other of the grounds described in the Oudh Rent Act.

I have heard some argument with reference to the point of registration. The deed is not a registered deed and I was at one time inclined to doubt whether in view of its not being registered, it could be treated as creating a tenancy. Section 156, however, of the Rent Act exempts from the operation of the Indian Registration Act *pattas* which are granted for any term not exceeding seven years by a landlord to tenants to whom section 36 or 37 of the Act applies. It seems to me that Bechan Singh was admitted to an ordinary tenancy under the sections just mentioned and consequently the deed did not require registration.

I am satisfied, therefore, that in the present circumstances the plaintiff is not entitled to obtain from the Civil Court an order for the ejection of the defendant. The appeal fails and is dismissed with costs.

Appeal dismissed.

LOWER BURMA CHIEF COURT.

CIVIL REGULAR No. 339 OF 1915.

January 29, 1918.

Present:—Mr. Justice Young.

OFFICIAL ASSIGNEE—PLAINTIFF—

APPELLANT

versus

Hajee MAHOMED HADI—DEFENDANT—

RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XL, r. 1—Administrator, insolvency of—Receiver, appointment of.

Where a person, who holds certain property partly in his personal and partly in a representative capacity as an administrator, becomes an insolvent, his personal share in the property vests in the Official Assignee and the latter, as trustee for the creditors of the insolvent, is entitled to have a Receiver appointed of the whole of the property till the share of the creditors is determined. It is immaterial that the bodies for whom the insolvent holds the property as administrator are content to leave their shares in his hands. [p. 153, col. 2.]

Messrs. Cowasjee and A. B. Banerji, for the Appellant.

Mr. Giles, for the Respondent.

ORDER.—This is an application by the Official Assignee for the appointment of a Receiver to collect the rents and profits and take charge of a certain property until further orders.

The property in question is at present being held by the respondent partly in his personal and partly in a representative capacity as administrator *de bonis non*. In his personal capacity the respondent is an insolvent, and, therefore, his personal share vests in the Official Assignee, who sued the insolvent as heir and as administrator for the determination of his share and its delivery to him. The Official Assignee obtained a decree on the 23rd August 1917. The insolvent has appealed and by consent the taking of the accounts has been stayed pending the hearing of the appeal without prejudice to this application for a Receiver.

The insolvent states that he is keeping accounts and this is not denied, nor is any mismanagement alleged.

The suit was filed at the end of 1915 and no decree was passed for nearly two years. During the whole of this time the Official Assignee was content to leave the management of the property in the hands of the administrator and never applied for a Receiver. The respondent has been in possession for nearly forty years, and so far as the papers before me show, has

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managed it without giving cause for complaint; and none of the persons or bodies for whom he is administering join in the application. The Official Assignee is joint tenant with the administrator to the extent of the insolvent's personal share. As such he is entitled to be protected from waste, but none is alleged. The sole ground for the application appears to be his insolvency.

Johnson, In re, Steele v. Cobham (1) shows how loth the Court is to allow an insolvent to manage another's estate. It was an administration action brought by a creditor against an administrator who subsequently became in his personal capacity insolvent. A Receiver was appointed apparently as a matter of course, on the ground that the Court could have no confidence in the insolvent. There, however, the administrator became insolvent on the 18th January 1866, and the plaintiff in the administration suit took out a summons at once. Here the insolvent was adjudicated on the 7th August 1912, and no application was made till the 21st December 1917, and though the Official Assignee sued in 1915 to have the insolvent's share defined and partitioned and prayed for a Receiver, no application was ever made in the suit till now.

Hopkins, In re, Dowd v. Hawtin (2) is an authority to the same effect, but there also action was taken as soon as the administrator became insolvent. If similarly prompt action had been taken by the Official Assignee my course would have been plainer, but when the beneficiaries have been content with his administration for nearly forty years, are content with it still despite his insolvency and when his creditors as represented by the Official Assignee have despite the same fact been content with his management for nearly six years, the matter is less easy. On the whole, however, I do not see how I can allow him to continue managing a property, an undefined portion of which belongs to his creditors, except with their consent. He manages for the Official Assignee who is a trustee for the creditors and is, therefore, a trustee for them himself and as Jessel, Master of the Rolls, said in *Hopkins, In re, Dowd v. Hawtin*

(1) (1866) 1 Ch. 325; 14 L. T. 242; 14 W. R. 493.

(2) (1882) 19 Ch. D. 61; 30 W. R. 601.

(2) it is not fit that a man who is a bankrupt should continue to be a trustee without the consent of the *cestui que trustent*. These did consent up till now, but do not consent any longer and there is nothing more to be said. They are entitled to have their share protected; what their share is it is impossible to determine at present. Till it is determined, they have rights over the whole and there must, therefore, be a Receiver of the whole despite the fact that the charities and other bodies for whom the respondent holds as administrator are content to leave their shares in his hands. The application must, therefore, be allowed with costs, two gold mohurs.

Application allowed.

OUDE JUDICIAL COMMISSIONER'S COURT,

FIRST CIVIL APPEAL NO. 103 OF 1917.

August 20, 1918.

Present:—Mr. Lindsay, J. C.

Musammat SUNDARA DEBIA—DEFENDANT
—APPELLANT

versus

SHEO RAM AND ANOTHER—PLAINTIFFS—
RESPONDENTS.

Hindu Law—Joint family—Separation—Revenue papers, entry in, weight of—Evidence, whether conclusive—Females, position of—Maintenance allowance, measure of—Court, duty of.

Where the name of the widow of a deceased member of a Hindu family is entered in the revenue papers in respect of the joint share belonging to her husband in the family property, such entry cannot, in the absence of any very definite evidence as to the manner in which that entry came to be made, be treated as conclusive evidence of the fact that the family separated although there was no actual division of the property, especially when it appears that the entry was disputed immediately after it had been made. [p. 156, col. 2.]

In fixing the maintenance allowance for a Hindu female, the Court has to look to the circumstances of the joint family, i. e., to the value of the joint family property, to the income of the family, and to the number of people who have claims to be supported out of the said property. [p. 157, col. 2.]

Appeal from the decree of the Subordinate Judge, Unao, dated the 13th July 1917,

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Mr. St. George Jackson and Babu Sulig Ram Sinha, for the Appellant.

The Hon'ble Pandit Gokaraj Nath Misra and Babu Parag Narain, for the Respondents.

JUDGMENT.—The plaintiffs in this suit were one Sheo Ram and his son Rameshwar. Sheo Ram is the son of one Dwarka Prasad and the defendant Musammatt Sundara Debia is the widow of Ram Shankar, who was also a son of Dwarka Prasad.

This man, Dwarka Prasad, died some 7 or 8 years before the present suit was brought and Ram Shankar, the husband of the defendant, died 8 months before the suit was brought. The case for the plaintiffs is that at the time of Ram Shankar's death they were joint in estate with him. It was alleged that the defendant, on the assertion that her husband Ram Shankar was separate, had taken possession of certain immoveable property and had also got possession of certain bonds, which, according to the case for the plaintiffs, were part of the joint family property.

It may be explained here that Sheo Ram and his brothers were natives of a village in the Unao District. It is admitted that they carried on a money-lending business in the District of Mymensingh in Bengal, and on the evidence there can be no doubt that one or other of the brothers used to reside in Mymensingh for the purpose of superintending the family business. Money-lending transactions were also carried on in the District of Unao.

The case set up for the defendant was that very soon after the death of Dwarka Prasad, the two brothers Sheo Ram and Ram Shankar decided to separate, and accordingly a division of the household goods was made at the village of Rajpur. It is stated that there was no actual division of the landed property, because it was thought more economical to keep the property intact. It is also stated that there was no division of the various sums which were owing to the brothers by various people to whom money had been advanced on loan.

The principal issue in the case, therefore, was whether or not at the date of Ram Shankar's death he and his brother Sheo Ram had been separate in estate for a period of nearly 7 years. The burden of proving this issue was very properly laid upon the

defendant. She called a number of witnesses who supported her story. The plaintiffs on the other hand produced a number of witnesses all of whom stated that the two brothers were joint up till the time of Ram Shankar's death. A number of documents have also been filed in the suit, the bearing of which is of considerable importance when we come to consider the value of the oral evidence put forward by either party. This oral evidence is of the description usually found in cases of this kind and little reliance can be placed on it as a whole. The Subordinate Judge was of opinion that the defendant had failed to discharge the burden of proof which rested upon her; and the principal argument in appeal is that on the evidence this finding of the Subordinate Judge is wrong.

Before the issues were framed in the suit the defendant's Pleader made a short statement of his case to the Court. He said that Sheo Ram and Ram Shankar had made a partition some 7 years before the date of the suit and that this partition had been carried out "without the intervention of any third person." The Pleader also stated that at the time the division was made lists of the property allotted to each of the brothers were prepared. The Pleader admitted that Musammatt Sundara Debia could not produce the list of the property which had been assigned to her husband at the time of division.

The two principal witnesses put forward by the defendant for the purpose of showing that a division of the household goods took place were Ram Lal and Ballu. The latter, it may be observed, is the father of Sundara Debia and his evidence is certainly open to suspicion on the ground that he is a deeply interested party. Indeed the case for the plaintiffs is that Ballu has instigated the defendant to put forward the false claim that her husband was separate from the rest of the family and in pursuance of this claim to assert her rights to a half share of the family property.

The Subordinate Judge has described the statements of these two witnesses as being vague and unconvincing, and after a careful perusal of what was said by each of them, I think his opinion is correct. In the first

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place, it is not made to appear why these two men were summoned from their homes in order to be present at this alleged division of the family property. Ram Lal professes to be a somewhat distant relation of the two brothers. He tries to make out that a message was sent to him calling upon him to come and to be present at the partition. He admits, however, that when he was summoned to the family house he was not called upon to do anything. In fact, as the Subordinate Judge observes, he seems to have sat there as a mute witness of all that took place. He is unable to give any precise details as to the manner in which the property was divided, and this is all the more remarkable when it is borne in mind that he was deposing to an affair which had taken place at no very great interval of time. Ballu was also vague in his statements. He professed to have been in attendance only for one of the two days which, it is said, were taken up in effecting the partition. It is admittedly a very unusual thing for a man to visit the house of his son-in-law and this was conceded by Ballu in the course of cross-examination. He admitted that only some urgent circumstance would justify a visit of this kind and it is not made to appear what urgency there was for asking him to be present. According to his own statement he did nothing whatever. He took no part in the division of the property. He suggested no course of action, nor was he called upon to settle any disputes between the brothers. He admits clearly that written lists of property were prepared.

So far then as this evidence goes, I think any Court might well hesitate to draw from it a conclusion that there had in fact been a division of the family property. The strongest point against the story is the non-production of the written list of property said to have been assigned to Ram Shankar. Both the defendant and Ballu say that such a list was prepared, and no satisfactory explanation has been given as to why it was not put forward. There is indeed a vague sort of suggestion that the plaintiffs, after the death of Ram Shankar, managed to get hold of all the family papers. I am not disposed to believe the story, for it is an admitted fact that when

Ram Shankar died in Unao, the plaintiffs were away in Bengal and did not come to Unao till a week or ten days after Ram Shankar's death. It is also admitted that immediately after Ram Shankar's decease the property which was in the family house, consisting of account-books, documents and the like, were taken to the house of one Sheo Sahae. It is hardly possible to believe that if Ram Shankar had in fact separated entirely from his brother, his widow or her father would have tamely handed over all the documents and books to the plaintiffs.

As for the other evidence adduced for the defendant it is of a very general character. The witnesses state in a broad way that the two brothers were separate, that they occupied separate portions of the family house, that they performed *shradh* separately and that on occasions of ceremony invitations were sent to the brothers separately. Bearing in mind the fact that one or other of the brothers was always away from home attending to the business in Bengal, this evidence is of no value at all and may be discarded as being entirely useless for the purpose of proving separation.

The defendant relied very strongly upon one circumstance for the purpose of showing that her husband had separated. It seems that a mortgage had been executed in favour of the brothers while the family was joint, and it is said that after the brothers separated the mortgage debt was discharged by Matadin, the son of the mortgagor. The defendant stated that when this debt was paid up, half of the money owing under the bond was made over to her. This fact is admitted, but the plaintiff's account of the affair was that he had been compelled by a show of force or by threats to hand over half of the money to his sister-in-law. The plaintiff's case on this point is not borne out by the evidence of Matadin who was called as a witness. What he says is that having been pressed by the plaintiff Sheo Ram to pay off the debt, he took the money to Sheo Ram's house. He was told that the money could not be received at that time inasmuch as Sundara Debia had gone off to live with her father and was not present. Accordingly Matadin was

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told to come on another date. He says he did so and on that day the money was handed over to the parties in equal shares. Matadin observes that in any case he would not have handed over the money to one of the parties separately. It is hard, therefore, to believe that Sheo Ram was compelled to hand a share of this money over to the defendant. At the same time there is evidence to show that although Sheo Ram was the elder of the two brothers, the chief duties of management of the family property were made over to Ram Shankar, who is said to have been the more clever man of the two, and it may be that Sheo Ram is an easy-going person who would have handed over half of this money to his brother's wife without trying to make any trouble over the matter.

The plaintiffs called a number of witnesses, all of whom stated that the brothers were joint to the time of Ram Shankar's decease. I do not set any great value upon this oral evidence either, but I have been much impressed by the statement of the plaintiffs' witness No. 8, a man named Chandar Nath, who, so far as I can see, is a disinterested party. This man too carries on business in Bengal and he knew all about the money-lending business which these two brothers were carrying on in those parts. He speaks of one or other of the brothers coming at times to Bengal to look after the business, and he was able to point out in the account-books which were produced in Court the various entries which were in the writing of Sheo Ram and Ram Shankar respectively. There is certainly nothing in the cross-examination of this witness which affords any ground for supposing that he has any particular interest in supporting the case for the plaintiffs. I am inclined to believe his evidence and to hold that it is quite sufficient to rebut the story which was put forward for the defence.

To turn now to the documentary evidence in the case, it is an admitted fact that after the death of Ram Shankar the name of his widow was recorded in the *khewats* of the villages in which the parties own immoveable property. These *khewat* entries have been produced before me, and there can be no doubt that orders were passed in the month of April 1916 directing that

the name of the defendant should be entered in place of that of her deceased husband. How then are these entries in the *khewat* to be accounted for? The case for the defendant-appellant is that they afford conclusive proof of the defendant's story that the two brothers had separated although there had been no actual division of the landed estate. There is no documentary evidence before us to show in what way these entries came to be made. The defendant gave evidence in the case, and her story is to the effect that after the death of her husband she went to the plaintiff, Sheo Ram, and said that she would have her name entered in the village papers in the same way as her husband's name had been entered. The plaintiff said that she might do so if she chose. On the other hand according to the allegation in the plaint the name of Sundara Debia was allowed to be put in the village papers merely by way of consolation (*tasalli*). There being no very definite evidence as to the manner in which these entries in the lady's favour came to be made, it is hardly possible to treat them as conclusive evidence of the separation; and in this connection it is important to observe that the quarrel arose almost immediately after mutation had taken place. There seems to be no doubt that what brought the parties into Court was an attempt made by the defendant to make collections of the rents of the shares which are recorded in her name. In her statement which was taken on commission the defendant stated that ever since the time of separation, that is to say, for 7 years before this case came into Court, the two brothers had regularly divided the profits of the immoveable property. She could not, however, give any details of any occasion on which there had been any settlement of accounts and she was unable to produce any documentary evidence in the shape of account-books for the purpose of proving her story. It has been argued here that the learned Judge of the Court below has attached too much importance to this failure of the defendant to produce books of account. Indeed it was suggested that she had made over all the accounts and papers to the plaintiffs shortly after her husband's death. That, however, is not the story

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which the defendant herself tells. She admits that she had a number of account-books in her possession which she handed over to her *mukhtar*, and the fact remains that those books were not placed before the Court. It is hardly possible to believe that if a separation took place Ram Shankar would not have kept some record of his separate account of the profits of the *zemindari* property. The parties are people who make a living out of money-lending and they are in the habit of keeping accounts. Some of these books have been produced in Court and show that two sets of account-books were kept, one in Bengal and one in Unao. But there is nothing in any of these books to indicate that Ram Shankar's share was in any way separate from the rest of the family property. On the other hand, certain entries have been referred to which all point the other way. There is for example an entry in the cash book (Exhibit 41) which was kept up in Bengal, showing various items of expenditure incurred jointly on behalf of Ram Shankar and the second plaintiff Rameshwar. It is also proved that in connection with the money-lending business which the parties carried on two ledgers were maintained, one called the home ledger and the other the Bengal ledger, and an examination of these two books shows that there are common entries in the accounts indicating that a double set of ledgers was kept up on account of the same business. This seems to me to be a very strong piece of evidence in support of the plaintiffs' case. Then we have the admitted fact that after the date of this alleged separation documents were on some occasions executed in the names of both the brothers. In particular there are three documents, namely, deeds of sale (Exhibits A-2, A-10, and A-11), all executed on the 30th of August, 1912, that is to say, long after the date of the alleged partition. It would, I think, be a very unusual circumstance for two brothers who had separated in the manner described to have joint dealings of this kind after separation; and although such a case is not inconceivable, it would at any rate be supposed that in any dealings of this kind after partition had taken place the shares of the brothers would be specified in the documents. There is nothing

of this kind here and no satisfactory explanation has been placed before me to account for the fact that these properties were purchased in the joint names of the two brothers. I do not think it necessary to examine in any further detail the evidence produced on this issue of separation. It seems to me that the only possible conclusion is that the defendant failed to prove the separation which she alleged and this being so, the plaintiffs' claim was bound to succeed. I agree with the finding of the Court below on this issue.

The only other matter argued before me was the question of the allowance for maintenance which should be made to the defendant. The Subordinate Judge came to the conclusion that she ought to receive an annuity of Rs. 10 a month. Having found, however, that previous to the suit she had collected a sum of between six and seven hundred rupees to which she had no right, he set off this amount in making his calculation and reduced the amount of the annuity to Rs. 7 a month. It has been argued strenuously on behalf of the appellant that this is a wholly inadequate allowance for the lady, considering the value of the family property. I have very little doubt that these two brothers were in very comfortable circumstances and that they had extensive money-dealings, and I am inclined to agree with Mr. Jackson's contention that the sum which has been allowed to the widow is in the circumstances insufficient. It is difficult to assess the amount of the allowance which should be made in these cases. I have been referred to several rulings of the Calcutta High Court, in which various sums were allowed in cases of this kind. It is not possible, I think, to lay down any hard and fast rule in the matter or to say that in no circumstances ought a widow to receive more than a certain proportion of the income from the joint property. A great deal depends upon the number of people who have claims to be supported out of the joint family property. In the present case we have the fact that the only persons with claims on the property are the first plaintiff and his son with their families. It has been stated in evidence that the

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income of the family is between seven or eight hundred rupees a year. It is probably considerably more than this. On the whole I think the claims of the lady will be fairly met by awarding her an allowance of Rs. 12 a month. This is to be irrespective of the money which she has realized according to the Subordinate Judge's finding.

I allow the appeal, therefore, to this extent that I direct that in place of the annuity of Rs. 7 a month there be awarded to the defendant a sum of Rs. 12 a month for her maintenance. In other respects the appeal fails. The defendant-appellant will pay 3/4ths of the costs incurred by the respondents in defending this appeal.

Appeal partly allowed.

MADRAS HIGH COURT.

LETTERS PATENT APPEAL No. 191 OF 1917.

July 30, 1918.

Present:—Sir John Wallis, Kt., Chief Justice, Mr. Justice Oldfield and Mr. Justice Seshagiri Aiyar.
G. P. MALLAPPA—PLAINTIFF

—APPELLANT

versus

MATAM NAGA CHETTY—DEFENDANT

—RESPONDENT.

Evidence Act (I of 1872), ss. 58, 92 (4)—Mortgage registered—Subsequent agreement for payment of less than stipulated consideration—Oral evidence, admissibility of—Admission of agreement in pleadings, effect of.

A subsequent agreement to take less than is due under a registered mortgage is an agreement modifying the terms of a written contract, and, if it has to be proved, oral evidence is inadmissible under proviso (4) to section 92 of the Evidence Act. [p. 158, col. 2; p. 159, col. 2.]

Per Wallis, C. J., and Oldfield, J., (Seshagiri Aiyar, J., dubitante).—Where, however, the oral agreement is admitted in the pleadings of the other party it need not be proved, as no question of the admissibility of evidence, oral or documentary, arises when proof is dispensed with in consequence of an admission in the pleadings either under section 58 of the Evidence Act or under the provisions of the Code of Civil Procedure. [p. 158, col. 2.]

Per Wallis, C. J.—The plain language of section 58 of the Evidence Act should not be unduly restricted by reference to considerations of public policy. The admission of a party in his pleadings as to an oral arrangement modifying a written contract gets rid of the danger which it is intended to guard against, by the prohibition against the admission of oral evidence contained in the 4th proviso to section 92 of the Evidence Act. [p. 159, col. 1.]

Per Oldfield, J.—The acceptance of a statement in an unregistered writing as evidence of the modification of a registered contract is contrary to public policy, as tending to defeat the provisions of the Registration Act, though the language of section 58 of the Evidence Act is unqualified. [p. 159, cols. 1 & 2.]

Per Seshagiri Aiyar, J.—There is no justification in principle for not applying proviso (4) to section 92 of the Evidence Act to all cases other than those in which there has been a perfected discharge by payment. [p. 160, col. 1.]

Appeal, under clause 15 of the Letters Patent, against the prevailing judgment and decree of Mr. Justice Bakewell, in Second Appeal No. 851 of 1916, on the file of the High Court, preferred against the decree of the District Court, Coimbatore, in Appeal Suit No. 275 of 1916, preferred against the decree of the District Munsif, in Original Suit No. 88 of 1915.

Mr. C. S. Venkatachariar, for the Appellant.

Mr. L. S. Veeraraghava Aiyar, for the Respondent.

JUDGMENT.

WALLIS, C. J.—A subsequent agreement to take less than is due under a registered mortgage is clearly an agreement modifying the terms of a written contract, and if it has to be proved, oral evidence is inadmissible under the 4th proviso to section 92 of the Indian Evidence Act, which is designed to protect parties to registered instruments from false cases of subsequent modification of the original contract being set up and supported by oral evidence. If the subsequent agreement in this case has to be proved, oral evidence is clearly inadmissible. The contention, however, is that it has not to be proved, as it is admitted in the pleadings. Part II of the Evidence Act deals with proof, and Chapter III, which is the first Chapter of Part II, with "facts which need not be proved." Under section 58 of this Chapter among the facts which need not be proved are facts admitted in the pleadings, such as the subsequent agreement now in question. Evidence is tendered in proof of facts in issue, and no question of the admissibility of evidence, oral or documentary, arises when proof is dispensed with in consequence of an admission in the pleadings either under section 58 or under the provisions of the Code of Civil Procedure. Where, as in *Othenbasapa v. Lakshman Ramchandra* (1), the Legislature

(1) 18 B. 369; 9 Ind. Dec. (N. S.) 754.

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had enacted not only that an unstamped promissory note should not be receivable in evidence but also that it should not be "acted on", it was held that the Court was precluded from acting on the note by giving a decree on it, even though execution was admitted. It has not been shown that, in giving effect to the subsequent agreement admitted in the pleadings in the present case, we should be contravening any express statutory provision such as that contained in the Stamp Act, and I do not think that in the present case we are at liberty to restrict the operation of the plain language of section 58 or of the Code of Civil Procedure by reference to considerations of alleged public policy. Here the subsequent agreement is one by the mortgagee to take less than was due to him under the terms of the mortgage, and I do not think we should be justified in refusing to give effect to the section merely because, if the plaintiff had not admitted the subsequent agreement but put the defendant to the proof of it, there does not appear to be any admissible evidence by which it could have been proved. Further, I do not consider that in a case of this kind there is any public policy in refusing to give effect to the subsequent written agreement, because I think that the plaintiff's admission in the pleadings gets rid of the danger which it was intended to guard against by the prohibition of oral evidence in the 4th proviso to section 92. Different considerations might arise if the admission were that more than was provided for in the mortgage bond should be due under it. I would agree with Bakewell, J., and dismiss the appeal with costs.

OLDFIELD, J.—With all due deference I cannot follow the judgment just delivered, so far as it lays down that acceptance of a statement in an unregistered writing as evidence of the modification of a registered contract is not contrary to public policy, as tending to defeat the provisions of the Registration Act. Those provisions are, as I understand them, intended to facilitate the investigation of titles by compelling their registration and by fixing the offices, in which they must be registered and to which, therefore, investigation can be restricted. This intention would be frustrated, if the investigation had to be wider; and

nonetheless so, if it had to be extended not only beyond those Registration Offices, but also to pleadings in the records of Courts. This, however, does not affect the validity of the broader ground of decision, which is available, the unqualified nature of the language used in section 58 of the Indian Evidence Act, and I, therefore, concur in dismissing the appeal with costs.

SESHAGIRI Aiyar, J.—I agree with the conclusion at which the learned Chief Justice has arrived.

The suit is on two mortgages executed by the defendant to the plaintiff. In or about March 1914 plaintiff threatened to sue on the bonds. Then certain mediators intervened. An oral agreement was come to by which the plaintiff agreed to accept in full satisfaction Rs. 1,400 in cash. Rs. 1,000 was paid within a week's time and the other Rs. 400 within three months thereafter. There was a further stipulation that if the Rs. 400 was not paid within three months, an additional sum of Rs. 100 was to be paid by the defendant. This settlement was not reduced to writing. The question for consideration is whether this arrangement is admissible in evidence. There is a further question whether the admission contained in the counter-statement of the plaintiff is not sufficient for the disposal of the case. On the first question I feel no doubt that the admission of this oral arrangement would contravene proviso 4 to section 92 of the Evidence Act. The effect of the arrangement is to alter the terms of the two documents in question and as the original documents were in writing and registered, oral evidence of the arrangement is within the mischief of proviso 4. The decision of this Court in *Karampalli Unni Kurup v. Thekku Vittil Muthorakutti* (2), which was followed by the learned Chief Justice and Benson, J., in *Kattika Bapanamma v. Kattika Kristnamma* (3), covers this point. Sitting with Kumaraswami Sastri, J., I acted on the principle enunciated in the above decisions [*Namagiri Lakshmi Ammal v. Srinivasa Aiyangar* (4)]. The contention of the learned Vakil for the respondent that the admission would not vary the document is unsup-

(2) 26 M. 195.

(3) 30 M. 281; 17 M. L. J. 30.

(4) 27 Ind. Cas. 269.

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portable. The cases he drew our attention to all relate to actual payments under documents which discharged the liability thereunder. An agreement which in future will have the effect of putting an end to the liability must be regarded as a subsequent agreement modifying the original contract. I am in entire agreement with the view enunciated by Mr. Justice Boddam in *Goseti Subba Row v. Varigonda Narasimham* (5). The learned Judge says referring to, proviso 4 of section 92: "The words of the proviso are perfectly clear and, in my opinion, apply to any agreement, whether executory or executed." I am unable to see any justification in principle for not applying the proviso to all cases other than those in which there has been a perfected discharge by payment. I agree with Sadasiva Aiyar, J., on this question.

On the second question I felt doubts whether section 58 and the Chapter in which it appears should not be restricted to admissions in pleadings which do not contravene the express provisions as to the mode of proof contained in the other sections of the Evidence Act. At the same time, I realise the force of the learned Chief Justice's observation that the language of the section takes the facts admitted in the pleadings out of the category of proof altogether.

The rule of law enunciated in *Slatterie v. Pooley* (6), which accepted oral admissions of every kind as proving documents, has no doubt been departed from in India [See section 22 of the Evidence Act and sections 59 and 65 (b)]. It is open to argument that admissions in pleadings are in the nature of secondary evidence and that the prohibitions in section 22 applies equally to pleadings as well. Otherwise parties may compel a Court by statements in pleadings to pronounce judgment upon evidence which is not legally admissible. There is the further fact that, notwithstanding the admission in the pleadings, the Court may call upon the party to prove a fact. In such cases the proof must be restricted to the

modes mentioned in the Act. It is, therefore, with hesitation that I agree in the conclusion arrived at by the learned Chief Justice on this point.

M. C. P.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION, No. 102-B of 1917.

July 25, 1918.

Present:—Mr. Mittra, A. J. C.

BAPU BALAJEE—DEGREE-HOLDER

—APPLICANT

versus

DHANNU AND ANOTHER—JUDGMENT-DEBTORS.

—NON-APPLICANTS.

Civil Procedure Code (Act V of 1908), s. 115—Revision—Error of law, whether ground for interference.

An error in a conclusion of law arrived at by the lower Court is no ground for revision under section 115 of the Civil Procedure Code.

Balakrishna v. Vasudeva Aiyar, 40 Ind. Cas. 650; 40 M. 793 at p. 799; 15 A. L. J. 645; 2 P. L. W. 101; 33 M. L. J. 69; 26 C. L. J. 143; 19 Bom. L. R. 715; (1917) M. W. N. 628; 6 L. W. 501; 22 C. W. N. 50; 11 Bur. L. T. 48 (P. C.), followed.

Application for the revision of the judgment of the District Judge, West Berar, dated the 10th April 1917, in Miscellaneous Civil Appeal No. 6 of 1916.

Mr. M. V. Joshi, for the Applicant.

The Hon'ble Sir Bipin Krishna Bose, for the Non-Applicant.

ORDER.—The lower Appellate Court has set aside an auction sale on the ground that the judgment-debtors had no saleable interest in the property at the date of the sale. The auction-purchaser is a stranger. Admittedly there is no second appeal in the case. Assuming that the conclusion of law arrived at by the Court below is wrong in law, this is no ground for revision under section 115, Civil Procedure Code: *Balakrishna v. Vasudeva Aiyar* (1). The application is, therefore, dismissed with costs.

I fix Rs. 15 as Pleader's fee in this Court.

Application dismissed.

(1) 40 Ind. Cas. 650; 40 M. 793 at p. 799; 15 A. L. J. 645; 2 P. L. W. 101; 33 M. L. J. 69; 26 C. L. J. 143; 19 Bom. L. R. 715; (1917) M. W. N. 628; 6 L. W. 501; 22 C. W. N. 50; 11 Bur. L. T. 48 (P. C.).

- (5) 27 M. 368.

(6) (1840) 6 M. & W. 664; 10 L. J. Ex. 8; 4 Jur. 1085; 65 R. R. 760; 151 E. R. 579.

PUBLIC PROSECUTOR V. SETTIGIRI NARAYANA REDDI.

RAM ANUJ V. EMPEROR.

MADRAS HIGH COURT.

CRIMINAL APPEALS NOS. 146 TO 184 OF 1918.

August 6, 1918.

Present:—Mr. Justice Sadasiva Aiyar and
Mr. Justice Napier.

THE PUBLIC PROSECUTOR

—APPELLANT

versus

SETTIGIRI NARAYANA REDDI

AND OTHERS—ACCUSED—RESPONDENTS.

Madras District Municipalities Act (IV Mad. of 1884), ss. 207, 217, 264 A—Notice under s. 207, non-compliance with—Prosecution—Construction of latrines by Council or notice to party to provide moveable receptacles, whether conditions precedent.

Before prosecuting a person under section 264 A of the Madras District Municipalities Act for failure to comply with a notice issued under section 207 of the Act, it is not necessary that the Municipal Council should have called on him to provide moveable receptacles under section 217 or should have constructed the latrines themselves under section 264 (1).

Appeals under section 417 of the Code of Criminal Procedure, 1898, against the acquittal of the accused by the Court of the Bench of Magistrates, Tirupati, in Bench Cases Nos. 414 to 452 of 1917 respectively.

The Public Prosecutor, for the Appellant.

Mr. A. Ramachandra Aiyar, for the Respondents.

JUDGMENT.—The notices, so far as they require persons having no backyards to their houses to provide latrines in their non-existing backyards, are clearly bad and we dismiss the appeals in which the respondents are owners of houses having no backyards. Criminal Appeal No. 176 of 1918 is also dismissed, the respondent being dead. It appears that the respondents in the 12 Appeals Nos. 158, 164 to 167, 171, 174, 175, 177, 181, 182 and 184 of 1918 do own backyards to their houses and could have complied with the notice issued under section 207 of the District Municipalities Act (Act IV of 1884) to provide latrines in their several backyards.

We are unable to follow the reasoning of the majority of the Bench that the Municipal Council ought to have called upon the accused to provide moveable receptacles under section 217 of the Act before proceeding to take action under

section 264A. We are also unable to accept the arguments of the respondents' learned Vakil that the Municipal Council ought to have constructed the latrines themselves under section 264 (1) before prosecuting under section 264A for failure to comply with the notice under section 207. We are unable to find any such duty imposed by the Act on the Council as a necessary condition precedent to the institution of prosecutions under section 264A.

We, therefore, convict the respondents in these 12 appeals and impose a fine of one rupee on each of them, dismissing the other appeals.

M. C. P.

Order accordingly.

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 43 OF 1918.

May 27, 1918.

Present:—Mr. Kanhaiya Lal, A. J. C.

RAM ANUJ AND OTHERS—ACCUSED—

APPLICANTS

versus

EMPEROR—RESPONDENT—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 476—Offence brought to notice of Court in subsequent judicial proceeding, effect of—Court, power of, to enquire into commission of offence, exercise of, time of.

The powers conferred by section 476, Criminal Procedure Code, can be exercised at any time when an offence is committed before a Court in a judicial proceeding, or when the commission of it is brought to its notice in the course of that judicial proceeding or in any other. [p. 162, col. 2.]

Aiyakannu Pillai v. Emperor, 1 Ind. Cas. 597; 32 M. 49; 19 M. L. J. 42; 4 M. L. T. 404; 9 Cr. L. J. 41 (F. B.) and *Begu Singh v. Emperor*, 34 O. 551; 11 C. W. N. 563; 5 O. L. J. 508; 5 Cr. L. J. 398; 2 M. L. T. 298 (F. B.), dissented from.

Revision against the order of the Munsif, Hardoi, dated the 5th March 1918.

Mr. A. P. Sen, for the Applicants.

The Government Pleader, for the Opposite Party.

JUDGMENT.—This is an application for revision of an order passed by the Munsif of Hardoi, directing the prosecution of Ram

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Anuj, Tilak and Baldi, the first named on charges under sections 193 and 209 and the latter on a charge under section 193 of the Indian Penal Code.

In 1917 Ram Anuj filed a suit against Likha Singh for the recovery of the price of bullocks alleged to have been sold in 1321 Fasli. The defence was that the bullocks had been purchased 6 or 7 years prior to the suit and that the price had been paid up. Baldi and Tilak gave evidence in that case, supporting the claim of Ram Anuj. On behalf of Likha Singh, Lone Singh was examined. The Small Cause Court, which tried that suit, decreed the claim.

Ram Anuj then filed a suit against Lone Singh, alleging that the latter had similarly purchased a bullock in 1321 Fasli. He was apparently confident that, Lone Singh having admitted in the suit against Likha Singh that both had purchased bullocks at the same time, and Likha Singh having failed to satisfy the Court, a decree against Lone Singh was certain to be passed. Lone Singh, however, succeeded in proving that at or about the time of the alleged purchase he was in jail. Fearing discomfiture, Ram Anuj applied for an amendment of the plaint but was unsuccessful. He thereupon withdrew the suit.

The Court then directed notices to issue to Ram Anuj to show cause why he should not be prosecuted for perjury and similar proceedings were subsequently taken against Tilak and Baldi also, with the result that their prosecution was ordered.

If the facts found by the Court below be taken to be correct, Ram Anuj would be *prima facie* chargeable with the perpetration of systematic fraud and perjury, and his witnesses, Tilak and Baldi, with giving false evidence in support of his claim against Likha Singh. The learned Counsel for the applicants contends that, so far as Tilak and Baldi were concerned, the commission of the alleged offence was not noticed by the Court till after the judicial proceeding in which it is said to have been committed was over. He relies on the decisions in *Aiyakannu Pillai v. Emperor* (1) and *Begu Singh v. Emperor* (2),

wherein it was held that the power conferred by section 476 of the Code of Criminal Procedure could be exercised by the Court which tried the case only in the course of the judicial proceeding in which the alleged offence was committed or at its conclusion or so soon after it as to make it really a continuation of the same proceeding. Such a restricted interpretation does not seem, however, to be justified by the language of section 476 of the Code, for there is nothing in it to limit the exercise of that power within any period or at any particular time. The power can be exercised at any time when an offence is committed before a Court in a judicial proceeding, or when the commission of it is brought to its notice in the course of that judicial proceeding or in any other. The discovery of the commission of such an offence may not be brought to the notice of the Court, before which it was committed, till an enquiry is made in some cognate matter in any other judicial proceeding, and it would be stultifying the scope and intention of section 476 to hold that a Court would not be competent to deal with such a commission, unless a discovery is made in the judicial proceeding in which the offence was committed. In *Girwar Prashad v. Emperor* (3) it was accordingly held that the words "brought under its notice" were wide enough to cover an offence committed in another forum and on some previous occasion, but it must be an offence brought to the notice of the Court holding the enquiry. In *Tilak Pandey v. Emperor* (4) it was similarly held that there was nothing in section 476 to require a Court to take action, if at all, immediately after the conclusion of the case in which the offence was to have been committed or within any fixed time thereafter. In *Lakshmidas Lalji, In re* (5) a similar view was taken. The circumstances set forth by the Court below render an enquiry into the charges laid against the applicants eminently desirable. The application is rejected.

Revision rejected.

(3) 1 Ind. Cas. 306; 6 A. L. J. 392; 9 Cr. L. J. 219.

(4) 29 Ind. Cas. 97; 37 A. 344; 13 A. L. J. 466; 16 Cr. L. J. 465.

(5) 32 B. 184 at p. 190; 10 Bom. L. R. 28; 3 M. L. T. 116; 7 Cr. L. J. 35.

(1) 1 Ind. Cas. 597; 32 M. 49; 19 M. L. J. 42; 4 M. L. T. 404; 9 Cr. L. J. 41 (F. B.).

(2) 34 C. 551; 11 C. W. N. 568; 5 C. L. J. 508; 5 Cr. L. J. 398; 2 M. L. T. 298 (F. B.).

SUNDER BUKSH SINGH v. EMPEROR.

PATNA HIGH COURT.

CRIMINAL APPEAL No. 148 OF 1918.

October 24, 1918.

Present:—Mr. Justice Atkinson and

Mr. Justice Manuk.—

SUNDER BUKSH SINGH AND OTHERS—
APPELLANTS

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 309—Penal Code (Act XLV of 1860), ss 99, '3), 148—Rioting, charge of—Right of private defence of property—Possession of accused—Assessors, opinion of, mode of taking of—Sessions Judge, duty of—Procedure.

In a case of rioting where the dispute arises over the possession of a piece of land and the Crown admits the possession of the accused and the accused themselves, urge the plea of private defence, it is the duty of the Sessions Judge, to explain to the Assessors the legal aspect of the plea put forward by the accused, and to direct their attention to it by putting specific questions to them on the point. [p. 165, col. 2.]

In such a case general questions such as "Has the offence of rioting been proved against any of the accused?" are utterly insufficient. [p. 166, col. 1.]

Cases of rioting in which a plea of right of private defence is raised should be decided strictly on their own facts and previous decisions are only useful in so far as they indicate the general principles which may apply to an approximately similar set of facts. [p. 166, col. 2.]

Where the accused, on learning that their crop was being cut by the complainants, sent information to the Thana and collecting their men went to the field in dispute where they were assaulted by the complainants, with the result that a fight ensued and several persons were injured:

Held, (1) that the accused were justified in collecting their men and arming them sufficiently to prevent the crops being removed from their field in the event of the Police not arriving in time; [p. 167, col. 1.]

(2) that a breach of the public tranquillity having been forced on the accused by the complainant before the arrival of the Police, the right of private defence of person immediately arose in favour of the former and that the complainants were solely responsible for the subsequent fight. [p. 167, col. 1.]

Appeal against the order of the Sessions Judge, Saran.

Messrs. S. Sinha and G. C. Pal, for the Appellants.

The Government Pleader, for the Crown.

JUDGMENT.

MANUK, J.—The appellants, five in number, have been convicted at a trial held by the Sessions Judge of Saran with the aid of Assessors as follows:—

Sunder Bux Singh, appellant No. 1, has

been convicted under sections 148 and 326 of the Indian Penal Code and been sentenced to three years' rigorous imprisonment under section 326, there being no separate sentence under the other section. The other four appellants, Ram Khelawan Singh, Rekha Singh, Ram Tahal Singh and Patti Singh, have been convicted under section 147 of the Indian Penal Code and sentenced to 18 months' rigorous imprisonment each. The common objects set out in the charge under section 148 were to enforce the right or supposed right of Sunder Bux to a field the gram crops of which Ghan-sham and Biran were harvesting and to assault them. In their appeal to this Court the learned Counsel on their behalf has raised an important question involving the right of private defence of both property and person, which calls for a narration of the facts in some detail. As the success or failure of such a plea invariably turns upon the facts found, it is necessary to clear the facts before we proceed further.

The case for the prosecution was that on the day in question, in the morning at 2 *gharies* after sunrise, Biran Singh, Prosecution Witness No. 1, and Ghansham Ahir, P. W. No. 2, were cutting gram in a field in Hakma village, which field Ghan-sham Ahir claims as his, when Sunder Bux, appellant No. 1, came with a mob of 16 or 17 persons, including the other four appellants before us, armed with various weapons, such as swords, *garansas* and *lathis*. Sunder Bux asked Ghansham why he was cutting the crops. Ghansham replied that he was cutting the crops because he held the field on *batai* under the *surpesh-gidar* and, on being requested to leave the field, Ghansham refused to do so. Sunder Bux and his companions then prepared to assault Ghansham and so the latter retreated a little way from the field. Sunder Bux then hit one Biran Singh, who was with Ghansham, with a sword on the left side of the head causing an incised injury, for which Biran was treated in hospital for over 20 days. The second appellant Ram Khelawan also hit Biran a slight blow with a *gransa* on the top of his head. Biran fell and received other injuries including a spear wound on the leg. Ghansham ran away and Biran remained lying

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in the field unconscious. When he recovered consciousness everyone had gone. According to the medical evidence, except the injury on the head which was severe all the other injuries were slight in nature.

The Crown case in the lower Court was somewhat different from the above version, which was really the case alleged by the private prosecutor. The Crown case was that besides Biran and Ghansham who were actually cutting the crops, there were also a number of men armed with weapons on their side in the field and that when Sunder Bux turned up with his party, a fight ensued in the course of which Beni Singh was killed by one of Ghansham's men and Sunder Bux and Ram Tahal, the two appellants before us, were assaulted and received several injuries, whilst on the other side Biran received the injuries mentioned above.

With regard to the possession of the field there was also a complete conflict between the case of the private prosecutor and the case of the Crown. Into the details of that dispute it is not necessary for us to go, for it has been found by the learned Sessions Judge, and accepted by the Crown here as it was in the lower Court, that Sunder Bux had all along been in possession both *de jure* and *de facto* of the field in question up to the morning of the occurrence, when Ghansham's party unlawfully trespassed upon the field in the absence of Sunder Bux and began to get the crops cut.

The defence version of the occurrence may best be stated by quoting Sunder Bux's own first information in the counter-case lodged at Garkta Thana at 11.30 in the morning of the 23rd March, on which date the occurrence took place. A summary of that report is as follows:—

At about 2 *gharies* after sunrise on the 23rd March he was informed by his nephew Ram Khelawan, one of the appellants, that Ghansham, Biran, Narsingh and Din Dayal were cutting his gram crop, so he went there alone to remonstrate. They threatened to kill him so he returned to the village and then came back to the field with his servant Beni Singh (subsequently killed in the riot) and with Rekha Singh son of Beni and Ram Khelawan, his nephew. He saw a number of men, including one Ram Kishun Singh, armed with various

deadly weapons sitting upon the eastern boundary of the field. He asked them why they were getting his field looted; Ghansham then assaulted Sunder Bux with a *lathi*; then Beni Singh pushed Sunder Bux aside and remonstrated with the people. The mob on the Bundh stood up and Ram Kishun Singh ran up and struck Beni with a *garasa* on the left side of the neck and killed him on the spot. The assailants then ran away.

It is important to mention here that the Thana is $1\frac{1}{2}$ miles from the place of occurrence, which in its turn is something under a mile from the village in which the appellants reside. It is also an admitted fact that Sunder Bux, after seeing the prosecution party on his field interfering with his crops, sent one Mohit, Chonkidar of the village, to the Thana with a report of what was going on. That report was recorded by Muhammad Rafique, Writer Head Constable, a witness in this case, at 10.30 that morning in the Station Diary. No explanation of his somewhat dilatory journey has been elicited. It appears that the Writer Head Constable with two constables then proceeded to the spot and on the way met Sunder Bux, Reka and Ram Khelawan with the corpse of Beni Singh. The Writer Head Constable took the party back to the Thana and recorded Sunder Bux's first information report at 11.30 at the Thana. The counter-first information was not recorded till 8 o'clock that night.

In this conflict of the evidence with regard to the incidents of the actual occurrence which led to a serious breach of the public tranquillity and to the death of one man and the causing of grievous injuries to several others, we expected some assistance from the findings and conclusions arrived at by the learned Sessions Judge who had the advantage of hearing the witnesses and appreciating their truthfulness, but on turning to the judgment for assistance on this point we are much disappointed to find that the judgment in this respect was of little or no use to this Court in helping it to come to a conclusion on the facts. It is obvious that if possession is once conceded, as it has been conceded, and was conceded at the trial in the Sessions Court, to the appellants, the findings of fact on the sequence of events which led up to

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the occurrence are of the utmost importance in deciding the question of law as to whether the appellants were protected by the provisions of the Code with regard to the exercise of their right of private defence of property, or person, or both. The learned Sessions Judge has no doubt in one part of his judgment discussed in a superficial manner this question of the right of private defence. He observes:—"Now I am of opinion that Sunder Bux was not justified in his collecting a number of men in this way, and in going to the field in order to prevent the crop from being cut. The Thana was close at hand (about a mile or $1\frac{1}{2}$ miles away)." He then proceeds to say that as Sunder Bux had sent Mohit Chowkidar to the Thana, he should certainly have awaited the arrival of the Police, and further that as the Police arrived on the scene shortly afterwards and only a very small quantity of gram was actually cut, Sunder Bux was not justified in acting as he did. Now, these general observations are of no use when it is first necessary, as we have said, to come to precise findings both with regard to the sequence of events and the part played by each party to the occurrence.

Getting no assistance from the learned Sessions Judge's judgment, we appealed to the learned Government Pleader, who finds himself in the difficult position of being compelled to admit that it is impossible from the judgment to gather what are the findings of facts so important to the decision of the question of the right of private defence. He, therefore, invited us to enter into the evidence of the witnesses and constitute ourselves a Court of first instance in order to supplement the judgment of the lower Court. We have heard those portions of the evidence which he wished to place before us, read out, but they gave us little or no assistance having regard to the admitted fact that the witnesses from whom they come are obviously witnesses of untruth. They come to support a totally false story of Ghansham's possession. The Crown itself has had to reject their version on this point. Their narrative of the events both before and during the occurrence is unconvincing and their attempt to fix upon Sunder Bux, the principal accused, the only serious injury caused to one of their party

is, to say the least of it, extremely suspicious. We, therefore, deem it highly dangerous to accept their evidence as a basis for our findings. Nor would it be fair to the appellants to do so, having regard to the fact that the learned Sessions Judge has, so far as we can gather, preferred the version given by Sunder Bux himself in his first information report. I say "so far as we can gather" advisedly, because even this is not clear from the judgment. He has used it as against the appellant Sunder Bux for another purpose, but, as the learned Judge nowhere indicates that he does not accept this version, we are of opinion that it is only fair and proper for us to accept it as the foundation for our findings. It is in any case the most reliable evidence to act on in this record.

Failing to get any assistance from the learned Government Pleader through no fault of his, for he has, in his usual courteous, fair and able manner helped us to the best of his ability, we were anxious to know what the Assessors had thought of the evidence on the important questions of fact involved in the case. On turning, however, to the record of their opinion to be found at the head of the judgment, we were once again disappointed to find that though they were asked numerous questions, nothing specific as to the incidents of the occurrence had been put to them and that, therefore, they, as laymen, had naturally floundered in the generalities of such questions as "are any of the accused persons guilty of any offence?" "Is the offence of rioting proved against any of the accused?" Now, whatever may be said as to the sufficiency of these general questions in an ordinary case of rioting, there can be no two questions that they are utterly insufficient in a rioting case in which the Crown has admitted the possession of the accused and the accused themselves have strenuously urged the plea of private defence. It should be remembered by the Sessions Judges of our province that Assessors are laymen to whom the niceties of the law of private defence are a sealed book. Without assistance, in the shape of specific questions, concerning the facts upon which the law will turn, they would naturally, in answer to questions such as I have quoted above, reply, as they have replied: "It appears to

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me proved that he committed rioting." "In my opinion all the accused persons are guilty." These are *verbatim* extracts from the record of their replies. It is, however, interesting to see that in spite of the absence of any assistance from the learned Judge, one of the Assessors undoubtedly had at the back of his mind a dimly conscious feeling that merely because there had been a breach of the public tranquillity and people had been injured, it did not follow that the accused, were, in the circumstances of this case, guilty. To the question: "Is the offence of rioting proved against any of these accused?" the first Assessor answered as follows: "Sunder Bux Singh collected a mob for his own field." There is a distinct indication in that answer that the Assessor was of opinion that the mob had been collected not necessarily with an unlawful common object but in order to protect the property of Sunder Bux. That answer should have given the learned Sessions Judge a clue to what was working in the mind of the Assessor, namely, a desire to be instructed as to the facts on which the question of the guilt of the accused, in the circumstances of the case, might turn. But instead of welcoming this indication the next question the learned Sessions Judge put was: "Is it proved that Sunder Bux Singh committed rioting?" And the answer was only what one might expect. "It appears to me that he committed rioting." It is difficult to see how the Assessor could have got out of giving this answer having regard to what he had just said, namely, "Sunder Bux Singh collected a mob for his own field." Speaking for myself, I hold very strong views about the duties of Sessions Judges as regards the questions they should put to the Assessors, especially in cases of this class where the eventual decision turns on a mixed question of fact and law. I speak from personal experience in a case conducted in this province before a learned Sessions Judge and Assessors in which the accused raised a plea of the right of private defence. The Assessors, who were ignorant of the law of private defence, were asked general questions. Their replies were in the same general terms unfavourable to the accused. On my pressing the learned Sessions Judge to expound to them even shortly what the

position would be having regard to the provisions of the law of private defence or to put them more specific questions, he readily acceded, with the result that the Assessors immediately turned round and said that in that case they found the accused not guilty. It is, therefore, that I have entered into this question at some length in the hope that these observations from this Court will bear fruit.

To turn to the case itself, the only question that remains is to decide whether, even accepting the first information report of Sunder Bux as the true version of the occurrence, it is open to the accused to successfully raise the plea of the right of private defence of property or person, or both. Mr. Sinha, for the appellants, has strenuously urged that Sunder Bux did all he possibly could do and showed great forbearance, although confronted with a dishonest and criminal interference with his rights; that he sent information to the Thana and that it was not his fault that before the Thana authorities arrived on the scene a breach of the public tranquillity was forced on his party. The learned Government Pleader on the other hand has equally strenuously urged that it behoved Sunder Bux to wait quietly in his village before taking any steps and to wait on, apparently for an indefinite amount of time, until the Police authorities arrived. He, therefore, argues that the appellants are barred by section 99, clause (3), of the Indian Penal Code from raising the question of the right of private defence. Now, cases in which this question is raised must be decided strictly on their own facts and previous decisions are only useful in so far as they indicate the general principles which may apply to an approximately similar set of facts. No hard and fast rule can be laid down and the boundary line is often so fine that a single circumstance may turn the scales either in favour or against the party asserting this right. The answer to the learned Government Pleader's contention in my opinion is that if Sunder Bux, after sending information to the Thana, had quietly remained in the village till the Thana authorities appeared, it was more than possible that those who trespassed on his field would have carried away the whole or a portion of his crops before the autho-

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rities could arrive. He was, therefore, justified in collecting his men and arming them, if necessary, sufficiently to prevent the crops being removed from his field in the event of the Police not arriving in time.

The next question is, and this to my mind is the crucial question in the case, what happened when Sunder Bux and his party arrived on the field? As I have said, we accept the version given by Sunder Bux in his first information report, even as the learned Judge has apparently accepted it. That being so, we find that when he arrived on the field with his party, Sunder Bux asked the trespassers why they were getting his field looted. This was a perfectly legitimate question for him to put. On this Ghansham immediately assaulted him with a *lathi*. We are of opinion that the moment this assault on Sunder Bux took place, the right of private defence of person certainly and of property as well probably immediately arose and that for the subsequent events the prosecution party in this case is to be held entirely and solely responsible. Had Sunder Bux on reaching the field immediately ordered his party to assault the trespassers, I might not have been disposed, speaking for myself, to accede to the plea of the right of private defence having yet arisen; but the circumstances here are entirely different. The quarrel was forced on Sunder Bux, when he went merely to protect a possession which was his. He was, therefore, entitled, if violence was used, to meet violence with violence and there is nothing whatever to indicate that he would not have been prepared to wait for the arrival of the Police, if the initial violence had not proceeded from the prosecution party. Had the Thana been further away or public authority more difficult of access, I would have been prepared to hold that Sunder Bux had a right to drive the trespassers from his fields provided he did not exceed that right.

Under these circumstances we are of opinion that the convictions and sentences in this case must be set aside and we hereby do so; and direct that the appellants be immediately released or discharged from their bail.

I desire to add one more word, on the question of the sentences. In the counter-

case (Criminal Appeal No. 120 of 1918) in which my learned brother has just delivered judgment, with which judgment I am in entire agreement, the learned Sessions Judge imposed sentences of two years' rigorous imprisonment on each of the only two persons who were convicted out of the 17 persons put on trial. We find it difficult to appreciate the learned Judge's methods of apportioning sentences. On the side of Sunder Bux one man was killed, as I have said, two others received several injuries. On the other side only one man had a severe injury. Possession of the field lay admittedly with Sunder Bux, and on the learned Judge's own findings the riot which occurred originated with the wrongful acts of Ghansham and his party. Yet we find that in this case the learned Sessions Judge has thought fit to sentence one of the appellants to three years' rigorous imprisonment and the others to 18 months' rigorous imprisonment each. It is sufficient to say that these sentences, in our opinion, are, even if the accused could not have successfully pleaded the right of private defence owing to some technicality, much too severe and based upon a complete misappreciation of the extreme and sustained provocation which the accused in this case received.

ATKINSON, J.—I concur.

Convictions and Sentences set aside.

PUNJAB CHIEF COURT.

CRIMINAL APPEAL NO. 172 OF 1918.

July 29, 1918.

Present:—Mr. Justice Scott-Smith and
Mr. Justice Martineau.

EMPEROR THROUGH THE ELECTRIC
SUPPLY COMPANY, LAHORE—

APPELLANT

versus

JAGAT RAM—ACCUSED—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 222, 234, 235—Joint trial for criminal breach of trust and falsification of accounts, when permissible—Trial for criminal breach of trust during period exceeding

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one year, legality of—Court, duty of—Procedure—Appeal from acquittal—Retrial, whether can be ordered on technical ground—Circumstantial evidences, conviction based on, when justified.

A charge of criminal breach of trust of a sum of money can be tried under section 235 (1), Criminal Procedure Code, at the same time with one of falsification of accounts made to conceal the act of misappropriation as part of the same transaction, but a charge of criminal breach of trust cannot be legally tried together with one of falsification relating to a distinct act of misappropriation committed in a separate transaction. [p. 169, cols. 1 & 2.]

Emperor v. Jiban Krishna Bagchi, 20 Ind. Cas. 412; 40 C. 318; 14 Cr. L. J. 426, followed.

The accused was jointly tried of offences falling under six different charges, viz.:

(1) Criminal breach of trust of a sum during the period 17th September 1914 to 25th March 1915.

(2) Criminal breach of trust of a sum during the period 26th March 1915 to 31st March 1916.

(3) Criminal breach of trust of a sum during the period 1st April to 31st May 1916.

(4) Criminal breach of trust of a sum during the period 1st June 1916 to 9th October 1916.

(5) Preparation of a false balance sheet of the Lahore Electric Supply Company for the year ending 31st March 1915.

(6) Preparation of a false balance sheet for the year ending 31st March 1916;

and was acquitted. Government preferred an appeal to the Chief Court against the acquittal.

Held, (1) that charges (1) and (5) could have been tried together, because the preparation of the false balance sheet for the year ending 31st March 1915 was effected to conceal the criminal breach of trust which had been committed during the period ending 25th March 1915; [p. 169, col. 2.]

(2) that similarly charges (2) and (6) could have been tried together and charges (4) and (5) could also have been tried together in one trial, as they related to two offences of the same kind committed within the space of 12 months; [p. 169, col. 2.]

(3) but that the trial of all six charges in one trial was contrary to section 234 of the Criminal Procedure Code and was quite illegal; [p. 169, col. 2.]

(4) that charge (2) contravened section 222, Criminal Procedure Code, and the trial of that charge was in itself quite illegal; [p. 169, col. 2.]

Subrahmanya Ayyar v. King-Emperor, 25 M. 61; 11 M. L. J. 233; 3 Bom. L. R. 540; 28 I. A. 257; 5 C. W. N. 866; 2 Weir 271; 8 Sar. P. C. J. 160 (P. C.), followed.

(5) that the Court before the commencement of the trial should have recorded an order to the effect that it was trying such and such charge or charges and should have proceeded to take all the evidence relating thereto, the trials should have been quite distinct and the accused should have been apprised as to which charges were being tried in each trial and the opinions of the Assessors should have been recorded separately in each; [p. 169, col. 2; p. 170, col. 1.]

(6) that it would not be fair to the accused, who had been acquitted, to order a retrial simply because the trial was illegal on account of misjoinder of charges, unless the Court was satisfied that the order of acquittal was obviously erroneous or was not one which should be maintained owing to the trial

Court having omitted to consider material evidence for some other sufficient reason; [p. 170, col. 1.]

(7) that the onus was on the prosecution to prove affirmatively that the accused received any sums beyond those entered by him as having been received; [p. 171, col. 2.]

(8) that it could not on the evidence be said for certain that the accused was in charge of all the money received by the Company; [p. 172, col. 2; p. 174, col. 1.]

(9) that in view of all these facts it was not one of those exceptional cases where, supposing the trial had been legal, the Chief Court would reverse the order and convict the accused and that, therefore, a retrial should not be ordered. [p. 174, col. 2.]

One of the cardinal principles of cases based upon circumstantial evidence is that in order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis other than that of his guilt. [p. 174, col. 1.]

Appeal from the order of the Additional Sessions Judge, Lahore, dated the 29th October 1917, acquitting the respondent.

Lala Mul Chand, R. S., Public Prosecutor, for the Crown.

Mr. Ganpat Rai, for the Electric Supply Company, Lahore, Appellant.

The Hon'ble *Mr. Muhammad Shafi* and *Mr. Haq Nawaz* and *Lala Raghu Nath Sahai*, for the Respondent.

JUDGMENT.—This is an appeal by the Crown from the order of the Additional Sessions Judge, Lahore, acquitting the accused Jagat Ram of four separate charges of criminal breach of trust under section 403, Indian Penal Code, and of one charge of falsification of accounts under section 477A, Indian Penal Code. The facts of the case appear sufficiently from the judgment of the learned Additional Sessions Judge and from the evidence of *Mr. Robinson*, late Secretary of the Lahore Electric Supply Company, recorded by the Committing Magistrate and of *Mr. Ganguly* (P. W. No. 15), and it is unnecessary for us to repeat them.

The first ground taken by *Mr. Mul Chand* on behalf of the Crown is, that the joint trial of all the offences together was illegal and in particular that the charge relating to criminal breach of trust covering a period from the 25th March 1915 to the 31st March 1916, a period exceeding one year, is contrary to the provisions of section 222, Criminal Procedure Code. The Sessions Judge in his judgment says that there were six charges, and not five as appears from the record, the extra one being a second charge under section 477A, Indian Penal

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Code, and relating to the falsification of balance sheet of the 31st March 1916, and that in all of these charges evidence was taken together with the consent of Counsel on both sides. There is, however, nothing on the record to show that there were separate trials and that the evidence was recorded in one of them. What is apparent from the record is that there was really one and only one trial. The charges framed by the Committing Magistrate were, as stated by the Sessions Judge, as follows:—

(1) Criminal breach of trust of the sum of Rs. 2,948-6-0 during the period 17th September 1914 to 25th March 1915;

(2) criminal breach of trust of the sum of Rs. 10,069-9-1 during the period 26th March 1915 to 31st March 1916;

(3) criminal breach of trust of the sum of Rs. 3,447-1-9 during the period 1st April to 31st June 1916 (*sic*);

(4) criminal breach of trust of the sum of Rs. 2,225-14-9 during the period 1st June 1916 to 9th October 1916;

(5) preparation of false balance sheet of the Lahore Electric Supply Company for the year ending 31st March 1915;

(6) preparation of a false balance sheet for the year ending 31st March 1916. There is, however, no such charge as this last one upon the record and none appears to have been framed by the Committing Magistrate.

At the end of the trial it appears from the record that Counsel for the Crown stated that the charge under section 477A actually framed ought to have had reference to the balance sheet for the year ending 31st March 1916 and not for the previous year, but in spite of this the Court made no amendment of the charge. It also omitted to amend charge No. 3. There is no such date in the calendar as 31st June 1916 and it is explained, and is quite clear, that the date ought to have been 31st May 1915. It is to be regretted that the Court below did not carefully scrutinize the charges at the commencement of the trial and amend them where necessary. Now it was held in *Emperor v. Jiban Krishna Bagchi* (1) that a charge of criminal breach of trust of a sum of money can

be tried under section 235 (1), Criminal Procedure Code, at the same time with one of falsification of accounts made to conceal the act of misappropriation as parts of the same transaction, but that a charge of criminal breach of trust cannot be legally tried together with one of falsification relating to a distinct act of misappropriation committed in a separate transaction. In accordance with this authority it is clear that charges Nos 1 and 5 could have been tried together, because the preparation of the false balance sheet for the year ending 31st March 1915 is said to have been effected to conceal the criminal breach of trust which had been committed for the period ending 25th March 1915. Similarly charges Nos. 2 and 6 could have been tried together, and charges Nos. 4 and 5 could also have been tried in one trial, as they related to two offences of the same kind committed within the space of twelve calendar months, but the trial of all six charges in one trial was contrary to section 234, Criminal Procedure Code, and was quite illegal. Moreover, charge No. 2 contravenes section 222, Criminal Procedure Code, and the trial of this charge was in itself quite illegal. See the well-known judgment of the Privy Council reported as *Subrahmanya Ayyar v. King-Emperor* (2).

The Court before the commencement of the trial should have recorded an order to the effect that it was trying such and such a charge or charges, and should then have proceeded to take all the evidence relating thereto. Thereafter it should have taken up one of the other charges or set of charges and the evidence of witnesses already taken in the first case, so far as it was material to the second one, could have been read over and put in with the consent of Counsel, and any fresh evidence specially bearing upon the charge or charges then being tried should have been taken. Similarly with the third case, but the trials should have been quite distinct, and the accused should have been apprised as to which charges were being tried in each trial, and the

(2) 25 M. 61; 11 M. L. J. 283; 3 Bom. L. R. 540; 28 I. A. 257; 5 C. W. N. 866; 2 Weir 271; 5 Sar. P. C. J. 160 (P. C.).

(1) 20 Ind. Cas. 412; 40 C. 318; 14 Cr. L. J. 428.

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opinions of the Assessors should have been recorded separately in each.

Mr. Mul Chand suggested that without going into the merits of the case we should set aside the trial as illegal and order a re-trial, but we considered that it would not be fair to the accused who has been acquitted to do this, unless we were first satisfied that the Court's order of acquittal was obviously erroneous, or was not one which should be maintained owing to its having omitted to consider material evidence or for some other sufficient reason. In this connection we have borne in mind the principles enunciated in *King-Emperor v. Chatter Singh* (31), the leading authority of this Court on the subject of appeals from orders of acquittal. We have, therefore, heard lengthy arguments on the merits, and after long and anxious consideration have come to the conclusion that this is not one of those exceptional cases where a High Court should interfere with an order of acquittal. In addition to bearing in mind the principles in *King-Emperor v. Chatter Singh* (3), we cannot in the present case, lose sight of the fact that the Judge who presided over the trial was an officer of wide experience in accounts, having recently been Liquidation Judge in Lahore for several years, and that his opinion coincided with that unanimously expressed by three intelligent and well-educated Assessors one at least of whom, Mr. Framji, is a merchant.

Briefly the charge against the accused is that he, when accountant and treasurer or cashier in the employment of the Lahore Electric Supply Company, committed criminal breach of trust in respect of the sums of money set forth in the charges, and that in order to conceal his misappropriations he framed or assisted in framing false balance sheets. The method in which the money was misappropriated is described with great clearness in the evidence of the late Secretary, Mr. Robinson, recorded by the Committing Magistrate and in that of Mr. Ganguly (P. W. No. 15) and in the latter's report, Exhibit P. W. No. 8. When the balance sheet had to be prepared for

the years ending 31st March 1915 and 1916 respectively, there was a difference between the cash balance as appearing in the Company's general ledger and in the pass book of the Bank of Bengal, and this had to be reconciled. All money was sent or was supposed to be sent to the Bank of Bengal up to the 31st May 1916. After that date the Company dealt with the Punjab National Bank, and on this account two charges have been framed in regard to the misappropriations said to have occurred between the 1st June 1916 and 9th October 1916. Mr. Ganguly's evidence and report explain very clearly how the balance as appearing in the Company's books was reconciled with that shown in the Bank pass book.

The first and most important question in the case is, who had charge of the money and cheques received from consumers of energy and other debtors of the Electric Supply Company. The accused, Jagat Ram, was appointed accountant in March 1914. At that time one Jiwan Ram was treasurer and his services were dispensed with a few months later owing to certain defalcations in cash and stores belonging to the Company. He used to receive all payments and give receipts, but under the new system inaugurated after his dismissal the receipt clerk Gian Chand, P. W. No. 4, received payments and gave receipts. He entered these payments in the energy and his miscellaneous cash registers, from which the general cash register and the general ledger were prepared. The general cash register was prepared by various clerks in the office and the general ledger was prepared by the Secretary. None of these registers were in the charge of the accused. The allegation of the prosecution is that Gian Chand on the evening of each day, or at latest on the morning of the following day, took the amount received by him to the accused who sent it, or should have sent it, to the Bank along with the paying-in-slips. Gian Chand and his successor, Charan Das, who relieved him on the 16th April 1916, say that they always paid the whole amount, and gave all the cheques received by them, to the accused and kept nothing in their own possession. It has, however, come out in the evidence that money was often spent by them out of the

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current income in order to meet current expenses and also that they did not always hand over the money to the accused on the day of receipt. They were recouped for the sums thus spent by them by Company's cheques, and these they say were made over to the accused who should have paid them into the Bank. It is, however, admitted that they were not so recouped till some days later, and it is, therefore, obvious that the total daily receipts could not have been made over daily to the accused, and if partial receipts were made over to him, one would certainly have expected to find that he would have given some acknowledgments to the receipt clerks. He might, for instance, have initialled in the receipt counterfoil books or in the cash registers the items actually received by him, but he never acknowledged anything in writing at all.

It was said that when he took the money and cheques from the receipt clerks he compared the amounts with the registers kept up by the latter, but if so, why did he not sign in them in token of having received them? The evidence as to whether he compared the receipts with the entries in any register is conflicting. Rai Bahadur Narinjan Das, Managing Director, P. W. No. 1, says that he used to see accused making comparisons with the entries in some books, but his evidence on the point is not very definite and Hans Raj, P. W. No. 5, says that he used to see Gian Chand paying over the money to the accused but that no book or register was shown to the latter at the time.

Now what the accused says is that the receipt clerk brought him so much money in cash and cheques, and he entered particulars thereof on the paying-in-slips and then sent the money and slips to the Bank. He came to know that the monies paid to him by the receipt clerks were not all that they had received up to date. This he reported to the Secretary who, he says, told him that the receipt clerks could not make over the full amount of the day's receipts to him as they had to spend out of the current income. He told accused that he himself was responsible and that accused need not worry. He also says that he made entries on the back of the paying-in slips in accordance

with the statements made to him by the receipt clerks and with the permission of the Secretary. These notes at first were made in ink and stated that the remittances were of receipts up to such and such date, but after some time they were made in pencil and merely showed that the receipts of certain dates were still outstanding. These pencil notes were of the following sort, *e. g.*, O. 25, 26, which meant that the receipts of the 25th and 26th of the current month were still outstanding. A great deal has been said about these notes in argument, and it has been contended that they are a clear indication of the accused's guilt. There is, however, a good deal to be said for the lower Court's view that it is not likely that the accused, if misappropriating the money, would have kept the record of his defalcations on the back of the paying-in-slips which were subsequently sent to the Bank and open to everybody's inspection. In our opinion, the accused's object in making these entries on the slips might have been to shew that he was not responsible for anything more than the sums actually sent to the Bank. The entries are in a sense his acknowledgments of having received the amounts entered in the slips and nothing more from the receipt clerk.

We agree with Mr. Shafi, Counsel for the accused, who has argued that the onus was on the prosecution to prove affirmatively that the accused received any sums beyond those entered by him in the slips. The evidence of Rai Bahadur Lala Narinjan Das and other prosecution witnesses that they used to see monies being counted over to the accused is quite compatible with his statement that he only received the sums entered in the slips and forwarded by him to the Bank. There is no evidence on the record that he received more than these sums beyond that of the receipt clerks, and as the learned Sessions Judge remarks: "They have to save themselves and are, therefore, highly interested witnesses." It has been urged by Mr. Mool Chand that at first, when the amount withheld by the receipt clerk was small, the accused might have thought that things were all right, but that when the amount reached Rs. 13,000 odd at the end of March 1916 he must have suspected

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something to be wrong. The accused says that about the end of September 1914 the receipt clerk did not bring any money for some days for remitting to the Bank, and that he brought this matter to the notice of the Secretary who, as already noted, replied that as the receipt clerk was authorized to spend from the daily collections, he could not remit the complete amount unless he was recouped. The Secretary further told him that he would himself check the accounts from time to time and would take over charge of the general ledger and the Bank pass book. Accused says that again in October 1914 he brought to the notice of the Manager and the Secretary that the receipt clerk was not regular in sending the amounts of payments to the Bank. He says that the Secretary also told him that it was *his* (the Secretary's) duty to see whether the amounts were going regularly to the Bank or not. Mr. Robinson denies that he had any such conversation with the accused, but as there appear to be good grounds for considering that either he or the accused was privy to the embezzlement, it is the word of Mr. Robinson against that of the accused, and the evidence of the former must, therefore, be received with great caution. If the accused did bring this matter of short remittances to the Secretary's notice as he says he did and was answered as he says he was, there was no need for him to worry further in the matter even where the amount held back by the receipt clerk became large. He says that he was never appointed cashier or treasurer of the Company, and he was certainly never shown as such in the list of the employees of the Company and no security was ever taken from him. Rai Bahadur Lala Narinjan Das no doubt says that he had to perform the duties of the cashier, but he was also forced to admit that specific duties were not assigned to the various employees of the Company. Charan Das says that he was appointed treasurer in March 1916, but he never took over the duties of the treasurer because he could not give the security demanded of him. It is extraordinary that the accused should have been allowed to remain as treasurer without security being demanded from him. He kept none of the registers

which we should have expected him to keep had he really had charge of, and been responsible for, all money received by the Company. In our opinion it cannot on the evidence be said for certain that the accused was in charge of all the money so received.

We next proceed to consider what are called the reconciliation statements, and Mr. Mul Chand has stated repeatedly in his argument that they furnished the main reason for considering accused's guilt to be proved. These statements were prepared in connection with the annual balance sheet of the Company and the object of them was to reconcile the balance as appearing in the Company's general ledger with that shown in the pass book of the Bank of Bengal. It was necessary to prepare these statements in any case, because even if there had been no misappropriations at all, the balance shown in the Company's ledger would not correspond with that shown in the Bank pass book on any particular date because

(1) there would be outstanding cheques drawn by the Company in favour of their creditors and not yet presented to the Bank to be cashed, and

(2) there would be remittances of cheques made to the Bank and not yet credited because of non-realization. It is admitted that such cheques were not credited until after realization. These reconciliation statements show remittances of certain dates as in transit to the Bank when in fact there had been no such remittances. Mr. Mul Chand asks, why did accused show that the amount of certain remittances should be added to the balance when, according to his own statement, he knew the amount represented receipts of certain dates which were still in the hands of the receipt clerks which had not yet been remitted at all. Mr. Robinson explained that the entry should really have been "collections" and not "remittances." Now as a matter of fact up to 31st March 1915 and 1916, respectively, certain remittances had been made to the Bank of Bengal which had not yet been credited in the pass book. The actual amount misappropriated as on those dates was considerably less than the amount shown as remittances of certain specified dates not yet credited by the Bank,

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The entry in the reconciliation statement should really have been neither 'remittances' nor 'collections'. Part of the deficiency consisted of remittances actually made but not yet credited, and the rest represented collections actually made but not yet remitted to the Bank. A mere misdescription of this sort in these statements would not necessarily be dishonest or fraudulent. What, however, does appear to be dishonest in them is that in their preparation certain sums representing the exact amount of defalcation as on those dates were taken into credit twice over (see in this connection Mr. Ganguly's report, Exhibit P. W. 8). To put it shortly, the amounts shown as remittances to the Bank but not yet credited include sums which had been really credited by the Bank. The crux of the whole matter really is, "who prepared these statements?" Now the learned Sessions Judge is wrong in thinking that both were in the handwriting of Mr. Robinson. That of 1915 is in his handwriting, but that of 1916 is in that of the accused. Mr. Robinson says that he prepared the statement of 1915 in accordance with the figures supplied to him by the accused which he did not check, whereas the accused says that he wrote out that for 1916 under the instructions of Mr. Robinson; in other words, each wants to shift the responsibility to the other. Now these statements were prepared, as already stated, in connection with the annual balance sheets. These latter were prepared by the Secretary and he was primarily responsible for their correctness. It was, therefore, incumbent upon him to reconcile the balance as appearing in the Company's ledger with that appearing in the Bank pass book, and it can hardly be believed that he left this duty entirely to the accused. He certainly should not have done so. He himself maintained and kept in his possession the general ledger, and Mr. Ganguly has stated (see page 172 of the record) that the reconciliation statement for 1916 could have been prepared without reference to the paying-in-slips as the necessary information could be gathered from the general ledger and the Bank pass book. Mr. Mul Chand urged that this was wrong and that no one could have prepared the

statement without reference to the paying-in-slips. We have carefully examined the general ledger and we find that both the reconciliation statements could easily have been prepared by a reference to it and the Bank pass book. No reference to the paying-in-slips was necessary for the preparation of these statements. None of the books which had to be used in their preparation were in the custody of the accused. All of them were with the Secretary. The statement of 1915 is in his handwriting and every item is tick-marked by him. We see no reason why we should assume that the accused must have had the chief hand in its preparation. Once it is admitted that Mr. Robinson prepared the reconciliation statement for the period ending 31st March 1915, it is not difficult to hold that he probably prepared that for the period ending 31st March 1916 also, even though it is in the handwriting of the accused. It is certainly not shown beyond doubt that the accused prepared either of these statements and the probabilities, in our opinion, point to the view that Mr. Robinson prepared them. It, therefore, appears to us that these reconciliation statements, upon which Mr. Mul Chand has laid such very great stress, do not at all necessarily shew that the accused must either have been guilty of the misappropriations or have abetted the misappropriations. No doubt the accused or Mr. Robinson was privy to the embezzlements, but the facts, as appearing from the evidence, cannot be said to be inconsistent upon any reasonable hypothesis with the theory of the accused's innocence.

Another point upon which some stress was laid by Mr. Mul Chand was the accused's conduct when first taxed with the deficiency. The deficiency with which he was taxed was that relating to the period between the 1st June and the 9th October 1916. The amount entered in the charge relating to this period represents short remittances made to the Punjab National Bank, and the accused who was ill at the time and absent from duty was made to pay it up. He did so under protest. He is said to have stated at first that there must have been some mistake in the books and that he would see to it when he returned to office. He

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did not at that time disclaim all responsibility and say that the cash was not in his charge at all. What he said at that time rests mainly upon the evidence of Mr. Robinson and the receipt clerks who are interested witnesses, but in any case we do not think very much stress should be laid upon the accused's conduct at that time. He was ill and absent from the office and was faced with a very serious charge. It is quite possible that he got frightened and in that condition made the statements ascribed to him.

The matter to which the learned Sessions Judge might have given more attention is this, that after the 31st March 1916 no pencil notes were made on the back of the paying-in-slips by the accused. He should, in our opinion, have been asked why he ceased to make those notes. He also should have been asked whether, when Charan Das took over the duties of the receipt clerk from Gian Chand on the 16th April 1916, he informed him that the collections of certain dates were still outstanding and asked him to look into the matter. Accused made good the amount outstanding in the accounts of the Punjab National Bank, but he did so under protest and his conduct in doing so certainly does not prove anything against him.

The main charges relate to the embezzlement of Rs. 16,000 odd which should have been, but was not, paid into the Bank of Bengal. We cannot hold that it is proved beyond all reasonable doubt that the accused must have embezzled all this money, or have been privy to the embezzlement. It is not, in our opinion, proved, as we have stated above, that the accused had charge of all the monies paid into the Company. The other evidence on the record is purely circumstantial, and one of the cardinal principles of cases based upon circumstantial evidence is that in order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. See Wills on Circumstantial Evidence, 6th Edition, page 311. In our opinion, so far as the evidence goes, we consider it just as likely that the embezzlements were com-

mitted by the receipt clerks with the connivance of the Secretary, Mr. Robinson, as that they were committed by the accused with or without the help or connivance of any one else. In addition to this we cannot ignore the facts that an experienced Judge and three educated Assessors have concurred in holding that the accused's guilt is not proved and that the accused has been acquitted. We are very clear that this is not one of those exceptional cases where, supposing the trial had been legal, we should reverse the order and convict the accused, and in these circumstances we decline to order a retrial.

We feel it to be our duty before closing this judgment to say that the commission of the frauds and the apparent impossibility of bringing responsibility home with certainty to any one were due to the utter lack of system in the affairs of the Company and to the want of supervision in the office. The Secretary at the end of each financial year should have counted the cash and cheques in the hands of the persons who had charge of them, and he could then easily have seen whether there was any deficiency in the balance in their hands. If Mr. Robinson was not himself a party to the frauds, he obviously exercised no supervision at all over his subordinates in the office. Had he exercised any, he could not have failed to discover the frauds which would have been nipped in the bud. It is also clear that Pandit Balak Ram (P. W. No. 13) of the firm of Messrs. Basant Ram and Sons, Auditors, must have performed his duty of auditing the accounts of the Company in an extremely perfunctory manner. He audited the accounts of the Company for the years ending the 31st March 1915 and 1916, and yet he failed to discover anything amiss. He saw that there was a difference between the balance as appearing in the books of the Company and in the pass book of the Bank of Bengal, and he saw how this difference was reconciled. It was perfectly easy for him to see by a careful examination of the general ledger and other registers whether the reconciliation statements were correct or not, but he apparently accepted the explanation of the employees of the Company without making any thorough examination on his own account.

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The appeal is dismissed and Jagat Ram is discharged from his bail.

Appeal dismissed.

PATNA HIGH COURT.

CRIMINAL REVISION No. 295 OF 1918.

October 3, 1918.

Present:—Mr. Justice Mullick.

BADRUL HASAN AND ANOTHER—PETITIONERS
versus

Musammat CHAMELA—OPPOSITE PARTY..

Criminal Procedure Code (Act V of 1898), ss 517, 520, 523—Restitution of property—Revision—Power of Court in revision—Restitution, enforcement of.

Section 520 of the Criminal Procedure Code of 1898 differs from the corresponding provision in the Code of 1882 and contemplates that the Court of reference or revision shall order restitution if justice so requires. [p. 176, col. 1.]

Where a remedy is allowed by law, it must be assumed that the Legislature intends that the tribunal invested with jurisdiction shall enforce its order in the manner it considers most suitable, even though there is no express provision for doing the same. [p. 176, col. 1.]

Criminal revision from an order of the Sessions Judge, Gaya.

Mr. Muhammad Hasan Jan, for the Petitioners.

Mr. Panchanan Banerji, for the Opposite Party.

JUDGMENT.—In consequence of an information lodged before the Police on the 13th January 1918 by one Musammat Chamela, the house occupied by the petitioner Badrul Hasan, his son Nurul Hasan and the petitioner Musammat Haku, the wife of Nurul Hasan, was searched and a quantity of jewellery and one 10 rupee note, which were claimed by the prosecutrix Chamela, were seized by the Police. Subsequently Nurul Hasan was arrested while going along a road in Gaya town and a sum of Rs. 230 in currency notes was found upon his person. This sum of money was also seized by the Police and sent

to the Magistrate along with the other property. Nurul Hasan and Badrul Hasan were then prosecuted on a charge under section 411, Indian Penal Code, but Nurul Hasan having died after the commitment enquiry Badrul Hasan alone was prosecuted before the Sessions Court. He was acquitted on the 7th March 1918, on the ground that it had not been established that there had been any theft or dishonest retention of stolen property. Thereupon an application was made to the Sessions Judge by Badrul Hasan and Musammat Haku, who claimed to have succeeded to the estate of Nurul Hasan, for an order to deliver to them the currency notes of the value of Rs. 230 which were found upon Nurul Hasan's person. The Sessions Judge refused the application and directed the petitioners to apply to the Magistrate. The petitioners applied to the Magistrate, but upon objection being made by the prosecutrix Musammat Chamela the Magistrate on the 8th April 1918 directed the notes to be made over to Musammat Chamela on the ground that they were her property. The petitioners then moved the Sessions Judge, Mr. Foster, who had succeeded the officer who tried the original case. Mr. Foster has declined to revise the order of the Magistrate on the ground that section 520 of the Criminal Procedure Code of 1898 does not appear to confer any power of restitution. The petitioners now invoke the revisional jurisdiction of this Court for an order directing restitution of the notes. Although the affidavit attached to the petition before me states that the notes in question were marked as an exhibit in the Sessions trial and that it was, therefore, within the competence of the Sessions Court to deal with them under section 517 of the Code and although a similar statement appears in the order passed by Mr. Foster, I find on referring to the record itself that the notes were not before the trial Judge and that they were certainly not marked as an exhibit. That being so, the trying Judge was right in declining jurisdiction under section 517 of the Code and in directing the petitioners to apply to the Magistrate for necessary action. In this connection I desire to observe that the affidavit is worthless as the person swearing the same was not in a position to state

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the source of his knowledge in regard to the averment in question, and I desire to draw the attention of parties to the necessity of complying with the rules of this Court in this important matter. The notes were, however, made an exhibit in the trying Magistrate's Court and, therefore, that officer had full jurisdiction to make the order which he did under section 517. The only question is, whether Mr. Foster was right in declining to make an order for restitution on the ground that section 520, although it gave him the power to interfere with the Magistrate's order, did not permit him to make an order for restitution. In my opinion section 520 differs from the corresponding provision in the Code of 1882 and contemplates that the Court of reference or revision shall order restitution, if justice so requires. The words "and may make any further orders that may be just" seem to me to be very wide and to have been inserted for the purpose of meeting cases such as that now before me. No express judicial authority has been shown to me on the point since the Code was amended, but having regard to the language of the amendment and to the fact that the amendment was made in spite of decisions under the Code of 1882 laying down that restitution could not be made by the Court of reference or revision, it seems to me clear that the contention of the petitioners before me is correct.

Then arises the question as to how restitution is to be enforced. In my opinion where a remedy is allowed by law, it must be assumed that the Legislature intends that the tribunal invested with jurisdiction shall enforce its order in the manner it considers most suitable, even though there is no express provision for doing the same. In the case before me there is, however, express provision in section 547 of the Code for realising the money value of the notes as a fine, and I take it that it would also be competent to the Sessions Court to enforce its order by putting the penal law in motion relating to the disobedience of lawful orders. In my opinion it is eminently just and proper that the currency notes found upon Nurul Hasan should be returned to his representatives-in-interest and that on

default restitution should be made by payment to them of the money value thereof. The learned Magistrate's view that the notes were the property of *Musammal Chamela* appears to me to be based upon no judicial evidence whatsoever. I fail to see how the learned Magistrate, in the face of the finding of the Sessions Court that there had been no theft or dishonest retention, could substitute a finding of his own at variance with that of the trial Court.

The learned Vakil for the opposite party contends that the order of the learned Magistrate was made under section 523 of the Code and that it is in the nature of an executive or administrative order which is not revisable by the High Court. In my opinion the order is clearly one under section 517, but even if it had been an order under section 523 it must be viewed as a judicial order and the provisions of the Code as regards revision are, in my opinion, clearly applicable.

It is not clear whether the petitioners have established their right to administer the estate of the deceased Nurul Hasan. The order, therefore, that I shall make is that upon the petitioners establishing within three months from this date before the learned Sessions Judge that they are entitled to administer the estate, the learned Sessions Judge will make an order of restitution in their favour in the terms proposed. On their failure to establish the necessary title, the application will be rejected.

Order accordingly.

SHEO SHANKAR BAKHSH v. MITHANA KUAR.

OUDH JUDICIAL COMMISSIONER'S
 COURT.

FIRST CIVIL APPEAL No. 71 OF 1917.

June 27, 1918.

Present:—Pandit Kanhaiya Lal, A. J. C., and
 Mr. Daniels, A. J. C.

SHEO SHANKAR BAKHSH AND OTHERS—
 PLAINTIFFS—APPELLANTS

versus

Musammat MITHANA KUAR—DEFENDANT
 —RESPONDENT.

*Construction of document—Will, interpretation of—
 Legatees, several, named in succession—Estate bequeathed,
 nature of.*

Where a Will, after stating that the testator would remain in proprietary possession of his property till his death, provided that if he left a son that son would be "the owner and possessor" of the said property, that if he left no son his widow and the widow of his predeceased son would be "the owners and possessors" thereof, and that in the event of none of them existing his daughter would be "the owner and possessor" of the same:

Held, that the Will did not confer life-estates on any of the legatees or even successive estates on the several legatees, but conferred an absolute estate on the eventual legatee, whoever such legatee might be at the time of the testator's death. [p. 178, col. 2.]

Appeal from the decree of the Subordinate Judge, Unao, dated the 23rd February 1917.

Babu Bisheshwar Nath Srivastava, for the Appellants.

The Hon'ble Pandit Gokaran Nath Misra, for the Respondent.

JUDGMENT.—The dispute in this case relates to the construction of a Will, purporting to have been executed by Ganga Prasad on the 14th May 1878. Ganga Prasad had a son, Ram Narain, who had died in his lifetime, leaving a widow, Musammat Batasi Kuar. He had also a wife, Musammat Dula Kuar, and a daughter, Musammat Mithana, both of whom survived him. By the Will he declared that Musammat Dula Kuar and Musammat Batasi Kuar were to be the owners and possessors (*malik wa qabiz*) of his property after his death, that if a son was subsequently born to him by his present wife or by another wife whom he might thereafter marry, that son would inherit his estate, and that in the event of none of these existing (*dar surat na hone in sabhon ke*) his daughter would be the owner and possessor thereof.

Ganga Prasad died on the 23rd November 1886. On his death Sheo Shankar Bakhsh, the present plaintiff No. 1, and Mahabir Prasad, the father of the other three

plaintiffs, took possession of the entire estate of the deceased and got mutation of names effected in their favour. Musammat Dula Kuar and Musammat Batasi Kuar sued them for possession on the strength of the aforesaid Will and got a decree, which was confirmed by this Court on the 16th September 1890 (Exhibit A-3). In that suit no question was raised as to the nature of the rights conferred by the Will. Musammat Batasi Kuar died on the 15th November 1904, leaving Musammat Dula Kuar surviving her. Musammat Dula Kuar remained in sole possession of the disputed property till her death on the 2nd February 1905. On the death of Musammat Dula Kuar, Musammat Mithana, the daughter of Ganga Prasad, applied for mutation of names in her favour but was resisted by the present plaintiffs. She succeeded.

In the suit which has given rise to this appeal the plaintiffs sued for possession of the disputed property, alleging that according to the custom of the family and the conditions laid down in the *wajib-ul-arz*, daughters and their issue were excluded from inheritance and that the plaintiffs were entitled to succeed to the estate on the death of Musammat Dula Kuar. The defendant denied the existence of the alleged custom and pleaded that she succeeded to the property on the death of Musammat Batasi Kuar and Musammat Dula Kuar under the Will of Ganga Prasad above mentioned, and that the plaintiffs had no right to sue. There was a further plea that the claim was barred by the rule of *res judicata*; but that plea was later on abandoned.

The learned Subordinate Judge did not go into the question of custom. He found that under the Will of the 14th May 1878 Musammat Batasi Kuar and Musammat Dula Kuar had a life-interest in the property bequeathed and that on the death of the latter Musammat Mithana succeeded to an absolute interest therein by virtue of the said Will.

We are unable, however, to accept the construction put by the learned Subordinate Judge on the said Will. After stating that he shall remain in proprietary possession of his property till his death and that after him his widow and the widow of his predeceased son shall be the owners

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and possessors thereof, the testator said: "In the event of a son being born to me in my lifetime from my present wife or from a second wife, whom I may marry, such son shall be the owner and possessor; and in the event of none of these existing, my daughter will be the owner and possessor." The estate, which the testator was conferring on a son, who may be born to him, or if no son was born to him, on his widow and the widow of his predeceased son, and in the absence of all of them on his daughter, was described by the same terms, namely, that they were to be the owners and possessors of his property. If the son, who might be born to him, was to be the full owner of his property after his death, his widow and the widow of his predeceased son were equally to be the full owners thereof, if no such son was born; and if those widows were to be the full owners in case no such son was born, it is difficult to conceive how an ulterior disposition in favour of the daughter could have been within the contemplation of the testator. In any case, the Will does not say so. All that it provides is that in the event of there being none of the persons previously mentioned his daughter shall get his property, implying thereby that she would only get it if she survived him and the others did not. Section 107 of the Indian Succession Act (X of 1865) lays down that a legacy bequeathed in case a specified uncertain event shall happen does not vest until that event happens. Till that event happens, the interest of the legatee is only contingent. Section 21 of the Transfer of Property Act (IV of 1882), which applies to transfers *inter vivos*, recognises the same principle and declares that an interest created in favour of a person to take effect only on the happening of a specified uncertain event becomes a vested interest, when that event happens or when the happening of it becomes impossible; but till then it remains contingent.

In the present case both *Musammat Dula Kuar* and *Musammat Batasi Kuar* survived the testator. He had no son born to him after the execution of the Will. There was no occasion, therefore, for the contingent interest given to the daughter coming into operation.

As pointed out by their Lordships of the Privy Council in *Surajmani v. Rubi Nath Ojha* (1), which was followed in *Tikram Singh v. Chet Kunwar* (2) and again in *Fateh Chand v. Rup Chand* (3), the use of the word "*malik*", unless qualified in any way by the context, indicates the grant of an absolute estate. *Musammat Batasi Kuar* was not even an heir of the testator, and as both the estates granted to the son, if any was born, and that granted to *Musammat Dula Kuar* and *Musammat Batasi Kuar* were described in the same terms, there can be no doubt that the grant of a full estate was intended by the testator, whoever the eventual legatee might be.

The learned Counsel for the defendant-respondent contends that the testator intended to grant successive estates, but such an interpretation is absolutely inconsistent with the express terms of the Will, which provides that if the testator left a son that son would be the absolute owner of the state, that if he left no son, his widow and the widow of his predeceased son would be the owners and possessors thereof, and that in the event of there being none of them, his daughter would get his property. Had a son been born and survived the testator, it could hardly have been intended that the daughter of the testator should get his property after the death of that son, in case he died leaving other heirs. Where an absolute estate is granted, the grant of an ulterior disposition is moreover void. On either ground, therefore, the defendant-respondent has no right to claim the disputed property on the strength of the Will.

It is suggested that even if *Musammat Dula Kuar* was entitled to an absolute estate under the Will, the defendant-respondent would be entitled to inherit that property as an heir to her *stridhan*. That point was not expressly pleaded or tried by the Court below, and its determination may depend upon the

(1) 80 A. 84; 5 A. L. J. 67; 12 C. W. N. 231; 18 M. L. J. 7; 10 Bom. L. R. 59; 7 C. L. J. 131; 3 M. L. T. 144; 35 I. A. 17 (P. O.).

(2) 2 Ind. Cas. 924; 12 O. C. 157.

(3) 87 Ind. Cas. 122; 38 A. 446; 18 Bom. L. R. 900; 20 M. L. T. 481; 21 C. W. N. 102; 4 L. W. 597; (1916) 2 M. W. N. 567; 26 C. L. J. 182 (P. O.).

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decision of the question of custom upon which no evidence has hitherto been taken. On the death of *Musammât Dula Kuar*, the property in dispute would devolve on her daughter, if she was not excluded by custom.

Let the Court below be, therefore, directed to determine, after taking such relevant evidence as the parties may adduce:—

1. Whether there was any family custom excluding the defendant-respondent from inheriting the property of her father or mother.

2. Whether the plaintiffs are entitled to sue and have a right to any of the reliefs claimed.

It may be noted that on the 7th February 1915 two applications were made by the plaintiffs for the amendment of the plaint, which were allowed by the Court below, but no amendment has actually been made. This omission should be rectified.

Two months' time will be allowed for a return of the findings and ten days from the date of the findings will be allowed to the parties for filing objections.

Issues remitted.

MADRAS HIGH COURT.

CIVIL APPEALS NOS. 92 AND 93 OF 1915.

August 15, 1918.

Present:—Mr. Justice Abdur Rahim and
Mr. Justice Oldfield.

LAKSHUMANAN CHETTY—DEFENDANT

No. 1—APPELLANT IN BOTH

versus

R. M. K. S. SADAYAPPA CHETTY AND
OTHERS—PLAINTIFF AND DEFENDANTS NOS. 2 TO
18—RESPONDENTS IN APPEAL No. 92 OF 1915,
SIVAGAMI ACHI AND OTHERS—PLAINTIFF
AND DEFENDANTS NOS. 2 TO 17—RESPONDENTS
IN APPEAL No. 93 OF 1915.

Limitation Act (IX of 1903), s. 19—Receiver, appointment of, by Court "to do all things necessary for the preservation of firm"—Power to acknowledge—Acknowledgment by Receiver, whether saves limitation.

A Receiver may be an agent authorised to make an acknowledgment within the meaning of section 19, Explanation II, of the Limitation Act. The language of the section is general enough to include an

agent appointed either by Statute or by Court, provided he is authorised under the law to make acknowledgments. [p. 181, col. 1.]

Whitley v. Lowe, (1858) 25 Beav. 421; 53 E. R. 697; 119 R. R. 482, distinguished.

A Receiver appointed "to do all things necessary for the preservation of the assets of a firm" has authority to make acknowledgments on behalf of the firm, if they are necessary for the preservation of the firm's assets and if the Receiver acts *bona fide* with that object. [p. 181, cols. 1 & 2.]

Appeals against the decrees of the Court of the Temporary Subordinate Judge, Ramnad at Madura, in Original Suits Nos. 19 and 32 of 1914.

FACTS appear from the judgment.

Mr. K. Srinivasa Aiyangar, for the Appellant.—The acknowledgment by the Receiver is not sufficient to save limitation under section 19 of the Limitation Act. It is not an acknowledgment by an agent within the meaning of Explanation II to the section. The section refers to agents appointed by an act of the debtor, *i. e.*, by a contractual act. As section 21 deals with other classes of agents, section 19 must be understood as referring only to agents authorised by the debtor. *Whitley v. Lowe* (1).

Again, under the terms of his appointment the Receiver had no authority to make the acknowledgment. He had power only "to do all things necessary for the preservation of the estate of the said firm." It cannot be for the benefit of the firm to make acknowledgments.

Mr. S. T. Srinivasagopalachariar, for the Respondents.—The Receiver is an agent within the meaning of Explanation II to section 19 of the Limitation Act. The section is not restricted to agents appointed by the debtor. Statutory agents also fall under the explanation.

The Receiver had power to make acknowledgments under the terms of his appointment order. He prevented suits by the firm's creditors and saved the firm's assets from being burdened with Court costs. That was an act necessary to preserve the assets of the firm.

JUDGMENT.—The first defendant was a minor. There was a suit for dissolution of the firm, and in that suit a Receiver was appointed under order of the Rangoon Court in these

(1) (1858) 25 Beav. 421; 53 E. R. 697; 119 R. R. 482.

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terms:—"It is ordered that M. A. R. A. R. Ramanathan Chetty be, and he is hereby appointed, Receiver to take charge of the property of the Chetty firms of M. L. R. M. A. and A. L. A. S. R. M. pending the decision of this suit for dissolution of partnership, with power to collect outstandings and do all things necessary for the realization and preservation of the assets of the said firms." The question we have got to decide in the appeal is whether an acknowledgment of a debt due by the firm under dissolution made by the Receiver was valid.

It is contended that section 19 of the Limitation Act is limited, so far as the signing of an acknowledgment by agents is concerned, to agents appointed by an act of the debtor himself, or in other words, by a contractual act. Explanation II does not cover the case of an agent who is otherwise appointed. Explanation II says, "For the purposes of this section 'signed' means signed either personally or by an agent duly authorised in this behalf." Reference is made to section 21 which deals with the case of a person under disability, and lays down that the expression 'agent duly authorised in this behalf' in section 19 shall include "his lawful guardian, committee or manager, or an agent duly authorised by such guardian, committee or manager to sign the acknowledgment". Section 21 is a new section which has been introduced, as is well known, in view of conflicting decisions as to whether section 19 covers the case of an acknowledgment made by a guardian. The argument advanced by Mr. K. S. Srinivasa Aiyangar is to the effect that although Explanation II does not say by an agent duly authorised by him, that is, by the person sought to be bound by the acknowledgment, yet it must be taken to mean that inasmuch as all other cases are dealt with by section 21. Section 21, however, only says that, in the case of a person under disability, "agent" shall include his lawful guardian, etc. It does not lay down that there can be no other agent duly authorized to make acknowledgment in the case of persons under disability. The words "by an agent duly authorized in this behalf" in Explanation II in section 19 were in force before the enactment of section 21, and we cannot accept the contention that by section 21 the Legislature intended in any

way to narrow the scope of section 19. It is unnecessary for us to say whether section 21 has widened its scope or not, or it has merely explained what was contained in section 19 itself.

The authorities seem to be uniform against the appellant's contention. The matter is fully dealt with by a Full Bench of the Bombay High Court consisting of the Chief Justice, Sir Lawrence Jenkins, and other learned Judges in *Annapagauda v. Sangadig-yapa* (2), where it is laid down that the agent in Explanation II, section 19, need not derive his authority from any contract. That was the case of a guardian, and it was ruled that the guardian appointed under the Guardians and Wards Act was an agent within the meaning of Explanation II, if the terms of his appointment gave him authority to make acknowledgments. English cases are then noticed and the statement of law on the subject as given by Lord Westbury in *Chinnery v. Evans* (3) is cited to show that the law in England is also to the same effect. In *Beti Maharani v. Collector of Etawah* (4) their Lordships of the Privy Council upheld an acknowledgment made by the Court of Wards as being operative under section 19, and that decision must be taken to be based on the principle that the agent mentioned therein may be one appointed under a Statute and need not be appointed under contract. There are similar decisions of this Court in *Kondamodalu Linga Reddi v. Alluri Sarvarayudu* (5), of the Calcutta High Court in *Rashbehary Lal Mandar v. Anand Ram* (6) and of the Allahabad High Court in *Ram Charan Das v. Gaya Prasad* (7). We may mention that in the Calcutta case the question raised was with reference to an acknowledgment made after the new Limitation Act had come into force. The learned Judges, however, proceeded not on

(2) 26 B. 221; 3 Bom. L. R. 817.

(3) (1864) 11 H. L. C. 115; 4 N. R. 520; 10 Jur. (N. S.) 855; 11 L. T. 68; 13 W. R. 20; 11 E. R. 1274; 145 R. R. 79.

(4) 17 A. 198; 22 L. A. 31; 6 Sac. P. C. J. 551; 8 Ind. Dec. (N. S.) 452.

(5) 6 Ind. Cas. 407; 34 M. 221; 20 M. L. J. 803; 8 M. L. T. 105; (1910) M. W. N. 453.

(6) 34 Ind. Cas. 205; 43 C. 211.

(7) 30 A. 422; 5 A. L. J. 375; A. W. N. (1903) 175; 4 M. L. T. 49 (F. B.).

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the words of section 21, but of section 19. We may also mention that there is a dictum of Kumaraswami Sastri, J., of this Court in *Venkataramiah Pantulu v. Subramaniam Pillai* (8) supporting the same view, and there is a very recent decision of the Bombay High Court reported as *Abdulali Badrudin v. Ranchodlal Trikamlal* (9) which proceeds on the same view of the law.

Some reliance was placed on behalf of the appellant on *Whitley v. Lowe* (1), but that case is distinguishable inasmuch as there the Receiver was only authorized to get in the assets of the partnership and to pay the assets realized into Court.

We hold on the authority of the cases referred to that a Receiver may be an agent authorized to make an acknowledgment within the meaning of section 19, Explanation II. The language is general enough to include an agent appointed either by Statute or by Court, if he is authorised under the law to make acknowledgments.

The next question in this connection is whether the Receiver appointed in this case had in fact authority to make an acknowledgment. If he had such authority, it must have been under the power "to do all things necessary for the preservation of the assets of the said firm." It is strongly urged on behalf of the appellant that making an acknowledgment cannot be for the preservation of the assets of the firm. We cannot, however, accept this contention. We can well imagine cases in which an acknowledgment of a debt may be a necessary act to save the estate from loss. This is recognized in one of the cases already referred to—*Kondamodalu Linga Reddi v. Alluri Sarvarayudu* (5)—and in support of the interpretation of the order, Exhibit I, we may point to the fact that the Receiver was appointed not of a firm which had already been dissolved but of a going concern. We have no hesitation in holding that the act of the Receiver in this case, if it was necessary for the preservation of the assets of the firm, would be within the scope of Explanation II of section 19. The Subordinate Judge says that "in the course of such management when

the creditors pressed for payment or threatened to sue, he averted the evil by acknowledging receipts and making part payments." It does not appear, however, where he got this from, for none of the parties before us have been able to point to any evidence which bears this out. The point does not seem to have been properly understood in the lower Court. We think it, therefore, necessary that we must have a finding whether at the time the acknowledgments were made by the Receiver, such acknowledgments were acts necessary for the preservation of the estate, that is to say, the plaintiffs ought to satisfy the Court that the Receiver in making the acknowledgments was in the circumstances of the time acting *bona fide* for the preservation of the assets of the firm.

The Subordinate Judge will return the finding within three months. Fresh evidence may be adduced. Ten days will be allowed for filing objections.

We make no order for costs at present

In compliance with the order contained in the above judgment, the Temporary Subordinate Judge of Ramnad at Madura submitted the following

FINDING.

1. The High Court has directed this Court to submit a finding on the point:—

"Whether at the time the acknowledgments were made by the Receiver, such acknowledgments were acts necessary for the preservation of the estate, that is, for the preservation of the assets of the firm."

2. The plaintiff in Original Suit No. 32 of 1914 alone has recalled and examined plaintiff's third witness. No other evidence has been adduced in both the suits. Plaintiff's 3rd witness has sworn that the Receiver was collecting the outstandings of the firm and paying off debts, that the outstandings were over 40 lacs of rupees and the debts due were about 20 lacs of rupees; that he (witness) demanded from the Receiver payment of his firm's debts, saying that otherwise he would file a suit therefor; that the Receiver thereupon told him to wait for sometime for payment, representing that it would be inconvenient and disadvantageous to the firm if the witness should file a suit, as the debtors of the firm might not pay or

(8) 26 Ind. Cas. 393; 16 M. L. T. 489 at p. 499.

(9) 33 Ind. Cas. 873; 19 Bom. L. R. 86.

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might ask for remissions out of their debts, and that there would also be some hubbub and apprehension about the firm, and that he should, therefore, wait for receiving payment, and that he further said that he would acknowledge the debt by signing in the signature book. The witness adds that the Receiver then signed Exhibit E-1 and that he (witness) sent Exhibit D to the plaintiff mentioning the acknowledgment by the Receiver. It is clear from the above evidence of the witness, which stands unopposed or unchallenged, that the Receiver apprehended serious inconvenience, disadvantage or loss to the estate or the firm, if the plaintiff's 3rd witness should have filed the suit for the recovery of his debt, as the firm had very large outstandings to collect and to meet liabilities to the extent of about half the outstandings. If the plaintiff's third witness and the plaintiff in the other suit had rushed into Court with suits, other creditors might also have followed and the credit of the firm would have been in great risk or jeopardy, and it would not have been possible to collect outstandings, as the debtors, taking advantage of the condition of the firm, would have refused payment or put off payments, and the loss to the firm would have been immense. By making the acknowledgments of the debts the threatened suits by plaintiff's third witness and the other plaintiff were not filed and the risk to the firm's assets was averted. I, therefore, hold that in the circumstances of the case, the acknowledgments by the Receiver were acts necessary for the preservation of the estate, that is, for the preservation of the assets of the firm, and find the issue accordingly.

These appeals and the memorandum of cross-objections filed by the 1st respondent in Appeal No. 93 of 1915 coming on for final hearing after the return of the finding of the lower Appellate Court upon the issue referred to by this Court for trial, the Court delivered the following

JUDGMENT.

APPEALS NOS. 92 AND 93 OF 1915.

We accept the finding and dismiss the appeals with costs.

THE MEMORANDUM OF OBJECTIONS IN APPEAL No. 93 OF 1915.

With reference to the memorandum of objections, the decree of the Temporary Subordinate Judge will be modified by allowing interest at six per cent. per annum on the amount decreed from the date of the plaint to the date of payment.

Appeals dismissed.

M. C. P.

LOWER BURMA CHIEF COURT.

CIVIL REVISION No. 98 OF 1913.

January 5, 1914.

Present:—Mr. Henry Hartnoll, Offg. Chief Judge, and Mr. Justice Twomey.

E. N. M. K. CHETTY—APPLICANT

versus

CHARTERED BANK OF INDIA,
AUSTRALIA AND CHINA AND ANOTHER

—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, rr. 60, 61—Claim proceedings—Investigation of claims—Court, duty of

Order XXI, rules 60 and 61, Civil Procedure Code, lay down the lines on which the investigation of claims preferred to properties under attachment should proceed. The Court should consider whether at the time of attachment the property was in the possession of the judgment-debtor as his own property, and not on account of any other person or in trust for him. If this entails a consideration of the *bona fides* of a sale in his favour set up by the objector or the legal effect of the deed of conveyance including the circumstances of its registration, such matters should be gone into. [p. 183, col. 1.]

Mr. MacDonnell, for the Applicant.

Mr. Ormiston, for the Respondents.

JUDGMENT.

HARTNOLL, OFFG. C. J.—The respondents had many decrees against the Chetty firm of K.P., and in execution of such decrees attached certain immoveable properties. The applicant firm applied for removal of the attachments, alleging that they had purchased the properties by registered deed of the 23rd June 1912 and since then had been in possession. Respondents contested the application and alleged that the sale was a bogus one. The District Judge

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would not in his judgment consider whether the sale was a genuine one, nor did he come to any definite finding as to who was in possession at the time of the attachments. He said: "It is quite possible that it may ultimately be found that at the time of the attachment some of the properties were in the possession of the K. P. firm and some were not." He went on to say: "It seems to me quite possible that the K. P. firm may have had some attachable interest in at any rate some of the properties, if not in all of them." He refused to remove the attachments and considered that a regular suit should be brought.

It seems to me that the District Judge has not dealt with the case according to law. Order XXI, rules 60 and 61, lay down the lines on which his decision should have been based. He should have considered whether at the time of the attachments the K. P. firm was in possession of the properties or any of them as its own property, and not on account of any other person, or whether the properties, or any of them, when attached, were not in possession of the firm, or that being in possession of the K. P. firm they were in its possession not on its own account or as its own property but on account of or in trust for the appellant firm. If this entailed a consideration of the *bona fides* of the sale, or the legal effect of the deed of conveyance including the circumstances of the registration of it, such matters should have been gone into.

I would set aside the order of the District Court and remand the case back to it to deal with it according to law, namely, on the lines set out by me.

I allow applicants the cost of this application—three gold *mohurs*. I set aside the order passed by the Court as to costs. Costs in that Court will abide the result of the further investigation now ordered.

TWOMEY, J.—I concur.

Order set aside; Case remanded.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 38 OF 1918.

July 5, 1918.

Present:—Mr. Justice Mullick and Mr. Justice Thornhill.

LACHMAN OJHA—DECREE-HOLDER—
APPELLANT

versus

CHARITER OJHA AND OTHERS—PRINCIPAL
DEFENDANTS AND SHEOPANI OJHA AND
OTHERS—*Pro forma* DEFENDANTS—
RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 53—Decree for mesne profits and costs, whether immovable property—Attachment of decree—Decree, whether can be sold—Procedure.

In a suit by a mortgagee the Court passed a decree in favour of the mortgagee for recovery of possession of the mortgaged property, unless the persons in possession of the property redeemed the mortgage by a certain date. There was also a decree for costs and mesne profits in favour of the plaintiff. The defendants redeemed the mortgage, so that the only decree which remained subsisting was for mesne profits and costs. This decree was attached and sought to be sold by a creditor of the mortgagee in execution of a decree obtained by him against the mortgagee.

Held, that the decree as attached was a decree for money within the meaning of Order XXI of the Civil Procedure Code and that the only procedure which the attaching decree-holder could adopt was to execute the decree under Order XXI, rule 53. [p. 185, col. 1.]

Appeal from an order of the Subordinate Judge of Arrah, dated the 15th December 1917.

Messrs. S. Sinha and Shro Nanlan Roy, for the Appellants.

Mr. Atul Krishna Roy, for the Respondents.

JUDGMENT.

MULLICK, J.—This is a second appeal which raises an interesting point of law. The execution creditor before us is one Lachman Ojha, who has got a money decree against the respondent Chariter and others. Now, Chariter had a decree against Radha, Sheodani and others, which in execution of his decree Lachman Ojha attached. Lachman's claim against Chariter is about Rs. 500, while the decree which Chariter has against Radha and others is one for costs amounting to Rs. 278-8-0 and for mesne profits which have not yet been ascertained, but which are estimated to be of the value of Rs. 11,000. Lachman Ojha applied in the Court of the Munsif for permission to attach and sell Chariter's decree. The Munsif held that the decree

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was immoveable property within the meaning of section 60, Civil Procedure Code, that the provisions of Order XXI, rule 53, which prohibited the sale of decree, for payment of money were not applicable and that, therefore, the sale could proceed. The decree was accordingly sold and Lachman Ojha has satisfied his claim by purchasing the decree himself.

The case then went on in appeal to the Subordinate Judge, who took a different view and held that Chariter's decree was a money decree within the meaning of Order XXI, rule 53, Civil Procedure Code, and that it was not open to Lachman Ojha to sell that decree.

The matter comes before us in second appeal by the creditor.

The first contention is that the learned Subordinate Judge is wrong in holding that the decree now under consideration is a decree for money. It is contended that the decree is a decree for immoveable property which is saleable under the Civil Procedure Code.

Now it is necessary to examine what was the suit in which Chariter's decree was made. It appears that Chariter was a mortgagee in possession of certain lands. Some third party brought a suit against the mortgagor on the footing of another mortgage, obtained a decree and took possession of the mortgaged lands. Chariter was then obliged to bring a suit against his mortgagor as well as the persons who had obtained the decree for possession, for a declaration that the above decree was collusive and for recovery of possession of the property, which had been mortgaged to him by the mortgagor. In the alternative he claimed that if his prayer for recovery of possession was not allowed, his mortgage claim which amounted to Rs. 1,679 must be satisfied by the persons who had taken possession of the mortgaged property. The decree in appeal in that suit was that Chariter would be entitled to recover possession as prayed for, unless the persons who were in possession redeemed his mortgage within a certain time. There was also a decree for costs and mesne profits in favour of Chariter.

It appears that the defendants in that suit availed themselves of the opportunity to redeem and paid Chariter off, so that

the only part of Chariter's decree, that is, now outstanding, is that which relates to costs and mesne profits. It is this decree that Lachman Ojha seeks to sell in execution of his decree against Chariter.

It is contended that as the decree was primarily a decree for recovery of possession of lands coupled with an alternative condition as to redemption, it was a decree for immoveable property. In my opinion that contention does not apply to the circumstances of this case. Here the only decree that is now outstanding is the decree for costs and for mesne profits. Now we know that a decree for mesne profits is a decree for money within the meaning of Order XXI, Civil Procedure Code, and it seems to me that the only procedure that the decree-holder before us can legally take is to attach that decree and to execute it under the provisions of Order XXI, rule 53.

The learned Counsel who appears for the appellant draws our attention to *Vasudeva Ravi Varman v. Narayana Pattar* (1). In that case there was an order in appeal dismissing the suit and entitling the defendant to recover possession. The defendant applied under section 583 of the Code of Civil Procedure of 1882 to recover possession by way of restitution. One of his creditors thereupon applied to the Court to attach the defendant's right to realize mesne profits in respect of the lands, which also he was entitled to recover by way of restitution. Their Lordships of the Madras High Court held that as the decree in favour of the defendant did not expressly give him a right to recover mesne profits but merely dismissed the suit against him, it could not be said that there was any decree in existence for payment of money and that section 273, Civil Procedure Code, which corresponds to rule 53, Order XXI, of the present Code, did not apply to the sale of the right to recover mesne profits. They held, therefore, that that right was immoveable property and could be sold. It is to be noticed that their Lordships did not base their decision upon the fact that the right to mesne profits was coupled with the right to recover immoveable property. Similarly in the present case, so far as Chariter's decree gave him an alternative right to recover posses-

(1) 24 M. 341.

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sion of the mortgaged property, that right is not to be taken into consideration in determining the question as to whether the decree is or is not a decree for an immoveable property. The basis of their Lordships' decision was that there was no decree in existence expressly giving a right to recover mesne profits, but here there was a decree giving such a right and the ruling of their Lordships is, therefore, in favour of the respondents before us and not against them. This would seem to be sufficient for the disposal of this second appeal.

It is, however, contended that if the decree was immoveable property, then no proceeding under section 47, Civil Procedure Code, is competent, but that the proper provision for setting aside the sale would be rule 90 of Order XXI. The appellant is treading on rather dangerous ground here, because if it is held that the decree is immoveable property to which the provisions of Order XXI, rule 90, apply then there is no second appeal, and the appellant has no right to come here at all. However upon the view that we take, the decree is, in our opinion, not one for immoveable property, but is one for money within the meaning of Order XXI, Civil Procedure Code, and, therefore, the proper course for the attaching decree-holder is to proceed under rule 53 of Order XXI. The learned Subordinate Judge's decision is correct and the appeal will be dismissed with costs.

THORNHILL, J.—I agree.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL APPEAL No. 53 OF 1917.

November 15, 1917.

Present:—Mr. Justice Abdur Rahim and
Mr. Justice Oldfield.

K. A. SUBBARAYALU NAYUDU—
ASSIGNEE-PLAINTIFF—APPELLANT

versus

SUNDARARAJA NAYUDU AND OTHERS—

DEFENDANTS NOS. 2 TO 5, 7, 8, 10 TO 13,

15 TO 18, 21 AND 22 AND THE ORIGINAL-

PLAINTIFF—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 181—Civil

Procedure Code (Act V of 1908), O. XXXIV, r. 5 (2)—Mortgage suit—Decree for sale, application for—Appeal—Decree confirmed on appeal—Limitation, commencement of.

The right to apply for a final decree for sale in a mortgage suit arises on the expiration of the time fixed for payment by the original decree and the limitation applicable is that contained in Article 181 of the Limitation Act. [p. 186, col. 1.]

Where, however, an appeal is preferred against the preliminary decree, the right to apply for a final decree accrues from the date of the appellate decree, even though it merely confirms the decree of the first Court [p. 186, col. 2.]

Gajadhar Singh v. Kishen Jivan Lal, 42 Ind. Cas. 93; 15 A. L. J. 734; 39 A. 641 and *Nimmala Mahankali v. Kallakuri Subba Rao*, 41 Ind. Cas. 268; 32 M. L. J. 455, followed.

Madho Ram v. Nihal Singh, 30 Ind. Cas. 494; 38 A. 21; 13 A. L. J. 935, not followed.

Thathara Nannabha Chetty v. Kuppall Krishnamal, 16 Ind. Cas. 799; 14 M. L. T. 194, *Ramaswami Kone v. Sundara Kone*, 31 M. 28; 17 M. L. J. 495; 3 M. L. T. 261 and *Manavikraman v. Unniappan*, 15 M. 170; 2 M. L. J. 23; 5 Ind. Dec. (N. S.) 468, distinguished.

Appeal against the order of the Court of the Subordinate Judge, Mayavaram, dated the 17th October 1916, dismissing Original Petition No. 76 of 1916, in so far as it relates to the passing of a final decree in Original Suit No. 16 of 1909 on the file of the said Court.

Mr. T. V. Muthukrishna Aiyar for the Advocate General and Mr. K. S. Jayarama Aiyar, for the Appellant.

The Hon'ble Mr. T. Rangaachariar, Messrs. P. S. Vaidhinadha Aiyar and M. S. Venkatarama Aiyar, for 5th and 6th Respondents.

JUDGMENT.—The question involved in this appeal is one of limitation. The appellant's assignor obtained a preliminary decree on a mortgage which allowed six months for payment of the mortgage amount, and in default of payment, the property was to be sold. The decree was passed on the 4th August 1910 and the six months' time would expire on the 4th February 1911. In the meantime, an appeal had been preferred against the preliminary decree, and the Appellate Court in the result upheld the decree of the first Court on the 11th April 1913. The present application for a final decree under Order XXXIV, rule 5, Civil Procedure Code, was made on the 26th January 1916, that is, within 3 years from the date of the appellate decree but more than 3 years after the expiration of the six months from the

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date of the decree of the first Court. The Subordinate Judge has held that the application is barred reckoning time from the 4th February 1911, the date on which the six months allowed by the original decree expired. He seems to have proceeded upon a ruling of a Division Bench of the Allahabad High Court in *Madho Ram v. Nihal Singh* (1), but that decision has been overruled by a later Full Bench decision of that Court in *Gajadhar Singh v. Kishen Jivan Lal* (2). There is also a decision of this Court to the same effect in *Nimmala Mahankali v. Kallakuri Subba Rao* (3). We are inclined to accept this view of the law. There is no doubt that Article 181 of the Limitation Act applies. That Article says that every application, for which no period of limitation is provided elsewhere in the First Schedule, is to be made within three years from the date when the right to apply accrues. The question before us then is, when did the right to apply for a final decree accrue to the appellant. No doubt, if there had been no appeal preferred against the preliminary decree, his right to apply would arise on the expiration of 6 months from the date of the original decree; but there having been an appeal and a decree of the Appellate Court, it is that decree which is to be enforced. The appellate decree, ordinarily speaking, must be taken to supersede the decree of the first Court. Further, as pointed out by the Allahabad High Court, if the contention of the respondents were to be accepted, there would be more than one final decree, which, we do not think, could have been within the contemplation of the Legislature. Mr. T. Rangachariar appearing for the 5th respondent has argued that the decisions of the Full Bench of the Allahabad High Court and of this Court already referred to are wrong; and, in support of this contention, has referred us to the cases of *Thathara Nannabha Chetty v. Kuppal Krishnammal* (4), *Ramaswami Kone v. Sundara Kone* (5) and *Manavikraman v. Unniappan* (6). But those cases do not

seem to us to have any application to the present case. In all those cases, the question was, where the original decree lays down a certain period of time for the performance of certain conditions and that time has expired whether by reason of the mere fact that there has been an appeal and the Appellate Court has confirmed the decree of the lower Court without extending the time fixed by the first Court for the performance of the condition, the time laid down by the first Court is to be imported into the decree of the Appellate Court. All that those decisions lay down is that in such cases, the time fixed by the first Court could not be made part of the decree of the Appellate Court without the Appellate Court having expressly made it so. We have no hesitation in accepting that proposition, but in this case the decree-holder has not to perform any act for which any period of time was fixed by the first Court, and, therefore, it is difficult to say how the principle underlying the decisions relied on by Mr. T. Rangachariar can apply to the present case. It was contended that here also there was six months' time given for the payment of money by the mortgagor as a condition precedent and the properties could not be sold before this time expired. Hence it is argued that the right to apply under Article 181 of the Limitation Act must be taken to arise after the expiration of the six months. But this overlooks the fact that an appeal had been preferred from the decree of the first Court. Although the Appellate Court confirmed the decree of the first Court ultimately the right to apply for a final decree must, in our opinion, be taken to accrue from the date of the appellate decree, which is the binding decree in the matter.

We reverse the judgment of the Subordinate Judge; the petition will be remanded to the lower Court for disposal according to law. Costs will abide the result.

M. C. P.

Appeal allowed.

- (1) 30 Ind. Cas. 494; 38 A. 21; 13 A. L. J. 985.
- (2) 42 Ind. Cas. 93; 15 A. L. J. 734; 39 A. 641.
- (3) 41 Ind. Cas. 268; 32 M. L. J. 455.
- (4) 16 Ind. Cas. 799; 14 M. L. T. 194.
- (5) 31 M. 28; 17 M. L. J. 495; 3 M. L. T. 26.
- (6) 15 M. 170; 2 M. L. J. 23; 5 Ind. Dec. (N. S.) 468.

In re MAWCHI MINES.BRIJ NATH SAHAI SINGH *v.* HARI CHARAN RAY.

COURT OF THE FINANCIAL COMMISSIONER, BURMA.

STAMP REFERENCE No. 11 OF 1918.

June 4, 1918.

Present:—Mr. Thompson, F. C.*In re* MAWCHI MINES, LIMITED—APPLICANT.*Stamp Act (II of 1899), s. 3 (c)—Instrument executed outside British India not relating to any property situate in British India, whether chargeable with stamp duty.*

An instrument executed outside British India and not relating to any property situate or to any matter or thing done or to be done in British India is not chargeable with stamp duty under the Stamp Act.

Reference under section 56 (2) of the Stamp Act made by the Collector of Rangoon as to whether two documents, a deed of assignment and a deed of mortgage of certain property belonging to the Mawchi Mines, Limited, and situated in the Karenni State of Bawlake, executed in England were liable to be charged with stamp duty.

Mr. Okeden, for the Applicant.

ORDER.—The instruments under reference were not executed in British India, and do not relate to any property situate or to any matter or thing done or to be done in British India. The documents are not, therefore, chargeable with stamp duty under the Indian Stamp Act, 1899.

Answered in the negative.

PATNA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL No. 296 OF 1917.

October 23, 1918.

Present:—Sir Dawson Miller, Kt.,

Chief Justice, and Mr. Justice Mullick.

BRIJ NATH SAHAI SINGH AND OTHERS

—APPELLANTS

versus

HARI CHARAN RAY AND OTHERS—

RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 182—Step-in-aid of execution—Defence of appeal preferred by judgment-debtor, whether step-in-aid of execution

Defending an appeal preferred by the judgment-debtor in an execution proceeding is not a step-in-aid of execution within the meaning of Article 182, Schedule I of the Limitation Act. [p. 187, col. 2.]

Appeal from a decision of the District Judge, Shahabad,

Mr. Sundar Lal, for the Appellants.

Mr. L. N. Singh, for the Respondents.

JUDGMENT.

MILLER, C. J.—In my opinion this appeal should be dismissed. This is a second appeal from a judgment of the District Judge of Shahabad refusing to reverse a judgment of the Court below, which dismissed a petition for execution on the ground that it was time-barred. Another objection was taken, but with that we are not now concerned. The question is a very short one. It appears that in the year 1906 the appellant obtained a decree. Between that time and 1912 he appears to have made three separate attempts to execute his decree. Each of these attempts proved infructuous. Then on the 12th April 1912 a fresh petition for execution was filed. That, for reasons which do not concern us, was dismissed. On appeal to the District Judge on the 5th July 1913 the appeal was allowed and the petition for execution granted. From that time until the 20th July 1916, which was more than three years, the appellant took no steps to try and obtain execution. From the order of the District Judge, dated the 5th July 1913, the judgment-debtor appealed to the High Court at Calcutta and on the 20th April 1915 the High Court at Calcutta dismissed the appeal. Then on the 20th July in the following year an application was made by the present appellant, which has been called an application to continue the previous petition for execution, that is to say, the petition which was filed on the 12th April 1912. No doubt the reason why the petition has been so described and why probably it was set out in that form was because it was more than three years since the appellant had obtained his decree before the District Judge in July 1913 and he had taken no steps-in-aid of his execution since then, except that he had defended an appeal to the High Court at Calcutta. That obviously was not a step-in-aid of execution, because the appeal by the judgment-debtor to the High Court at Calcutta was no bar to the execution or to the carrying out of the decree which the appellant already had from the District Judge. That application, whether it is called an application to continue the previous petition or whether it is called a petition for the execution of the

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decree, was dismissed for default. Then the present petition was brought for execution on the 1st February 1917, and both the lower Appellate Court and the Court of first instance who tried these proceedings have come to the conclusion that the petition is time-barred. It seems to me that that decision is one which cannot be impeached. The Article in the Limitation Act which in my opinion clearly relates to a petition of this sort is Article 182, and the period of limitation prescribed by that Article is three years from the date of applying in accordance with law to the proper Court for execution or of taking some step-in-aid of execution of the decree or order. It is quite clear to my mind that the last step which was taken in execution in accordance with law was not later than the 5th July 1913 and as the present petition was not filed until the 1st February 1917, it seems to me that it is quite clear that that petition is out of time and ought to be dismissed.

It was contended in the first place that the petition of February 1917 was within 3 years of that filed on the 20th July 1916 and was, therefore, in time. But the earlier petition which was dismissed for default was itself time-barred and being out of time, cannot constitute a fresh starting point within three years of which another petition can be lodged. To hold otherwise would be to defeat the whole object of the Limitation Act.

It was also contended on behalf of the appellant that Article 182 does not apply to the case at all, although it cannot be denied that this is a petition for execution, but it is contended nevertheless that Article 181 applies, which provides for applications for which no period of limitation is provided elsewhere in this Schedule or by section 48 of the Code of Civil Procedure. I cannot accept this view. It is quite clear to my mind that Article 182 is the proper Article to apply to a petition of this sort. But even if Article 181 applies, it is very difficult to see how it can assist the appellant in any way, because there the time begins to run when the right to apply accrues. That part of the Article the learned Vakil for the appellant has not dealt with, but it seems to me that the right to apply is existing all along and

that only shows that Article 181 was clearly not meant to cover the case of a petition for execution such as that provided for in Article 182.

It has not been suggested when the right to apply accrued or before what time it was impossible to make this application. It is not necessary for me to say more than this that the Article which is clearly applicable to the present case is Article 182. That being so and it being quite clear that three years had elapsed since the last step taken by the appellant in aid of the execution, it follows that this application is time-barred and that this appeal ought to be dismissed with costs.

MULLICK, J.—I agree.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 583 of 1917.

July 8, 1918.

Present:—Sir Henry Drake-Brockman,
Kt., J. C.PANDU AND OTHERS—DEFENDANTS
—APPELLANTS*versus*

SITAL PRASAD—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. II, r. 2, O. XXI, r. 34—Transfer of Property Act (IV of 1882), s. 52—Specific performance of agreement to lease, decree for—Possession, subsequent, suit for, maintainability of—Abandonment of claim—Cause of action—Lease granted to third person after decree, validity of—Lis pendens, doctrine of, applicability of—C. P. Tenancy Act (XI of 1898), ss. 35 (4), 45 (2)—Surrender of tenancy—Non-cultivation of land—Lease of sir land—Sanction of Revenue Officer, failure to obtain, effect of.

The relief for possession is not a part of the claim which a plaintiff suing for the specific performance of an agreement to lease is entitled to make in respect of the breach of the defendant's agreement to demise the land. [p. 189, col. 2; p. 190, col. 1.]

Therefore, where a plaintiff obtained a decree for the specific performance of an agreement to lease and after the execution of the lease by the defendant brought a suit for possession of the land demised:

Held, that the suit for possession was not barred by the provisions of Order II, rule 2 of the Civil Procedure Code. [p. 190, col. 2.]

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Action taken by the Court under Order XXI, rule 34 of the Civil Procedure Code in execution of a decree for specific performance of a contract of lease is a proceeding in the suit itself. [p. 190, col. 2.]

Therefore, a transfer of the property in dispute by the judgment-debtor effected after the passing of the decree but before action is taken under Order XXI, rule 34 of the Civil Procedure Code, would be affected by the doctrine of *lis pendens*. [p. 191, col. 1.]

The provisions as to implied surrender embodied in section 35 (4) of the Central Provinces Tenancy Act do not apply to a case where the non-cultivation of land and non-payment of rent are not voluntary but are due to obstruction which is the outcome of the landlord's improper behaviour. [p. 19., cols. 1 & 2.]

Section 45 of the Central Provinces Tenancy Act requiring the sanction of a Revenue Officer for a lease of *sir* land has no application to an agricultural lease. [p. 191, col. 2.]

Appeal from the decree passed by the Additional District Judge, Wardha, dated the 28th September 1917, in Civil Appeal No. 130 of 1917.

Mr. Atmaram Bhagwant, for the Appellants.

Mr. Balwantrao Pendharkar, for the Respondent.

JUDGMENT.—The suit out of which this second appeal arises was brought to obtain possession of *sir* field No. 38/1 in Mauza Manikwara, the previous history of which may be briefly stated.

On the 16th January 1911 Narain and Withoba, the Malguzars of Manikwara, agreed in writing (Exhibit P-6) to let their *sir* lands to Sital Prasad for 99 years. On the 29th August 1911, Sital Prasad brought Suit No. 14 of 1911 in the District Court against the Malguzars to obtain specific performance of their agreement and on the 13th February 1913 obtained the desired decree which did not, however, fix the time within which the necessary lease should be executed. The relief claimed did not include possession of the fields. On the 23rd June 1913, Sital Prasad applied for execution complaining that the Malguzars had not executed the lease and praying that action might be taken under rule 34, Order XXI, First Schedule to the Civil Procedure Code. This application was eventually dismissed, with undue haste as it appears to me, on the 1st November following, on the ground that the draft put in by Sital Prasad did not show the date for which the term of the lease was to run and the omission had not been supplied. On that occasion Sital Prasad was represented merely by an agent, who might reasonably

have been given time to consult his master on the important question thus raised.

A fresh application was preferred on the 24th April 1914 and on the 29th August following Narain executed the lease, which had been drawn up in accordance with the decree-holder's final draft. The Court executed on behalf of Withoba in his absence on the same day. Registration was eventually effected on the 26th June 1915 after both the lessors had denied execution. On the 1st July following Sital Prasad went to take possession of field No. 38/1, but was obstructed by the defendants who set up a perpetual lease of that field given them by Narain and Withoba on the 22nd February 1913.

A number of pleas were raised in answer to the claim, but all have been decided against the defendants who have been directed to put the plaintiff in possession. Several are repeated in this Court and will now be dealt with *seriatim*.

The first point is that in the suit of 1911 the plaintiff should have included his claim for possession and is, therefore, debarred by rule 2 (2), Order II, First Schedule to the Civil Procedure Code, from obtaining that relief. *Narayana Kavirayan v. Kandasami Goundan* (1) is relied upon for the appellants. In that case the suit for possession was brought against the person who had executed a sale-deed in accordance with the decree passed in the suit for specific performance of an agreement to convey. It was held that the right to possession arose coincidentally with the right to the execution of a conveyance and that section 43 in the Civil Procedure Code, 1852, debarred the plaintiff from bringing the later suit for possession. This view was disapproved in *Krishnammal Manandiar v. Sundararaja Aiyar* (2), where it was held that the right to possession accrues on the execution of the deed of conveyance. The later Madras decision followed *Nathu v. Budhu* (3), where the conveyance was held to give rise to a new and distinct cause of action, the cause of action for the suit for specific performance being merely the breach of the contract of sale. The view

(1) 22 M. 24; 8 M. L. J. 147; 8 Ind. Dec. (N. S.) 18.

(2) 22 Ind. Cas. 512; 33 M. 698; 15 M. L. T. 103; (1914) M. W. N. 203; 1 L. W. 147.

(3) 18 B. 537; 9 Ind. Dec. (N. S.) 867.

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taken by this Court in *Sheodin v. Godhi Bai* (4) is in accordance with the balance of authority in the other Courts mentioned. The appellants seek to distinguish the last mentioned case on the ground that specific performance was obtained on foot of an award made by the Debt Conciliation Board, not on the strength of a private agreement between the parties. The *ratio decidendi*, however, applies equally to the case of an arbitration award and to that of a private contract, and the learned Additional Judicial Commissioner expressly preferred the Bombay view to that taken in the earlier Madras case. I am referred by the appellants to the following remarks made by Batten, Additional Judicial Commissioner, in *Thakur Rewasingh v. Hardayal* (5):—

"Can the agreement to execute a sale-deed and the agreement to put plaintiff in possession be regarded as separate parts of the contract? I think not; for the agreement to put the vendee in possession, though mentioned as a separate agreement, is not really a separate agreement, but is ancillary to the agreement to execute a sale-deed, and the executant of the sale-deed would be bound to put the vendee in possession without any separate contract to that effect. This part of the contract is bound up in the other part, and the separate mention of it is a superfluity."

In that case the contract, as stated in the plaint, was both to execute a sale-deed and to put the plaintiff in possession, and the question was whether in view of section 17, Specific Relief Act, the Court could direct execution of the sale-deed without also ordering delivery of possession. The answer given was in the affirmative. But it does not seem to me to furnish any authority for holding that the relief for possession is part of the claim which the plaintiff is entitled to make in respect of the breach of the defendants' contract to convey. I may also refer to *Abdul Majid v. Boida Nath Dhur* (6) as supporting the view that the cause of action, where the breach of a contract to convey has occurred, is different from that where resistance is

offered to the transferee when he endeavours to take possession of the property conveyed to him. For these reasons I hold that rule 2 (2) of Order II aforesaid does not operate as a bar to the respondent's claim for possession.

It is next contended that the rule of *lis pendens* contained in section 52, Transfer of Property Act, has no application. The lower Appellate Court, following the decision in *Mati Lal Pal v. Preo Nath Mitra* (7), has held that the suit for specific performance brought in 1911 must be considered to have been still pending when the appellants obtained their lease. Against this view it is now urged that after the decree for specific performance nothing remained but to execute it and that under the present Civil Procedure Code proceedings in execution are not proceedings in suits. Judging, however, from sub-rule (5), rule 34, Order XXI, First Schedule to the Civil Procedure Code, action taken by the Court in execution of a decree for specific performance of a contract of sale is clearly a proceeding in the suit itself. In *Shivjiram Sahebram Marwadi v. Waman Narayan Joshi* (8) Farran, C. J., remarked as follows:—

"Now the general rule of law is that the *lis pendens*, except in administration suits and suits for an account and in suits of a similar nature in which the decree is the inception of subsequent proceedings, ends with the decree."

In that case the *lis* was instituted on foot of a mortgage, the relief claimed being sale of the mortgaged property, and the purchase said to be affected by the rule of *lis pendens* took place while the mortgagee's execution proceedings were actually pending. That a mortgage suit is pending until a final decree is passed is now well settled: see *Digamber v. Ganpat* (9). In *Bhoje Mahadev Parab v. Gangabai Vithal Naik* (10) Batchelor, J., appears to have considered that the *lis* could not be regarded as having revived, unless the transfer said to be affected by it was made during the actual pendency of execution proceedings. If this view were to be acted upon, the

(4) 4 N. L. R. 14.

(5) 3 N. L. R. 160 at p. 161.

(6) 6 C. W. N. 314.

(7) 3 Ind. Cas. 696; 13 C. W. N. 226; 9 C. L. J. 96.

(8) 22 B. 939 at p. 942; 11 Ind. Dec. (N. S.) 120.

(9) 33 Ind. Cas. 436; 12 N. L. R. 50.

(10) 21 Ind. Cas. 54; 37 B. 621; 15 Bom. L. R. 803.

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defeated defendant in a suit for specific performance might convey to an outsider the very day after the decree was passed and so render the litigation nugatory; the prompter his defiance of the decree the more certainly would that result accrue. In the present case the transfer to the appellants was effected only 13 days after the decree for specific performance, *i. e.*, in less than what may fairly be regarded as a reasonable time for preparation of the necessary conveyance and its execution by the defendants. Under rule 34, Order XXI, First Schedule to the Civil Procedure Code, the decree-holder cannot move the Court for execution of the requisite document until the judgment-debtor has neglected or refused to obey the decree and he has then prepared a draft of the document. It is not, and could not be, suggested that 13 days is a sufficient time for fulfilling this requirement, nor was it pleaded in the Courts below that the plaintiff was guilty of any undue delay in taking out execution. In *Krishnappa v. Shivappa* (11) relied on for the appellants, it was assumed that inaction on the plaintiff's part might interrupt the operation of a *lis*, but on the findings of the Court of first appeal inaction on the plaintiff's part was negatived so that the question of laches appears to have been distinctly raised before the stage of second appeal. In these circumstances I think that the *lis* may properly be regarded as having been still under active prosecution when the appellants took their lease and that the rule of *lis pendens* has rightly been held to make that lease ineffective.

The next contention raised is that the plaintiff must be deemed to have impliedly surrendered the field under section 35 (4), Central Provinces Tenancy Act, 1898, inasmuch as he neither cultivated it nor paid rent for two years after the date of his agreement. As to this I am clearly of opinion that the sub-section cited has no application. The plaintiff was not in a position to claim possession till the lease in his favour was executed by the Malguzars on the 29th August 1914, and his attempt to obtain possession on the 1st July 1915 was frustrated by the appellants. The case

(11) 31 B. 393; 9 Bom. L. R. 530.

is not one of voluntary inaction on the part of the tenant such as the sub-section contemplates, but one of obstruction which was the outcome of the landlord's improper behaviour.

The fourth ground of appeal is not pressed, and the fifth raises for the first time a question of fact which cannot be entertained at the present stage.

The last point that calls for notice is also a new one, namely, that the land being *sir*, the lease to the plaintiff required the sanction of a Revenue Officer under section 45 of the Tenancy Act. If this plea had been taken in either of the Courts below, it would have been open to the plaintiff to show what already appears *prima facie* to be the case, that the lease is an agricultural one, so that section 45 has no application: see *Bhagirathi Bai v. Anyaji Kunbi* (12). This contention, too, must be overruled.

The result is that the appeal fails and is dismissed with costs. In the Courts below costs will be paid as already ordered.

Appeal dismissed.

(12) 3 N. L. R. 159.

MADRAS HIGH COURT. SECOND CIVIL APPEAL No. 462 OF 1917.

January 8, 1918.

Present:—Mr. Justice Bakewell
and Mr. Justice Phillips.

LACHAKKAMMAL—PLAINTIFF—

APPELLANT

versus

SOKKAYYA NAICK AND OTHERS—

DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Arts. 75, 132—Mortgage-deed—Stipulation for payment by instalments—Penal clause for recovery of full amount at enhanced interest on default in payment of instalment whenever mortgagee required, construction of—Waiver—Suit to enforce mortgage—Limitation—Interest, enhanced, liability for.

Defendant executed a mortgage-deed in favour of plaintiff stipulating to repay the amount advanced thereunder by monthly instalments. There was a penal clause binding the mortgagor to pay the full amount at an enhanced rate of interest on his failure to pay the first instalment whenever the mortgagee required. After the second instalment became due, the plaintiff enforced the penal clause and sued for the whole amount with enhanced interest.

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Held, (1) that the suit was governed by Article 132 and not by Article 75 of the Limitation Act;

(2) that as the plaintiff failed to exercise the option to enforce the penal clause, the contract for instalments subsisted;

(3) that plaintiff was not entitled to claim enhanced interest.

Second appeal against the decree of the Court of the Temporary Subordinate Judge, Ramnad, at Madura, in Appeal Suit No. 69 of 1916, preferred against the decree of the Court of the District Munsif, Satur, in Original Suit No. 618 of 1913.

Mr. Ramachandra Iyer, for the Appellant.

Mr. A. Srinivasa Iyengar, for the Respondents.

JUDGMENT.—The Subordinate Judge is mistaken in applying Article 75 of the Limitation Act. The document sued on is a mortgage and Article 132 applies. It has not been shown that the appellant availed herself of the penal clause of the bond, which gives her an option of requiring payment of the whole amount of the mortgage money at an enhanced rate of interest upon the failure of the respondent to pay the first instalment.

Her case in fact was that the first instalment had been paid. The words in the default clause "whenever you require" in our opinion give the appellant an option and since that option has not been exercised, the contract for payment by instalments subsists. The case is similar to *Narna v. Ammani Amma* (1).

The appellant, however, is not entitled to the enhanced interest, because she does not appear to have made any demand until both instalments had become due and the option had thereafter expired.

The case must be remanded to the lower Appellate Court for disposal on the question of consideration.

Costs to abide the result.

M. C. P.

*Appeal allowed;
Case remanded.*

(1) 35 Ind. Cas. 418; 39 M. 981; 4 L. W. 77; 20 M. L. T. 176; (1916) 2 M. W. N. 125; 31 M. L. J. 865.

PATNA HIGH COURT.

APPEAL FROM ORIGINAL ORDER NO. 242 OF 1917.

October 25, 1918.

Present:—Mr. Justice Roe and Mr. Justice Jwala Prasad.

FIRM OF HAR CHAND RAI-ANAND RAM
AND OTHERS—APPELLANTS

versus

Raja RAM BAHADUR SINGH AND

ANOTHER—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. IX, r. 8, O. XIV, r. 1, cl. (5)—Date fixed for settlement of issues, whether date fixed for hearing.

The date fixed for the settlement of issues is a date fixed for the hearing of the suit within the meaning of Order IX, rule 8 of the Civil Procedure Code. [p. 193, col. 1.]

Appeal from a decision of the Subordinate Judge, Bhagalpore.

Mr. P. K. Sen, for the Appellants.

Mr. S. Sinha, for the Respondents.

JUDGMENT.—This is an appeal against an order under Order IX, rule 9, refusing to set aside the dismissal of the plaintiffs' suit.

The facts of the case briefly are that the 1st of March 1917 was fixed for the settlement of issues. The plaintiffs had failed to complete the service of summons upon either of the two defendants. But in spite of this the second defendant had appeared, the first defendant being still absent. The plaintiff himself failed to appear, nor did any agent or Vakil appear on his behalf. The suit was accordingly dismissed. The reasons given for the plaintiffs' failure to prosecute the suit were, firstly, that the case was in charge of one Bhagwan Sabai who was ill on the day in question, and secondly, that the plaintiffs had been much upset by the death of a member of their firm named Ananta Ram. In addition to these two grounds for restoring the suit it is urged, firstly, that the 1st of March having been fixed for the settlement of issues only was not a date fixed for the hearing within the meaning of rule 8 of Order IX, and, secondly, that on the day in question the District Judge having directed that the Courts should close at 2 p. m. and the order complained of having been passed at 3-30 p. m., the order was a bad order.

We may deal briefly with the last two points taken. The District Court has no

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jurisdiction to close the Subordinate Judge's Court, and it is nowhere suggested that owing to the Subordinate Judge's failure to close the Court the plaintiff or his agent was caught unawares. Moreover, it appears that so far as the Subordinate Judge's Court was concerned, no notice of the Judge's order was received before 3.30 P. M. With regard to the contention that the date fixed for the settlement of issues is not a date fixed for the hearing, it is sufficient to read Order XIV, rule 1, clause 5. It is clear from the use of the word 'hearing' in that clause that the date fixed for the settlement of issues is as much a date fixed for the hearing of the suit as any other date fixed.

Upon the merits of the case we feel constrained to accept the Subordinate Judge's findings upon the facts. It was not suggested that Ananta Ram was looking after the case; it was the plaintiffs' case that Bhagwan Sahai was in charge of it. Ananta Ram's death, therefore, would not have affected Bhagwan Sahai's ability to appear and either ask for an adjournment or prosecute the suit. We find it impossible to differ from the finding of the learned Subordinate Judge that Bhagwan Sahai was not prevented by illness from taking necessary action in the case, for it has been proved to our minds conclusively that Bhagwan Sahai was not only not ill on the day in question but was actually looking after a suit of the plaintiffs in the Batwara Deputy Collector's Court. Upon all the grounds urged we are of opinion that the appeal fails. It is dismissed with costs.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 70 OF 1917.

August 15, 1918.

Present:—Mr. Mittra, A. J. C.

DILESHWAR RAM BRAHMAN

—PLAINTIFF—APPELLANT

versus

NOHAR SINGH AND ANOTHER—

DEFENDANTS—RESPONDENTS.

Evidence Act (I of 1872), s. 18—Admission of one

of several persons jointly interested, whether admissible against all—Burden of proof—Hindu Law—Joint family—Alienation—Antecedent debt, what is—Civil Procedure Code (Act V of 1908), s. 152, O. XLI, r. 33—Appellate Court, power of, to correct accidental slips in judgment and decree of lower Court.

Where several persons are jointly interested in the subject-matter of a suit, the general rule is that the admissions of any one of those persons are receivable against himself and his fellows, whether they be all jointly suing or sued, provided the admissions relate to the subject-matter in dispute and were made by the declarant in his character of a person jointly interested with the party against whom the evidence is tendered. [p. 194, col. 2.]

Kowsulliah Sundari Dasi v. Mukta Sundari Dasi, 11 C. 588; 10 Ind. Jur. 66; 5 Ind. Dec. (N. S.) 1151 and *Ambar Ali v. Lutfe Ali*, 41 Ind. Cas. 116; 45 C. 159; 25 C. L. J. 619; 21 C. W. N. 996, followed.

Where there is an admission by a party, he must show that the admission is untrue in fact. [p. 195, col. 1.]

Chandra Kunwar v. Chandhri Narpat Singh, 29 A. 184; 4 A. L. J. 102; 11 C. W. N. 321; 5 C. L. J. 115; 17 M. L. J. 103; 2 M. L. T. 109; 9 Bom. L. R. 267 (P. C.), followed.

An antecedent debt justifying the father or manager of a joint Hindu family in charging the family property must be an obligation not only antecedently incurred, but incurred wholly apart from the ownership of the joint estate or the security afforded or supposed to be available by such joint estate. [p. 195, col. 2.]

Sahu Ram Chandra v. Bhup Singh, 33 Ind. Cas. 250; 39 A. 437 at p. 447; 21 C. W. N. 698; 1 P. L. W. 537; 15 A. L. J. 437; 19 Bom. L. R. 498; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213; 44 I. A. 126 (P. C.), followed.

An Appellate Court has, under Order XLI, rule 33 of the Civil Procedure Code, power to correct accidental slips in the judgment and decree of the lower Court, although no application has been made to it under section 152 of the Code. [p. 196, col. 1.]

Appeal from the decree of the Additional District Judge, Raipur, in Civil Suit No. 33 of 1916, dated the 14th July 1917.

Dr. H. S. Gour, for the Appellant.

The Hon'ble Sir *Bepin Krishna Bose*, for the Respondents.

JUDGMENT.—This is an appeal from a suit to enforce a mortgage-deed, dated the 23th October 1912, executed by the deceased Ruprai for himself and for his minor uncle Narayansingh. The suit is against Noharsingh, minor son of Ruprai, and Narayansingh who has since attained majority. Out of the consideration of Rs. 5,500 secured by the mortgage, Rs. 3,500 was for the redemption of a prior mortgage dated the 11th March 1909 also executed by Ruprai in favour of one Amritrao for Rs. 2,700. The plaintiff claims to have redeemed this prior mort.

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gage and produced the original mortgage-deed (Exhibit P-5), which contains an endorsement of satisfaction purporting to be in the handwriting of Amritrao. The plaintiff has been given a decree against the four-annas share of Ruprai and the suit has been dismissed as against the shares of Narayansingh and Noharsingh, the lower Court holding that no legal necessity has been proved.

The first point for decision is whether the plaintiff has proved legal necessity for either of the mortgages. Both the documents contain the usual recitals which would make out a case for necessity. The transactions, however, are so recent that little weight can be attached to these recitals. The plaintiff, who is the original mortgagee of the deed in suit, has not gone into the witness-box to depose to the representations made to him, nor is there any evidence that he made any enquiries, and was satisfied about the necessity for the loan. There is no oral evidence of any kind to prove that the loans were necessary. The prior mortgage, it will be noted, was also by Ruprai and not by any ancestor of Narayansingh. It may be conceded, as argued for the appellant, that Ruprai was the manager though the lower Court was disposed to think otherwise, but this concession does not carry the plaintiff's case any further.

Reliance, however, is placed upon certain statements made by Narayansingh and contained in Exhibits P-2, P-4 and P-6. In these statements the plaintiff's mortgage-debt is admitted as an existing debt. Narayansingh applied to the Deputy Commissioner under section 45 of the Tenancy Act for sanction to transfer *sir* land without reservation of expropriary occupancy rights. He had to establish that the debts could not be met except by such a transfer. This statement is made by Narayansingh as representing himself and the minor Noharsingh. It is to the following effect:

"We owe Rs. 5,500 to Dilesar (plaintiff) under a mortgage-deed and our twelve annas of Baharhod is mortgaged for this debt."

The lower Court has attached no importance to this statement as, in its opinion, Narayansingh had just attained

majority; but it is pointed out that Narayansingh's age as given in the deposition (Exhibit P 6) was 22. It is urged that this statement amounts to an admission which shifts the burden of proof as against both him and the minor Noharsingh.

I agree with the contention of the appellant that the statement is relevant also against Noharsingh. The following statement of the law from Taylor on Evidence has been held by Garth, C. J., in *Kowsulliah Sundari Dasi v. Mukta Sundari Dasi* (1) to be applicable to India under section 18 of the Evidence Act:

"When several persons are jointly interested in the subject-matter of the suit, the general rule is that the admissions of any one of those persons are receivable against himself and fellows, whether they be all jointly suing or sued, provided the admission relates to the subject-matter in dispute and be made by the declarant in his character of a person jointly interested with the party against whom the evidence is tendered."

To the same effect is the recent judgment of Mookerjee, J., in *Ambar Ali v. Lutfe Ali* (2), where other authorities have been collected.

It is urged that the statement of Narayansingh amounts also to an admission on the part of Noharsingh under section 18 of the Evidence Act, and this admission has the effect of shifting the burden of proof on both of them. In support of this the appellant cites the Privy Council case of *Chandra Kunwar v. Chaudhri Narpal Singh* (3). The case in the Privy Council was concerned with the admission of a party himself and it was also upon a question of fact regarding his adoption. Although I have held that the statement of Narayansingh is receivable in evidence against Noharsingh, it is only an admission by construction of law. I doubt whether such a constructive admission has the effect of shifting the burden of proof as against Noharsingh.

(1) 11 C. 588; 10 Ind. Jur. 66; 5 Ind. Dec. (N. S.) 1161.

(2) 41 Ind. Cas. 116; 45 C. 159; 25 C. L. J. 619; 21 C. W. N. 996.

(3) 29 A. 184; 4 A. L. J. 102; 11 C. W. N. 321; 5 C. L. J. 115; 17 M. L. J. 103; 2 M. L. T. 109; 9 Bom. L. R. 267 (P. C.)

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The Privy Council laid down that where there is an admission by a party, he has to show that the admission was untrue in fact (*vide* page 195* of the report). Their Lordships quote the following passage from the judgment of Baron Parke: "What a party himself admits to be true may reasonably be presumed to be so."

The statement above referred to (Exhibit P-6) makes no allegation regarding the purpose for which the loan was taken from the plaintiff. It merely states the existence of a debt. Its binding character is only to be inferred. According to the view hitherto taken by the Court in such cases, it is binding to the extent of Ruprai's share in the family property. The mortgage is one by conditional sale in which there is no personal covenant to pay. It is not likely that Narayansingh would know whether he could repudiate Ruprai's mortgages until he went to a lawyer, so far as his share was concerned. The allegation, so far as it relates to the existence of the debt, is not disputed now. The plaintiff was no party to those proceedings and there was no occasion for making a statement as to whether the debt was binding on Ruprai's share alone or on the whole family property. The utmost that can be contended is that Narayansingh at the time probably believed that the mortgage was binding. This is a mixed question of law and fact regarding which Narayansingh's belief may be well-founded or ill-founded. The plaintiff is now seeking to draw some far-fetched inferences from that admission. The Privy Council case, in my opinion, is no authority for drawing such inferences from the statement contained in Exhibit P-6. The same observation applies to Exhibits P-2, and P-4. I hold that the burden of proof is not shifted by these statements.

On the whole I agree with the lower Court that legal necessity for either of the mortgages has not been proved. This disposes of the case so far as Narayansingh is concerned and also the case against Noharsingh, except as regards the item of Rs. 3,500.

As against Noharsingh it is argued that there was an antecedent debt of the father which the mortgages had paid off. To prove the endorsement of Amritrao on the back

of his mortgage the plaintiff called one witness P. W. No. 7. The witness says:—

"The endorsement on the back of Exhibit P-5 appears to be in Amritrao's handwriting. I cannot say for certain if the handwriting is Amritrao's. I have some doubts. I cannot say it is a forgery."

This was all said in examination-in-chief. I agree with the lower Court that the evidence of this witness is insufficient to prove the endorsement. There is no other witness on the point.

It is, however, rightly pointed out that the plaintiff has produced the original mortgage-deed from Amritrao. Some presumption, no doubt, arises from this fact, but it is still impossible to hold on this presumption that the plaintiff had paid Rs. 3,500 to Amritrao, and without a finding regarding the amount paid by the plaintiff it is impossible to give a decree. I am asked to give the plaintiff a further opportunity of proving the endorsement.

This I am not prepared to do, especially as no application to this effect was made to the lower Court after the examination of P. W. No. 7 or at any later stage.

In *Sahu Ram Chandra v. Bhup Singh* (4) Lord Shaw lays down what sort of antecedent debt will justify the father in charging the family property. His Lordship says:

"It must be an obligation not only antecedently incurred, but incurred wholly apart from the ownership of the joint estate or the security afforded or supposed to be available by such joint estate."

The father's power in the absence of necessity to deal with the joint family property is treated in the judgment as an exception to the general principle of Hindu Law.

The judgment then proceeds:

"The exception being allowed, as in the state of the authorities it must be, it appears to their Lordships to apply, and to apply to the case where the father's debts have been incurred irrespective of the credit obtainable from immoveable assets which do not personally belong to him but are joint family property. In their view of the rights

(4) 39 Ind. Cas. 280; 39 A. 437 at p. 447; 21 C. W. N. 696; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 493; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213; 41 L. A. 126 (P. C.).

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of a father and his creditors, if the principle were extended further, then the exception would be made so wide as in effect to extinguish the sound and wholesome principle itself, viz., that no manager, guardian, or trustee can be entitled for his own purposes to dispose of the estate which is under his charge. In short, it may be said that the rule of this part of the Mitakshara Law is that the joint family estate is in this position: under his management he can neither obtain money for his own purposes for it nor can he obtain money for his own purposes upon it. To permit him to do so would enable him to sacrifice those rights which he was bound to conserve. This would be equivalent to sanctioning a plain and, it might be, a deliberate breach of trust. The Mitakshara Law does not warrant or legalize any such transaction.

"The limits of the principle of the exception have been thus set forth, because in their Lordships' opinion they form a guide to the settlement of the conflict of authority in India on the subject of antecedent debt."

The previous debt, having been secured upon the credit of the joint immoveable property, was not such an antecedent debt for which Ruprai could have charged his son's share in the joint family property.

The decree of the lower Court has awarded the plaintiff the mortgagor's share in the mortgaged property. There is no appeal from this decree by the defendants.

There appears to be an accidental slip in the judgment and decree which requires correction. Although no application has been made to me under section 152 of the Civil Procedure Code, I have the power to correct the decree, especially in view of the new section, Order XLI, rule 33. Ruprai's share in the family property was four annas. The lower Court says that the mortgage is binding on the defendants in respect of Ruprai's four annas. It then proceeds to add that the plaintiff is entitled to foreclose Ruprai's four-annas share of the village. The family, however, owned only twelve annas in the village, as correctly pointed out in an earlier part of the judgment. The plaintiff is, therefore, entitled to foreclose one-fourth of twelve annas, that is, three

annas of the village. This was a mistake due to inadvertence, and the decree will, therefore, have to be modified by showing three annas share of Mouza Baharhod as the property to be foreclosed under the decree.

The appeal fails and is dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL APPEAL No. 403 OF 1917.

August 16, 1918.

Present:—Sir John Wallis, Kt., Chief Justice and Mr. Justice Seshagiri Aiyar.

SINGA RAJA AND OTHERS—DEFENDANTS

—APPELLANTS

versus

PETHU RAJA AND OTHERS—PLAINTIFF AND DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 2, O. XXXIV, rr. 2, 5—Mortgage decree for sale—Payment out of Court of amount of preliminary decree, plea of, maintainability of—Certificate under O. XXI, r. 2, production of, effect of.

Under Order XXXIV, rules 2 and 5, Civil Procedure Code, a final decree for sale should be passed if the amount specified in the preliminary decree has not been paid into Court within the time specified. The Court will not recognise any plea, at the time of passing the decree for sale, to the effect that the amount has been paid out of Court to the decree-holder. In this respect, the scheme of the Code differs from the provisions laid down in section 89 of the Transfer of Property Act. [p. 197, col. 1.]

Piran Bibi v. Jitendra Mohan Mookerjee, 40 Ind. Cas. 845; 25 C. L. J. 553; 21 C. W. N. 920, followed.

If, however, between the passing of the preliminary decree and the passing of the decree for sale the defendant obtains a certificate under the provisions of Order XXI, rule 2, Civil Procedure Code, he can take advantage of it to reduce the amount for which the property is to be sold and the decision will be the same as if, at the time when the decree for sale was being made, he came forward and paid the amount into Court. [p. 197, col. 2.]

Jogendra Prasad Narain Singh v. Gouri Sankar Prasad Sahu, 40 Ind. Cas. 138; 2 P. L. J. 533; 2 P. L. W. 66, explained.

Appeal against the decree of the Court of the Temporary Subordinate Judge, Ramnad, at Madura, in Original Suit No. 59 of 1916.

Mr. T. M. Ramaswami Aiyar, for the Appellants.

MAHENDRA RAM V. SINGI LAL.

Mr. A. S. Viswanatha Aiyar, for the Respondents.

JUDGMENT.—This is an appeal from the decree for sale in a mortgage suit passed by the Subordinate Judge, of Ramnad. The plaintiff obtained a preliminary decree on the 27th September 1916 and the appellant, the 3rd defendant, complains that the Subordinate Judge, at the time of passing the decree for sale, refused to inquire into and recognise an alleged settlement of the decree out of Court on the 13th February 1917. The application for the decree for sale was made on the 25th June 1917 and, therefore, even if the procedure in Order XXI, rule 2, Civil Procedure Code, were applicable, the defendant was out of time and was too late to have the adjustment recorded. However, we think that the appeal fails on a larger basis. The scheme of the Code appears to us to be that, if the amount made payable in the preliminary decree is not paid into Court within the time limited, then the decree for sale is to be made. In this respect the provisions of Order XXXIV differ from section 89 of the Transfer of Property Act, which provided for payment to the plaintiff or into Court. Order XXXIV, rule 2, clause (c), and rule 5, Civil Procedure Code, provide that, "where on or before the day fixed, the defendant pays into Court the amount declared due as aforesaid, together with such subsequent costs as are mentioned in rule 10," the Court is to pass a decree ordering the plaintiff to deliver up the documents and to re-transfer the mortgaged property and, if necessary, to put the defendant in possession. But sub-rule 2 says, where such payment is not so made, that is to say, where such payment is not made into Court, the Court shall pass a decree ordering the sale of the mortgaged property or a sufficient part thereof. Forms of mortgage decrees are given in Appendix D and Forms 7 and 8 are drawn up in the same way. Form No. 7 says that if the defendants pay into Court the sum declared due on account of principal, interest and costs, the plaintiff is to deliver up the documents, etc., and clause (3) is that if the defendant pays the said sum as aforesaid (that is, into Court)

the mortgagor may apply, etc., Therefore we are of opinion that the scheme of the Code, so far as mortgage decrees are concerned, is that if the amount due under the preliminary decree has not been paid before the appointed day, a decree for sale is to be made and the machinery for sale is to be set in motion. This decision is in accordance with the decision of the Calcutta High Court in *Piran Bibi v. Jitendra Mohan Mookerjee* (1). It may be that if between the passing of the preliminary decree and the passing of the decree for sale the defendant obtains a certificate under the provisions of Order XXI, rule 2, he can take advantage of that to reduce the amount for which the property is to be sold, and the decision will be the same as if at the time when the decree for sale was being made he came forward and paid that amount into Court. We do not think that the decision in *Jogendra Prasad Narain Singh v. Gouri Sankar Prasad Sahu* (2) amounts to more than this.

The provisions of the Code are imperative that, if the money is not paid into Court within the time limited, then there is to be a decree for sale. Those provisions were advisedly inserted in modification of the corresponding provisions of section 89 of the Transfer of Property Act and we are bound to give effect to them. On this ground the appeal fails and must be dismissed with costs.

M. C. P.

Appeal dismissed.

(1) 40 Ind. Cas. 845; 25 C. L. J. 553; 21 C. W. N. 920.

(2) 40 Ind. Cas. 138; 2 P. L. J. 533; 2 P. L. W. 68.

PATNA HIGH COURT.

CIVIL REVISION No. 305 of 1917.

October 23, 1918.

Present:— Mr. Justice Roe and Mr. Justice Jwala Prasad.

MAHENDRA RAM AND ANOTHER

—PETITIONERS

versus

SINGI LAL AND OTHERS—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. XXIII, r. 1, applicability of—Withdrawal of suit—Sufficient ground,

BYUNNI RAGHAVACHARYULU v. EPURI GOVINDASARI.

Under Order XXIII, rule 1 of the Civil Procedure Code, a suit can only be withdrawn with permission to bring a fresh suit when the Court is satisfied that the suit must fail for reason of some formal defect or that there are other sufficient grounds for allowing the plaintiff to bring a fresh suit. The sufficient grounds contemplated in the second clause of the rule must be grounds closely analogous to the grounds given in the first clause.

The provisions of Order XXIII, rule 1 of the Civil Procedure Code, must be strictly applied.

Civil revision from an order of the Munsif, Siwan (Saran)

Mr. Rajendra Prasad, for the Petitioners.

Messrs. Chandra Sekhar Banerjee and Samhusaran, for the Opposite Party.

JUDGMENT.—The order against which this application is made, purports to have been made under Order XXIII, rule 1. The facts upon which it was passed do not appear in the petition asking to withdraw the suit, but are stated to have been ascertained orally from the Pleader in-charge of the plaintiff's case. They were, *firstly*, that the plaintiff's father had not been made a party to the suit; and *secondly*, that the defendant's brother had not been made a party to the suit. In the affidavit filed in support of the application it appears that the defendant denied that he has a brother at all, and it is argued by the learned Vakil for the applicant that the plaintiff's father had nothing to do with the contract upon which the suit was brought and was not a necessary party to the suit at all. We wish to draw particular attention to the imperative nature of the rule under which the Munsif purported to act. A suit may only be withdrawn with permission to bring a fresh suit when the Court is satisfied that the suit must fail for reason of some formal defect or that there are other sufficient grounds for allowing the plaintiff to institute a fresh suit. The sufficient grounds contemplated in the second clause should be grounds closely analogous to the grounds given in the first clause. We feel strongly that the Courts below are far too prone to allow suits to be withdrawn when they are more than a year old, so that the withdrawal of them from the file will improve the look of the file. The Munsif in the case before us does not appear to have been satisfied that the suit must fail. He was merely vaguely of opinion that the defect of

parties might materially affect the decision. This was not a sufficient reason for giving the permission asked for. We are of opinion that in making the order against which this application has been made, the learned Munsif failed to exercise the jurisdiction which was vested in him by law to make a serious enquiry as to whether the suit must fail for defect of parties or not. We, therefore, remand the case to him and direct that he devote his attention strictly to the wording of the rule and that before granting permission to bring a fresh suit, he satisfy himself that the suit must fail by reason of a defect in it. We would draw the attention of other Courts to this decision, for we are of opinion, as we have already stated, that a great deal of laxity prevails with regard to the manner in which these applications to withdraw with permission to bring fresh suits are granted. Costs will follow the result. The hearing fee of this Court is two gold mohurs.

Case remanded.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1700 OF 1916.

April 18, 1918.

Present: Sir John Wallis, Kt., Chief Justice, and Mr. Justice Seshagiri Aiyar.

BYUNNI RAGHAVACHARYULU AND OTHERS—PLAINTIFFS NOS. 2, 4, 5 AND 6 AND

LEGAL REPRESENTATIVE OF THE PLAINTIFF NO. 3—APPELLANTS

versus

EPURI GOVINDASARI - DEFENDANT—

RESPONDENT.

Landlord and tenant—Lease, perpetual, by majority of co-sharer landlords, validity of—Suit by minority to set aside lease—Decree, form of.

A lease of common land granted in perpetuity by a majority of the co-sharer landlords is not binding on the dissenting minority, except (1) where there is a custom authorizing such a lease or (2) in a case of unavoidable necessity or (3) where the lease is obviously beneficial to all the sharers. [p. 199, col. 2.]

In such a case the minority can sue to eject the lessee, and their remedy is not limited to a suit for a partition of their shares. [p. 199, col. 2.]

Watson & Co. v. Ramchund Dutt, 18 C. 10; 17 I. A. 110; 5 Sar. P. C. J. 535; 9 Ind. Dec. N. S. 7 (P. C.), *Lachmeswar Singh v. Manowar Hossain*, 19 C. 253; 19 I. A. 48; 6 Sar. P. C. J. 133; 10 Ind. Dec. (N. S.) 614;

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Madan Mohun Shaha v. Rajab Ali, 28 C. 223 and *Dhakhyani Debi v. Mana Rout*, 22 Ind. Cas. 686; 19 C. L. J. 113; 19 C. W. N. 407, distinguished.

The proper decree to be passed in such a suit is to declare that the lease is not binding on the plaintiffs and to direct that they should be put in possession for themselves and on behalf of the other co-sharers; [p. 200, col. 1.]

Second appeal against the decree of the Court of the Temporary Subordinate Judge, Nellore, in Appeal Suit No. 17 of 1915 (Appeal Suit No. 249 of 1914, District Court, Nellore), preferred against the decree of the Court of the Additional District Munsif, Nellore, in Original Suit No. 55 of 1913 (Original Suit No. 756 of 1912, Principal District Munsif's Court, Nellore).

FACTS appear from the judgment.

Mr. A. Krishna-swami Aiyar, for the Appellants.—The lower Appellate Court erred in holding that, as the majority of the sharers granted the lease, it was binding on those not parties to it. No custom to that effect has been alleged or proved. The position is analogous to that of a trustee granting a permanent lease of trust property or of a Karnavan granting a permanent lease of Tarwad property. Such a lease is prejudicial to the whole body of landlords. If the lease is invalid, it is competent to the dissenting minority to eject the lessee.

Mr. L. A. Govindaraghava Aiyar (with him Mr. L. Venkataraghava Aiyar), for the Respondents.—The grant of the lease was within the powers of the majority of the landlords. The result of the lease was to convert waste lands into cultivable lands. It was a prudent act of management.

In any event plaintiffs could not have sued for possession. Their only remedy was to sue for partition of their shares.

JUDGMENT.—The suit is by a few sharers of Samudayam or common lands for ejectment against the defendant, who has obtained a lease of it from the other shareholders. The lessee is himself a co-sharer and the Kurnam of the village. The lease is a permanent one. The extent mentioned is 60 acres, but it has been found by both the lower Courts that it comprises nearly 240 acres. There is a clause in the lease to the effect that the property should be regarded as comprising only 60 acres although the actual measurement may be more or less. The District Munsif held that the lease was not binding and decreed joint possession to the plaintiffs with the defendant.

On appeal the Subordinate Judge rightly held that the decree for joint possession was wrong. His view was that, as the lease was given by a majority of the share-holders, it is binding on the plaintiffs.

The principal question argued in second appeal is whether a majority of co-sharers can validly grant a perpetual lease of common property. The Courts below have found that it has not been proved that there is a custom authorising the majority to impose their will upon the minority. It is now settled law that, unless for unavoidable necessity, a trustee cannot grant a permanent lease of trust property. See *Palaniappa Chetty v. Deivasikamony Pandara Sannadhi* (1). It has also been held that a Karnavan of a Malabar Tarwad cannot grant a permanent lease except under exceptional circumstances. The same rule applies to the managers of Hindu families. At best the position of the majority in this case can only be regarded as that of managers of joint property for themselves and on behalf of others, *frima facie*, therefore, their action in granting a permanent lease is *ultra vires*. The learned Vakil for the respondent referred to the fact that the lands were waste and that it was a prudent act of management to grant a permanent lease. Under the Madras Estates Land Act, in exceptional circumstances, the landlord for the time being is permitted to grant leases on favourable conditions. Even such a lease is not binding upon the successor. *A fortiori* a lease granted in perpetuity by a fraction of the share holders should not be regarded as binding upon the dissenting minority. Mr. Govindaraghava Aiyar argued that, even if the lease is beyond the powers of the majority, the only remedy open to the plaintiffs is to sue for a partition of their shares. We are unable to agree with this contention. *Waston & Co. v. Ramchund Dutt* (2) was strongly relied on. In that case the propriety of the lease was not questioned. What the Judicial Committee decided was that it was not open to some of the shareholders to claim joint possession with the lessees who were let in by the other co-

(1) 39 Ind. Cas. 722; 33 M. L. J. 1; 40 M. 709 at p. 721; 21 C. W. N. 729; 15 A. L. J. 485; 1 P. L. W. 697; 19 Bom. L. R. 567; 22 M. L. T. 1; (1917), M. W. N. 477 & 507; 26 C. L. J. 153; 6 L. W. 222 (P. C.).

(2) 18 C. 10; 17 I. A. 110; 5 Sar. P. C. J. 535; 9 Ind. Dec. (N. S.) 7 (P. O.).

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sharers. *Lachmeswar Singh v. Manowar Hossein* (3) is also to the same effect. In *Madan Mohun Shaha v. Rajab Ali* (4) it was held that, a co-sharer being in possession, another co-sharer was not entitled to sue in ejectment against him. In *Dhakhyani Debi v. Mana Rout* (5) the Courts implied an assent on the part of the dissentients from the fact of their not objecting to the lease for over ten years. These authorities do not hold that, where a lease is found to be invalid, the lessee should be maintained in his possession leaving it to those objecting to his lease to sue for partition as their only remedy. In the present case we are unable to agree with the learned Vakil for the respondent that it was a prudent act of management to grant a perpetual lease of such a large extent of property. We cannot help feeling that the Kurnam, who must have known more or less the real extent of the property he had taken on lease, took undue advantage of the ignorance of the other co-sharers in obtaining a permanent lease and in getting the clause, we have referred to already, inserted in it.

In our opinion the proper decree to be passed is to declare that the lease is not binding on the plaintiffs and that they should be decreed possession for themselves and on behalf of the other co-sharers. We must, therefore, reverse the decrees of the Courts below and grant a decree as above indicated. The plaintiffs are entitled to their costs against the defendant in this and in the lower Appellate Court. As they were content to have a decree for joint possession in the first Court, we make no order as to costs in that Court.

M. C. P.

Appeal allowed.

(3) 19 C. 253; 19 I. A. 48; 6 Sar. P. C. J. 133; 10 Ind. Dec. (N. S.) 614.

(4) 28 C. 223.

(5) 22 Ind. Cas. 666; 19 C. L. J. 113; 19 C. W. N. 407.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 91 of 1916.

June 10, 1918.

Present:—Mr. Justice Piggott and Mr. Justice Walsh.

PAHLADI LAL—PLAINTIFF—APPELLANT
versus

Musammat LARAITI AND OTHERS—

DEFENDANTS—RESPONDENTS.

Registration Act (XVI of 1908), s. 28—Mortgage-deed—Property not belonging to mortgagor included in deed—Registration in district in which such property situate, validity of.

Where property which is admitted to be in existence but which does not belong to the mortgagor is included in a mortgage-deed, the fact that the document is registered in the district in which that property is situate and that that property is the only property hypothecated within the registration district, is not sufficient, in the absence of any collusion between the parties or of knowledge on the part of the mortgagee, to invalidate the registration of the deed. [p. 201, col. 2]

First appeal from a decree of the Subordinate Judge, Budaun.

Messrs. B. E. O'Connor and Iqbal Ahmad, for the Appellant.

The Hon'ble Dr. Tej Bahadur Sapru and Mr. Gulzari Lal, for the Respondents.

JUDGMENT.—We have come to the conclusion that this appeal must be allowed and the suit sent back for re-trial. The suit is brought upon two simple mortgage-bonds by the plaintiff against the widow of one Bijai Singh. Bijai Singh borrowed two sums, one of Rs. 6,000 and the other of Rs. 1,000, in the month of August 1902 and by two documents, executed respectively on the 26th and 27th of August, hypothecated in respect of those loans certain property set out in the schedule to the bonds. He was in urgent need of money on the 29th or 30th of August for the purpose of lodging it in Court in respect of a decree which he had obtained in a pre-emption suit. He had been a member of a joint Hindu family who had partitioned their property by means of an award in the year 1896. That award was carried out by a decree in the same year. The father, Sher Singh, had died in 1897. By the award the property was partitioned between his four sons, Bijai Singh, the mortgagor in question, Niranjana Singh, his brother who is still living, Shib Singh, a brother who is dead, and Dirgpal Singh, who is still living and who was at that time a

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minor. The property hypothecated by Bijai Singh in these two documents in substance consisted of the property which he was awarded under that partition, although it is not clear that it did not include some other property as well, and also included $2\frac{1}{2}$ biswas in a certain Mauza named Kachaura which had in fact been awarded in the decree to the minor, Dirpal Singh. *Prima facie* it would, therefore, appear to be established, at any rate for the purpose of our decision to-day, that Bijai Singh had no title to this property and could not hypothecate it to the plaintiff. It is this which has given rise to all the difficulty in the case. If this property had not been included in the bonds, the registration office at Budaun would not have been the proper place under the Registration Act for the registration of the bonds. If, on the other hand, this property was included, then Budaun was the proper place for the registration of the bonds which were in fact registered at Budaun. The learned Subordinate Judge has dismissed the suit on the ground that the registration was invalid, purporting to follow the decision of the Privy Council in *Harendra Lal Roy Chowdhuri v. Srimati Hari Dasi Debi* (1). We say purporting to follow that decision, because it is difficult to say what exactly the learned Subordinate Judge meant to find as a question of fact in his judgment. The question which we have to decide as a matter of law is this, whether, when property is admitted to be in existence and has been included in a mortgage-deed but is shown not to have been the property of the mortgagor, the fact that the document has been registered in the district to which that property belongs is sufficient to invalidate the registration when that property is the only property hypothecated within the registration district.

A priori no reading section 28 of the Indian Registration Act No. XVI of 1908 there would appear to be no ground for this contention. The section provides that "the document shall be presented for registration in the office of a Sub-Registrar within whose sub-district the whole or some portion of the property to which such docu-

ment relates is situate." Whether or not the mortgagor had a good title to this piece of property, does not affect the question whether this property is situated in the district where registration took place and whether the document relates to it. It would be a strange result if it were the law that upon proof that the mortgagee had obtained no title to a small portion of property on account of which the place of registration was selected, that he should lose not only the benefit of his security over that small portion but the entire benefit of the hypothecated property, particularly when, as might happen in many cases, he had been deceived by the mortgagor. This is the view which has been taken by a two Judge Bench in Calcutta in the case of *Broja Gopal v. Abinash Chandra* (2), which is not reported in any authorised report but which is to be found in 14 Calcutta Weekly Notes 532. We think that decision might be reported in the authorised reports. The Judges refer to a decision of the Privy Council many years ago, in which it was held that a small portion of the property covered by the deed was sufficient to give the Sub-Registrar jurisdiction in whose sub-district that portion was situate. We agree with the decision of the Calcutta Bench and it, therefore, becomes a question of fact and it is really a question of fact in every case whether, as the Privy Council says in its judgment in *Harendra Lal Roy Chowdhuri v. Srimati Hari Dasi Debi* (1), the parties have intentionally by a mutual collusive arrangement inserted in the deed property either which does not in fact exist or which, while in existence, is not intended by either of them to be a part of the security. Where the parties are colluding for the express purpose of evading the Registration Law, in such case, applying the Privy Council decision to the section, the result would be that the deed in question does not relate to the property, inasmuch as neither party had any intention of dealing with the property. On the other hand, where the real fact is that the parties intended to deal with the property, the condition of the mortgagor's title does not affect the question of registration. Applying these principles, which we think are clear and well-settled

(1) 23 Ind. Cas. 637; 41 C. 972; 27 M. L. J. 80; 12 A. L. J. 774; 16 M. L. T. 6; (1914) M. W. N. 462; 1 L. W. 1050; 18 C. W. N. 817; 19 C. L. J. 484; 16 Bom. L. R. 400; 41 I. A. 110 (P. C.).

(2) 5 Ind. Cas. 127; 14 C. W. N. 532.

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the question which we have to determine in this case is whether it is proved that the mortgagee was aware of the defect in the mortgagor's title and expressly consented to the inclusion of this property in the deed for the purpose merely of complying with the Registration Law. In our view nothing short of a finding to that extent would be sufficient and the finding, if arrived at, must be supported by clear evidence. It is suggested in this case that there is in the first place evidence of the fact. That is undoubtedly true; but the evidence on this point is far from satisfactory. On the one hand, the plaintiff himself did not go into the box and has exposed himself to just criticisms on that account; but it is difficult to see what more he could have said than the documents which were presented on behalf of Bijai Singh, unless he was prepared to admit what the defendants allege. Now the documents, the *khewat* and the revenue records, generally, were such as to justify the acceptance, by any purchaser or mortgagee, of Bijai Singh's title to this piece of property. For reasons of their own, possibly not unconnected with a scheme of this kind, the family had deliberately entered Bijai Singh's name as being in possession of this property, although it had been awarded to his minor brother. A witness named Sham Lal was called on behalf of the plaintiff. He deposed that Bijai Singh came to the house of the plaintiff with his brother Niranjan Singh and when asked with reference to this property referred the plaintiff to the *khewat*, and that the plaintiff saw the *khewat* and next day asked his servant Pandit Gumanj Lal to inspect the registers of the Registration Office. That evidence, although not supported by the testimony of the plaintiff himself, might have been contradicted by Niranjan Singh and was not. A Pleader, who has been practising since 1880 and has acted for the defendants for many years and is now indebted to them in an amount of Rs. 800 or Rs. 900, was called by the defendants although he had been summoned by the plaintiff, and it is upon his evidence and his evidence alone that it is suggested that it is proved that the plaintiff knew quite well that this was a fictitious entry in the deed. He attested both the documents and identified Bijai Singh

at the time of the registration. He knew the actual ownership of the property perfectly well and was under the impression, according to him, that this fictitious inclusion of the minor's property in the deed was done to avoid the journey to Dataganj, where registration would otherwise have taken place, and to enable Bijai Singh to borrow money for the satisfaction of the pre-emption decree. Whatever the profession may have thought before the Privy Council decision, we are of opinion that an act of this kind on the part of a professional gentleman who is said to be a gentleman of respectability was highly questionable. However that may be, we have to consider whether his evidence really proves anything against the plaintiff. He says that all of them, including himself, Bijai Singh and the plaintiff, knew that the property did not belong to Bijai Singh. We do not think that this is evidence that the plaintiff knew. It is merely an expression of opinion on the part of the witness. He does not tell us how the plaintiff is supposed to have known or how he came to know that the plaintiff knew. Nothing would have been easier, if there was any substance in the allegation, than for the witness to have stated in unequivocal terms to the Court how the plaintiff became acquainted with the true state of the facts. In the presence of the document which absolutely contradicted the witness, we think there was no evidence that the plaintiff knew, and, therefore, no evidence that he was a conscious party to the fictitious entry in the deed. Inasmuch as it was admitted that the property was in existence and was supposed to be in the possession of the mortgagor, the onus was on the defendants to show that both parties intended the entry to be fictitious. We do not think the Court below really found that the plaintiff knew. It was prepared to accept the Pleader's evidence but it does not expressly find any knowledge at all on the part of the plaintiff. On the other hand, it is said in the judgment that the question is whether the plaintiff should not have made more careful inquiries at the time. This question would be quite irrelevant if the Court below held that the plaintiff knew the real truth. It appears to us that the decision

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has gone against the plaintiff merely on the finding that the plaintiff ought to have known under all the circumstances that Bijai Singh had no power to transfer Mauza Kachaura and that, therefore, he was not acting in good faith. This is not sufficient. The appeal must be allowed with costs and the case remanded to the Court below to be tried out on the merits.

Appeal allowed; Case remanded.

MADRAS HIGH COURT.
FULL BENCH.

APPEAL AGAINST ORDER NO. 327 OF 1916.

April 25, 1918.

Present:—Sir John Wallis, Kt., Chief Justice,
Mr. Justice Sadasiva Aiyar and Mr. Justice
Spencer.

A. L. A. ALAGAPPA CHETTIAR—

RESPONDENT NO. 9—APPELLANT

versus

CHOCKALINGAM CHETTY AND OTHERS

—PETITIONERS NOS. 1 TO 6, RESPONDENTS NOS.

1 TO 8 AND ADDITIONAL RESPONDENT—

RESPONDENTS.

Civil Procedure Code (Act V of 1903), s. 96, O. XLI, r. 22—Provincial Insolvency Act (III of 1937), ss. 46, 47—Appeal—“In regard to proceedings under this Act”, meaning of—Memorandum of objections, whether can be presented—Appeal barred by time, effect of—“Procedure on hearing,” meaning of.

A memorandum of objections can be presented in an appeal against a decision under the Provincial Insolvency Act. [p. 209, col. 1; p. 211, col. 1.]

Where, however, the appeal is dismissed as presented out of time, the memorandum of objections cannot be heard. [p. 211, col. 1; p. 212, col. 1.]

(Authorities reviewed.)

Per Wallis, C. J.—The expression “in regard to proceedings under this Act in Courts subordinate to them” in section 47 (2) of the Provincial Insolvency Act is wide enough to cover cases in the subordinate Courts which come before the High Court or District Court on appeal or revision as well as applications for transfer, etc. The procedure prescribed in the Civil Procedure Code is the standard procedure and applies not only to insolvency cases in original Courts but also to cases of appeal and revision provided for in the Insolvency Act. [p. 203, col. 2; p. 209, col. 1.]

The right of a respondent to proceed by way of memorandum of objections is strictly incidental to the filing of the original appeal in time, and it is open to a party against whom a memorandum of objections has been filed to set up the bar that the original appeal was filed out of time [p. 211, col. 1.]

Per Sadasiva Aiyar, J.—The right to prefer an

appeal by way of memorandum of objections is an extension of the right of appeal, which must be given by Statute. Statutory provisions relating to such rights should be strictly construed. Order XLI, rule 22, of the Civil Procedure Code must, if possible, not be extended in favour of the right of a respondent to file a memorandum of objections so as to prejudice parties who have obtained a decree in their favour in the lower Court and who might reasonably entertain the belief that, as the time for preferring an appeal has expired, the rights which have been established in their favour under the decision of the Court of first instance have become finally secure. [p. 211, col. 2.]

The expression “in regard to civil suits” in section 47 (2) of the Provincial Insolvency Act includes proceedings in appeal in civil suits. [p. 207, col. 1.]

Per Spencer, J.—The word “hearing” in the heading to Order XLI, Civil Procedure Code, means hearing on the merits, and the heading “procedure on hearing” indicates that the respondent’s right to take cross-objections, which up to the time of the hearing was an inchoate right, becomes perfected at the hearing of the appeal. The words “upon the hearing” in section 561 of the old Code were probably omitted in the new Code as being redundant. [p. 212, cols. 1 & 2.]

Appeal against the order of the District Court, Ramnad at Madura, dated the 18th July 1916, in Insolvency Petition No. 6 of 1913.

This appeal and the memoranda of objections coming on for hearing on the 21st and 22nd January 1918, upon perusing the petition of appeal, the memoranda of objections, the judgment and order of the lower Court, and the material papers in the case, and upon hearing the arguments of Messrs. K. Srinivasa Aiyangar and K. Eshayam Aiyangar, for the Appellant, and of Messrs. A. Krishnaswami Aiyar and A. Venkatraghuliah, for the 6th Respondent, Mr. B. Sitarama Row, for the 7th Respondent, Mr. S. R. Muthusamy Aiyar, for the 7th and the 8th Respondents, Mr. A. Srirangachariar, for the 9th to 12th Respondents, the Hon’ble Mr. T. Rangachariar, for the 12th and 14th Respondents and of Mr. K. S. Desikan, for the 15th Respondent, and the other respondents not appearing in person or by Pleader and the case having stood over for consideration till the 5th February 1918, the Court (Oldfield and Sadasiva Aiyar, JJ.) made the following

ORDER OF REFERENCE TO A FULL
BENCH.

OLDFIELD, J.—The decision under appeal is one adjudicating 7, 9, 12, 13 respondents insolvents and avoiding transfers evidenced by Exhibit B series, Appeal against

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Order No. 337 of 1916 is by the transferee under these documents. The memoranda of objections are by 7 and 9 to 14 respondents, the persons adjudicated and their sons, for the cancellation of the order of adjudication. If the memoranda succeed, the order under appeal must be set aside *in toto*; and we have, therefore, dealt with them first. We consider at present two preliminary objections taken by 6th respondent, a creditor, who in consequence of an attempt by the original petitioners to withdraw the petition, was given the carriage of the proceedings by the lower Court and who now opposes the appeal and memoranda. His first objection is that memoranda of objections are not authorized by insolvency law and cannot be heard; his second, arising from the fact that this appeal is admittedly out of time with reference to the decision in *Kopparthi Lingayya v. Araveti Chinnarayana* (1), is that a memorandum cannot be heard on an appeal, which itself cannot be heard, because it is out of time.

That memoranda cannot be entertained in insolvency appeals is argued on the ground that the Provincial Insolvency Act contains no reference to them. A memorandum is the means, by which a respondent can take any cross-objection to the decree or order, which he could have taken by way of appeal, and in view of *Munisami Mudaly v. Abbu Reddy* (2) nothing turns on the fact that the objection raises, as it does in the present case, an issue between him and his co-respondent. A memorandum, although it can be presented only in special circumstances (a qualification material in the sequel), is in substance indistinguishable from an appeal. It follows that the right to present a memorandum, like the right to present an appeal, "cannot be assumed" and that "both alike must be given by Statute or some authority equivalent to it." *Minakshi Naidu v. Subramanya Sastri* (3). And certainly no right to present a memorandum is given explicitly by Statute in the case before us.

The first answer attempted is that such a right is given by necessary implication, since the recognition of a right of appeal involves recognition of a right of objection under the general law applicable to appellate proceedings. But, although a memorandum may be indistinguishable from an appeal in substance, the right of appeal is distinguishable from the right of objection, since they are exercisable by different persons in different circumstances, objection being open only to a respondent when an appeal has been filed by an appellant; and it does not follow from the recognition of the right of one person in one set of circumstances, that a similar right must be recognized in favour of another person in others. In fact the right of objection represents an extension of the right of appeal, for which distinct warrant must be required; and such warrant is not forthcoming in any general law applicable to appellate proceedings. For the existence of such general law is impliedly negated by the decisions in *Sesha Ayyar v. Nagarathna Lala* (4) and *Kausalia v. Gulab Kuar* (5), in which it was not invoked or applied, the latter relating directly to the right of objection; and it may be observed that we have not been shown in the present case any such course of practice as that referred to in it as a possible ground of decision. The attempt in those cases was to apply, not any general law, but that enunciated in the Civil Procedure Code consistently, it would appear, with the application to the appeals in question of the provision then corresponding with the present section 96; and, when the general law was relied on in *Minakshi Naidu v. Subramanya Sastri* (3), the judgment dealt with it as represented by that and the connected provisions. I accordingly turn to the argument that section 96 is applicable to appeals under the Provincial Insolvency Act, and that the right of objection follows from its application.

Section 96 authorizes appeals from all decisions of Civil Courts, "save when otherwise expressly provided in the body of the Code or by any other law;" and no doubt section 46, Provincial Insolvency Act, which

(1) 44 Ind. Cas. 805; 33 M. L. J. 566; 41 M. 169; 7 L. W. 443.

(2) 27 Ind. Cas. 323; 38 M. 705; 27 M. L. J. 740 (1915) M. W. N. 45.

(3) 14 I. A. 160; 11 M. 26; 5 Sar. P. C. J. 54; 11 Ind. Jur. 393; 4 Ind. Dec. (N. S.) 18 (P. C.).

(4) 27 M. 121.

(5) 21 A. 297; A. W. N. (1899) 72; 9 Ind. Dec. (N. S.) 598.

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purports to deal with appeals under it, contains nothing similar to the provisions in section 48 of the Guardians and Wards Act (VIII of 1890) and section 19 (3), Succession Certificate Act (VII of 1899), by which all orders not specified as appealable are declared final. On the other hand, the provision in section 46 for a right of appeal and, a point to which I return, the absence of other provisions regarding appeals or the procedure in them indicate that the right of appeal under the Provincial Insolvency Act is conferred by it alone, is subject to the restrictions it imposes and cannot be enlarged by the application of section 96 and other provisions of the Civil Procedure Code. This indication is strengthened by reference to those restrictions, the requirements of leave to appeal in certain cases and the mention of periods of limitation, and the absence of similar provisions regarding objections. It has not been shown how any argument in favour of the right of objection can be limited in its application to the cases of appeals, for which no leave is required. It was no doubt held in *Raghunathdas Gopaldas v. Secretary of State* (6) that a provision permitting an appeal to the High Court attracted the application of section 561, Civil Procedure Code, which at that time authorized the filing of objections; and not the less so, because an appeal could not be filed without the certificate of the original Tribunal. But the judgment notices the distinction between a certificate that the case is a fit one for appeal and leave to appeal, such as is now in question, granted to a particular individual in respect of a particular part of the case, that in which he is interested. And the requirement of leave to appeal is material; for, when it is required, it is difficult to assume either that the objector is at liberty to proceed without obtaining it and has thus been placed in a better position than the appellant or that the former's obligation to obtain leave is to be based on mere implication from the provision regarding the latter. Again, although the periods specified for appeals are identical with those provided for ordinary appeals in Articles 152, 156, Schedule I, Limitation Act, it was thought necessary to specify them distinct-

ly in the section; and, when limitation was thus dealt with, it is hard to believe that the necessity for a provision similar to Order XLI, rule 22 (1), was overlooked or that such a provision was to be imported from the Civil Procedure Code. As regards both leave and limitation the easy and natural explanation for the omission of provision for memoranda of objections is that memoranda are not contemplated. The specification in section 46 of the appeals, which can be entertained and of the conditions imposed on their entertainment indicate, in my opinion, an intention to deal with the law relating to appeals exhaustively in that section and to exclude the application of section 96, Civil Procedure Code, with all its implications.

Lastly it is argued that the law relating to appeals is to be found also in section 47, Provincial Insolvency Act, and that its references to powers and procedure impose on this Court the duty to deal with the objections in accordance with the Civil Procedure Code and confer on respondents the right to make them. The first objection to this is that, if the section is intended to deal generally with appellate work, the respondent's right to make and the Court's duty to deal with objections, although they are provided for under the heading "Procedure on hearing" in Order XLI, involve an extension of the right of appeal, which, as the decision in *Colonial Sugar Refining Co. v. Irving* (7) shows, cannot be described as matter of procedure; and if the question is of the Court's powers, it is an unusual and strained construction to treat the reference to them as conferring a right on the party. But in fact the argument against the application of section 47 rests on the broader foundation, that no part of it applies to appellate business proper. Sub-section (1) applies only "to the Court" and allows it the powers and procedure appropriate to the exercise of original civil jurisdiction; and it, therefore, is irrelevant in this connection. Sub-section (2) applies to High Courts and District Courts, which no doubt exercise appellate powers, but deals with their position only "in regard to proceedings

(7) (1905) A. C. 369; 74 L. J. P. C. 77; 92 L. T. 738; 21 T. L. R. 513.

(6) 29 B. 514; 7 Bom. L. R. 569.

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in Courts subordinate to them," not in appeals before them, and allows them the powers and procedure appropriate, not to appeals, but to civil suits; and the effect of the sub-section must, therefore, be taken as being, not the application to their appellate work of any of the provisions of part VII, Civil Procedure Code, but only of the powers of transfer and withdrawal and the procedure relating thereto, referred to in sections 22, 23, 24.

As, in my opinion, the right to present memoranda of objections involves an extension of the right of appeal, which the Provincial Insolvency Act does not sanction expressly and is not shown to sanction by implication or with reference to any general principle applicable to appellate proceedings, I would hold that, the memoranda before us cannot be heard. As, however, my learned brother entertains doubts on the point and it is one of general importance, I concur in referring to a Full Bench the question:—

"Whether a memorandum of objections can be presented in an appeal against a decision under the Provincial Insolvency Act?"

On the question, which would arise in case a memorandum of objections can be presented, there is a clear conflict of authority in the decisions of this Court, which we cannot resolve. See *Kanirkamanna Imath Narayana v. Maosad Kanirkamanna* (8), *Devibhashyam Venkanna v. Peddinti Venkataramanayya* (9), *Biridugadda Venkadu v. Receiver of N. & M. Estate* (10) and Second Appeal No. 1864 of 1916. It is, therefore, necessary to refer to the Full Bench this question also:—

"Whether a memorandum of objections, presented in an appeal which is dismissed as out of time, can be heard?"

SADASIVA AIYAR, J.—The preliminary questions for consideration are:—

(1) Whether a respondent is entitled to file a memorandum of objections in an appeal filed under section 46 of the Provincial Insolvency Act.

(2) Whether, if such a memorandum of objections is admissible, it can be heard after the appeal is dismissed as presented out of time.

(8) 8 Ind. Cas. 140; 8 M. L. T. 447.

(9) 32 Ind. Cas. 579; 19 M. L. T. 86; 3 L. W. 109.

(10) 30 Ind. Cas. 832; (1915) M. W. N. 792.

As regards the first question, the Provincial Insolvency Act is clearly not a self contained or complete Act in itself. (See second paragraph, page 570, of 33 M. L. J. 562 and also page 574.) As regards procedure, section 47 of the Provincial Insolvency Act directs the Court exercising insolvency jurisdiction to follow the same procedure as it has and follows in the exercise of original jurisdiction. Clause 2 of the same section directs High Courts and District Courts to follow the same procedure in regard to proceedings under the Act in Courts subordinate to them as the High Court and District Courts follow in regard to civil suits. The High Court and the District Courts have got appellate jurisdiction in respect of decisions passed in certain matters in insolvency proceedings in the lower Courts. As regards appeals under the Civil Procedure Code, Order XLI, rules 1 to 21, prescribe rules of procedure relating to several necessary matters such as the form of the appeal, stay of proceedings in the lower Court on appeal, endorsements to be made upon the memoranda of appeal, demands for security, sending of notices on appeal, calling for records from the lower Courts, fixing days for the hearing of appeal, service of notices on opposite party, right to begin and so on. There is no provision in the Insolvency Act as regards any of these matters of procedure in respect of appeals filed under section 46 of that Act, (at least until rules are framed under section 51 by the High Court) and unless we hold that they are incorporated in the Act by the provision in section 47, clause 2, which directs the High Court and District Courts in regard to proceedings of subordinate Courts to follow the procedure in regard to civil suits, there is an unexplained omission to make such a provision in the Act. I, therefore, am inclined to think that section 47, clause 2, does apply to appellate business proper of the High Court and District Courts and not only to the powers of transfer and withdrawal referred to in sections 22, 23 and 24 of the Civil Procedure Code. Having regard to the position of section 47 as immediately following section 46, which latter section gives the power of appeal, I think section 47, clause 2, though not as clearly and happily worded as it might have been, was intended by the Legislature to apply

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the provisions of all the rules under Order XLI of the Civil Procedure Code in respect of the regulation of the procedure in appeal, appeals being only continuations of the original proceedings in suits. I think that the expression "in regard to civil suits" means "in regard to all proceedings in civil suits" and includes proceedings in appeals in civil suits.

Then comes the question whether Order XLI, rule 22, which empowers the respondent to file a memorandum of objections is a rule of procedure. No doubt several provisions relating to substantive law are incorporated in the Civil Procedure Code but the rules in Order XLI from rules 9 to 15 are entitled as "procedure on admission of appeal," rules 16 to 37 are headed as "procedure on hearing", and rule 22 occurs among these latter rules described as falling under the head of "procedure on hearing". This is no doubt not conclusive on the point and there is much to be said (as shown by my learned brother in his opinion) for the opposite view that whatever may be the nature of the rules 9 to 37 other than rule 22, rule 22 gives a substantial right of appeal just as sections 96, 97 and 100 in the body of the Civil Procedure Code and section 46 of the Insolvency Act give a substantial right of appeal. In *Raghunathdas Gopaldas v. Secretary of State* (6) Jenkins, C. J., and Aston, J., had to construe a section which stated that subject to the provisions of section 48, sub-section 11, of the City of the Bombay Improvement Act, 1V of 1898, the provisions of the Civil Procedure Code with respect to appeals and original decrees "shall, so far as they can be made applicable, apply to appeals under that sub section." The learned Judges held that the procedure as to memorandum of objections in section 561 of the old Civil Procedure Code became thereby applicable, that is, that the respondent became entitled to file a memorandum of objections on an appeal having been filed with the necessary permission.

I think that without much straining of language, it could be argued that every party to the insolvency proceedings is given the substantial right of appeal under section 46 (just as every party aggrieved is given a right of appeal under sections 96, 97 and 100 of the Civil Procedure Code) and that the respondent

(who as a party has such a right of appeal) is merely allowed to avail himself of an additional rule of procedure by way of memorandum of objections as provided for in Order XLI, rule 22, in exercising his said right of appeal. On the whole I am inclined to the view that the Legislature intended that Order XLI, rule 22, about the right to file a memorandum of cross-objections (the objections being confined under that rule to those which the respondent could have taken by way of appeal) could be availed of by a respondent where an appeal had been filed under section 46 of the Provincial Insolvency Act. It was objected that one of the classes of appeals provided for under section 46, that is, the class coming under clause 3 of the section, requires leave of the District Court or of the High Court, and, if a memorandum of objections is allowed after an appeal has been filed under that clause, it will contravene the intention of the Act, as Order XLI, rule 22 of the Civil Procedure Code, makes no mention of the leave of the Court being required for filing a memorandum of objections in any case. I am not, however, impressed with this argument as Order XLI, rule 22, restricts the right to take cross-objections to those grounds which the respondent could have taken by way of appeal, and, as he could not advance grounds by way of appeal without the leave of the District Court or of the High Court in a case falling under section 46, clause 3, he could not file a memorandum of objections also in such an appeal without the leave of the Court [see also the observations in *Raghunathdas Gopaldas v. Secretary of State* (6), where the learned Judges seem to hold that once permission is given to appeal and an appeal is filed, a separate permission for a memorandum of objections is not necessary]. However, I should like, if possible, to express no final opinion on these points and to have the questions argued before a Full Bench and decided finally by such a Bench.

Coming to the second question as to whether a memorandum of objections can be heard after the appeal is dismissed as barred by limitation, there has been a conflict of authority in the several High Courts, and, in this Court itself, there has been such a conflict. [See *Kanirkamanna*

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Imath Narayana v. Maosad Kanirkamanna (8), *Deivibhashyam Venkanna v. Peddinti Venkataramanayya* (9) and Second Appeal No. 1864 of 1916.] I would, therefore, refer the second question also for the decision of the Full Bench if the first question is answered in the affirmative by the Full Bench.

This appeal came on for hearing before the Full Bench on the 9th and 10th April 1918.

Mr. A. Krishnaswami Aiyar (with him Mr. A. Venkatarayaliah), for Respondent No. 6, took the preliminary objection that a memorandum of objections could not be heard on an appeal from an order passed under the Provincial Insolvency Act.

The Provincial Insolvency Act is a self-contained enactment and does not provide for cross-objections by the respondent to an appeal. The right to appeal is a statutory right, and the right to present a memorandum of objections must also be conferred by Statute. The provisions of the Civil Procedure Code relating to appeals cannot be invoked for insolvency cases. Section 46 of the Insolvency Act is exhaustive as to appeals from orders under the Act. There are restrictions placed on the right of appeal, and the appeals that can be entertained are specified. The period of limitation is also distinctly mentioned in the section. Conditions are imposed on the entertainment of appeals. Then, the requirement of leave to appeal indicates that the Legislature did not intend to confer on the respondent the right to take cross-objections. It would be invidious that while the appellant can only appeal on the sanction of Court the objector should be placed in a better position by being enabled to present his objections without such leave. These limitations on the right and the absence of other provisions or procedure relating to appeals show that the provisions of Act III of 1907 cannot be enlarged by the application of the provisions of the Civil Procedure Code.

In any event, when the appeal itself was presented out of time, the respondent could not be heard on his objections. Under Order XLI, rule 22 (4), Civil Procedure Code, it is expressly provided that a memorandum of objections could be heard where the original appeal is withdrawn or is dismissed for default, but there is no such

provision where the appeal is dismissed on the ground of limitation or some other preliminary ground.

Mr. K. Srinivasa Aiyangar, for the Appellant.—Section 46 of Act III of 1907 was not intended to be exhaustive as to the procedure relating to appeals. The right of appeal is, no doubt, subject to the restrictions and limitations contained in the Act, but where the Act is silent as to procedure, it is permissible to follow the procedure laid down for appeals in the Civil Procedure Code. Act III of 1907 is not self-contained. The provisions of section 47 of the latter Act make the position clear. The section directs High Courts and District Courts to follow the same procedure in regard to proceedings under the Act in subordinate Courts as they follow in regard to civil suits. That means the procedure to be followed in appeals, and the procedure must relate to what is contained in the Civil Procedure Code.

The right to file memorandum of objections arises from the fact of the presentation of the appeal and its fate cannot be contingent on the appeal failing on a question of limitation.

Mr. Krishnaswami Aiyar, in reply.—Section 47 of the Provincial Insolvency Act cannot apply to appeals and sub-section 2 of the section can only refer to powers of withdrawal and transfer.

OPINION.

WALLIS, C. J.—Section 47 (1) of the Provincial Insolvency Act provides that, subject to the provisions of the Act, the Provincial Insolvency Court in regard to proceedings under the Act shall have the same powers and follow the same procedure as it has and follows in the exercise of original civil jurisdiction, thus making the provisions of the Civil Procedure Code clearly applicable, as far as may be to original proceedings under the Act. This sub-section applies to District Courts in the exercise of original jurisdiction in insolvency. Sub-section (2) then applies exactly the same provisions in the same language to the High Courts and District Courts "in regard to proceedings under this Act in Courts subordinate to them," and the first question is, what is the effect of these words. Though not very happily expressed they are, in my opinion, wide

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enough to cover cases in the subordinate Courts which come before the High Court or District Court on appeal or revision as well as on applications for transfer, etc., and there are sufficient indications that they were used by the Legislature in this sense. The procedure prescribed in the Civil Procedure Code is the standard procedure, and no reason has been suggested why it should have been made applicable in insolvency cases only in the original Court and not also to cases of appeal and revision provided for in the Act. There must be some procedure or other governing such proceedings, and if it had been intended that it should be prescribed by rules made under section 51, it would have been specifically mentioned in sub-section 2, among the other important matters as to which rules were to be made under that section. So far as appeals to the High Court are concerned, the sub-section so construed may, in my opinion, be regarded as superfluous, because, under section 590 of the Code of 1882, now section 108, the procedure prescribed in Chapter XLI, which deals with appeals from original decrees, was made applicable, as far as might be, to appeals from orders under any special or local law in which a different procedure is not provided. No different procedure is provided in the Provincial Insolvency Act as it was in the Insolvents Act of 11 and 12 Viet. C. 21, to which for that reason the provisions of section 590 were held inapplicable in *Brown, In the matter of* (11).

Clearly, therefore, in either view the procedure prescribed by the Code is applicable to appeals to the High Court under the Provincial Insolvency Act, and it is unnecessary to refer to section 117 and sections 3, 4 of the Code, which were also relied on.

The next question depends on the construction of Order XLI, rule 22 (formerly section 561), Civil Procedure Code, which has given rise to much difference of opinion. In Calcutta it was held that section 561 did not generally entitle one respondent in an appeal to present a memorandum of objection against another respondent, and this was followed in *Kallu v.*

Manni (12). On the other hand, it was held by this Court to be permissible in *Timmayya Mada v. Lakshmana Bhakta* (13), approved in *Kulaikoda Pillai v. Viswanatha Pillai* (14). In these circumstances the section was amended in 1908 by substituting in sub-section (1) "cross-objection" for "objection" and in sub-section (3) "the party who may be affected by such objection" for "appellant", while the new sub-section (4) speaks of "such notice to the other parties as the Court thinks fit." The interpretation put upon these amendments has not been uniform. A Full Bench of this Court in *Munisami Mudaly v. Abbu Reddy* (2) has relied mainly on the previous practice of this Court, but that consideration has less weight in a case like this, where the Legislature in making the amendments must be presumed to have intended to introduce uniformity of practice in place of the diversity prevailing in the different High Courts. While the Bombay High Court adheres to the view that cross-objections must be aimed at the appellant in *Nursej Virji v. Alfred H. Harrison* (15), it has been held in Calcutta in *Jadurandan Prosad Singha v. Koer Kallyan Singh* (16), (same case reported in 16 Calcutta Weekly Notes 612), that rule 22 (3) introduces a modification of the old rule in section 561, that the effect of the alteration is to leave no doubt that a respondent may prefer a cross-objection against a co-respondent, but that the limits of the rule are not attempted to be defined. The Allahabad Court takes a similar view, *Balgobind v. Ram Sarup* (17).

In none of these cases has the effect of the substitution of "cross-objection" for "objection" in rule 22 (1) been dealt with. *Prima facie* the intention would appear to have been only to allow objections which arose in some way out of the appeal, whether aimed at the appellant or at another respondent. This discussion is not irrelevant to the present question, as the more widely rule 22 is interpreted, the more serious would

(12) 23 A. 93; A. W. N. (1900) 212.

(13) 7 M. 215; 8 Ind. Jur. 78; 2 Ind. Dec. (N. S.) 735.

(14) 28 M. 229; 15 M. L. J. 212.

(15) 21 Ind. Cas. 7; 37 B. 511; 15 Bom. L. R. 781.

(16) 13 Ind. Cas. 653; 15 C. L. J. 61; 16 C. W. N. 612.

(17) 26 Ind. Cas. 83; 36 A. 505; 12 A. L. J. 892.

(11) 12 C. 629; 6 Ind. Dec. (N. S.) 428.

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be the consequences of answering the second question referred to us in the affirmative. At the time when the present Code was enacted in 1908, that question had been expressly decided in *Ramjiwan Mal v. Ohand Mal* (18) with reference to the terms of section 561 of the old Code, where the Court held that, when the appeal was dismissed as out of time, the objection could not be heard, as the entertainment of the objections was contingent and dependent upon the hearing of the appeal. In the course of the judgment Mahmood, J., observed that to decide otherwise would "be practically holding that an appellant who prefers an appeal long after the prescribed period of limitation may confer upon the respondent the right of having the appeal of his own heard in the shape of objections under section 561, Civil Procedure Code, although, if the original appeal was barred by limitation, *a fortiori* such objections ought to be barred also." The Legislature of 1903 must be taken to have known of this decision, and it is exceedingly unlikely that they intended to overrule it by implication. The decision no doubt proceeded on the ground that the case fell within the *ratio decidendi* of the earlier cases, in which it had been held that the objections could not be heard when the appeal had been withdrawn or dismissed for default. Those decisions were based on the language of section 343 of the Code of 1859 and section 561 of the Code of 1882 by which a respondent, although he had not appealed against any part of the decree, was entitled "upon the hearing" to take any objection to the decree which he could have taken by way of appeal. The view taken by the Courts when the section was so worded was, as explained by Sir Charles Sargent, C. J., in *Dhondi Jagannath v. Collector of Salt Revenue* (19), that when once the hearing of the appeal had commenced, the respondent's right to take his objections, which up to the time of hearing was an inchoate right, became perfected. The Legislature has now removed from this section the words "upon the hearing" upon which these decisions rested, and has expressly

overruled the decisions themselves in the case of withdrawal or dismissal of the appeal by enacting in sub-section (4); "Where, in any case in which any respondent has under this rule filed a memorandum of objection, the original appeal is withdrawn or is dismissed for default, the objection so filed may nevertheless be heard and determined after such notice to the other parties as the Court thinks fit." It does not, however, follow that *Ramjiwan Mal v. Ohand Mal* (18) was also intended to be overruled. If that had been the intention of the Legislature, it would probably have added some such words as "or is dismissed as having been filed out of time."

There are moreover strong reasons for not attributing any such intention to the Legislature. The right of parties to a suit to treat the decree as final, when no appeal has been filed within the prescribed period of limitation, is a substantive right of great value as pointed out by the Privy Council in *Colonial Sugar Refining Co. v. Irving* (7) and in *Saudagar Singh v. Pardeep Narayan Singh* (20), and there is a strong presumption against any intention on the part of the Legislature to interfere with it unnecessarily. It is no doubt impaired to some extent by rule 22, which may have the effect of extending the respondent's time for appealing or even giving a fresh starting point. Provided, however, the original appeal is required to be filed in time, the interference is a very limited one, and may be defended as necessary to enable the Court to do full justice in disposing of the case on appeal and as governed by the same considerations as have led to the enactment of the new rule 33, which gives the Court a discretionary power to interfere in appeal even as regards parties who have not been made respondents, and respondents who have not filed any memorandum of objection. It would, however, largely and unnecessarily impair this valuable right to hold that the filing of an appeal by one party, even though out of time, has the effect of enabling the respondents to file appeals not only against the appellant but against one another. The objections urged by Mahmood, J., in *Ramjiwan Mal v.*

(18) 10 A. 587; A. W. N. (1888) 258; 6 Ind. Dec. (N. S.) 395.

(19) 9 B. 28 at p. 30; 5 Ind. Dec. (N. S.) 19.

(20) 43 Ind. Cas. 484; 45 I. A. 21; 4 P. L. W. 52; 34 M. L. J. 67; 23 M. L. T. 31; 16 A. L. J. 61; 7 L. W. 146; 27 C. L. J. 186; 22 C. W. N. 436; (1918) M. W. N. 323; 20 Bom. L. R. 509; 45 C. 510 (P. C.).

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Chand Mal (18) against such a course have lost none of their force, and there is no reason to suppose that the Legislature intended to disregard them. Even greater difficulties arise if the present rule is treated as giving respondent an unrestricted right of filing memoranda of objection, because the decision on a question raised by a respondent in the same interest as the appellant may give occasion under rule 33 for the modification of the decree in favour of the appellant himself whose appeal is *ex hypothesi* barred.

The true rule would appear to be that the right of respondents to proceed by way of memorandum of objection is strictly incident to the filing of the original appeal in time, and that it is open to a party against whom a memorandum of objection has been filed to set up the bar that the original appeal was filed out of time. It is no doubt true that a respondent, who is served with a notice of appeal, cannot always be sure whether the appeal was filed in time or not and if so, whether or not delay will be excused and that he may, therefore, feel bound to file a memorandum of objection and incur the cost of Court-fees and briefing Counsel in support of the memorandum. That, in my opinion, is not a sufficient reason for taking the other view. Moreover in a proper case the hardship may be met by ordering the appellant to pay the costs of the memorandum. I answer the second question in the negative.

SADASIVA Aiyar, J.—In the Order of Reference, I indicated my inclination to answer the first question referred in the affirmative. In other words, while expressing no final opinion, I gave some reasons for holding that a respondent was entitled to file a memorandum of objections in an appeal against a decision under the provisions of the Insolvency Act. My Lord, in the opinion just now pronounced by him, has come to the conclusion that that question should be answered in the affirmative and I agree entirely therewith and have nothing to add to what I have said already.

The second question referred has caused me more difficulty. I expressed no opinion whatever upon that question in the Order of Reference. The right to prefer an appeal cannot be claimed by a litigant as a matter

of course but should be given by Statute Law. The right to prefer an appeal by way of memorandum of objections is an extension of the right of appeal which must, therefore, also be given by Statute. Statutory provisions relating to such rights should be strictly construed. Order XLI, rule 22, corresponding to old section 561, must, if possible, therefore, not be extended in favour of the right of a respondent to file a memorandum of objections so as to prejudice parties who have obtained a decree in their favour in the lower Court and who might reasonably entertain the belief that as the time for preferring an appeal has expired, the rights which have been established in their favour under the decision of the Court of first instance had become finally secure. This Court has no doubt in *Munisami Mudaly v. Abbu Reddy* (2) allowed one respondent to file cross-objections against another, and this is a further reason for strictly confining the right to file such objections. Supposing the plaintiff is the appellant and the defendants Nos. 1 and 2 are the respondents in an appeal and the plaintiff and the 2nd defendant are in collusion and the suit was dismissed by the District Munsif, upholding the 1st defendant's contentions. The plaintiff appeals out of time to the District Court. The Sheristadar's office does not discover that the appeal is out of time and sends notice to both the respondents. The colluding 2nd defendant files his memorandum of objections within one month of the receipt of the notice of appeal on the same grounds on which the plaintiff filed his appeal, the 2nd defendant's objections and the plaintiff's appeal being both thus directed against the 1st defendant. The result of answering the second question in the affirmative would be that while the plaintiff's appeal at the final hearing of the appeal is dismissed as barred by limitation, his friend, the 2nd defendant, by having his memorandum of objections heard, compels the Court to hear the appeal also, and the 1st defendant, who thought that the decision of the District Munsif was safe owing to no appeal having been filed in time, finds that he was living in a fool's paradise.

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I do not see that the omission in Order XLI, rule 22 (1), of the words "upon the hearing" which found a place in the old section 561 is of much importance, though some of the decisions under the old section 561 (which decisions denied the right of the respondent to have his memorandum of objection heard where the appeal itself was dismissed as out of time) attached importance to those words. I think that much weight attaches to the argument based on the new sub-rule 4 of Order XLI, rule 22, which makes an express provision for hearing the memorandum of objections only in cases where the original appeal is withdrawn or is dismissed for default and does not expressly allow the hearing of the objections, where the appeal is dismissed as barred by limitation or dismissed on other preliminary grounds. Another consideration which has weighed with me is that the right of a respondent to file an objection depends, if the second question is answered in the affirmative, on what I may call the accident of the Court or the Sheristadar discovering at once whether the appeal is barred. If the bar is discovered at once and the appeal rejected, then no notice is issued to any respondent and hence no respondent is entitled to file a memorandum of objections but if it is not so discovered and notice is issued, then he gets valuable rights.

I, therefore, agree with my Lord in the answer to the second question also.

SPENCER, J.—I agree that the first question referred to us should be answered in the affirmative and the second question in the negative.

The fact that rule 22, which confers upon respondents the right of taking cross-objections, falls under that portion of Order XLI which is headed "Procedure on hearing" supports the latter view and justifies, if I may say so, the observation of Sir Charles Sargent, C. J., in *Dhondi Jagannath v. Collector of Salt Revenue* (19), where he speaks of "the respondent's right to take his objections, which up to the time of the hearing was an inchoate right", becoming perfected at the commencement of the hearing of the appeal. 'Hearing' would then mean hearing on the merits. The words "upon the hearing" in section 561

of the old Code were probably omitted from the present Code as being redundant, seeing that in both Codes the heading "Procedure on hearing" preceded this provision, and in order that clause 1 of rule 22 should be consistent with the newly introduced clause 4 of the same rule. The retention of the words 'upon hearing' in the side note to the section indicates that this change was not intended to have any legal significance. *Devibhaskyam Venkanna v. Peddinti Venkataramanayya* (9), should be treated as now overruled.

Reference answered.

M. C. P.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 146 OF 1916.

June 15, 1918.

Present:—Mr. Justice Piggott and
Mr. Justice Walsh.

Syed ALI RAZA—PLAINTIFF—APPELLANT
versus
SANWAL DAS AND OTHERS—DEFENDANTS
—RESPONDENTS.

Muhammadian Law—Shia school—Waqf, creation of—Trust-deed not divesting settlor of ownership, whether constitutes waqf

A trust deed executed by a Shia Muhammadan and his wife contained a recital to the effect that the eldest son of the settlors had already been entrusted with the management of the landed properties belonging to the executants and that this management was to continue under the deed. The document also contained provisions as to what was to happen on the death of the executants, but none of those provisions operated so as to divest the executants of their ownership in the trust properties from the date of the execution of the deed:

Held, that the document was insufficient to create a valid waqf. [p. 213, col. 1.]

First appeal from a decree of the Subordinate Judge, Jaunpur.

Dr. S. M. Sulaiman (with him Mr. S. A. Haidar), for the Appellant.

Messrs. Surendra Nath Sen and Gokul Prasad, for the Respondents.

JUDGMENT.—The question in issue in this appeal, as it was in the Court below, is whether a valid waqf is created by a certain Sipurdamah, or trust-deed, of the 27th of December, 1863, executed by a Shia gentleman of the name of

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Syed Maqsd Ali Khan and his wife, Alwah Bibi. We have been taken through the document in question. It does not divest the executants *in presenti* of their ownership or power of alienation in respect of the property therein dealt with. It is true that it contains a recital to the effect that Syed Moazzam Ali, the eldest son of Syed Maqsd Ali Khan, has already been entrusted with the management of the landed properties belonging to the executants and that this management is to continue under the deed. But a mere power of management may be revoked at any time by the owners of the property. The document also contains provisions as to what is to happen on the death of the executants, but those provisions do not operate so as to divest the executants of their ownership from the date of execution of the deed. The other points taken in the memorandum of appeal are covered by the authorities relied on by the trial Court. *Murtazi Bibi v. Jumna Bibi* (1) and *Hamid Ali v. Mujawar Husain Khan* (2). It is true that a certain portion of the reasoning on which the decision of the learned Chief Justice of this Court in the latter of these two cases proceeds is invalidated by a subsequent decision of their Lordships of the Privy Council in *Baqar Ali Khan v. Anjuman Ara Begam* (3), by which the right of a Shia to create a *waqf* by Will was recognised, assuming, of course, that the testamentary disposition of the property amounted in other respects to a valid *waqf* under the Muhammadan Law. This, however, does not seriously affect the weight of the decisions above referred to. We do not feel at all disposed to reconsider at this time of the day the question of law disposed of by the two decisions above referred to. The effect of the Mnsalman Waqf Validating Act of 1913 can be considered hereafter, when the Court has before it a document executed in virtue of the power recognized by that enactment. We are content to say that, so far as this appeal is concerned,

the pleas taken in the memorandum of appeal either depend upon the construction of the deed of 1863, on which point our decision is against the appellant, or are concluded by authorities of this Court which we are in no way disposed to reconsider. We, therefore, dismiss the appeal with costs.

Appeal dismissed.

PRIVY COUNCIL.

APPEALS FROM THE OUDH JUDICIAL COMMISSIONER'S COURT.

February 25, 1913

Present:—Viscount Haldane, Sir John Edge, Mr. Ameer Ali and Sir Walter Phillimore, Bart.

Thakur RAJINDRA BAHADUR SINGH—
DEFENDANT—APPELLANT

versus

Rani RAGHUBANS KUNWAR—PLAINTIFF
—RESPONDENT.

Rani RAGHUBANS KUNWAR—PLAINTIFF
—APPELLANT

versus

Thakur RAJINDRA BAHADUR SINGH—
DEFENDANT—RESPONDENT.

Thakur RAJINDRA BAHADUR SINGH—
DEFENDANT—APPELLANT

versus

Rani RAGHUBANS KUNWAR—PLAINTIFF
—RESPONDENT.

Crown Grants Act (XV of 1895)—Crown, grant of land by—Limitation of descent, power of Crown to impose—Talukdari property, accretion to.

The Crown has in British India power to grant or to transfer lands, and by its grant or transfer to limit in any way, it pleases the descent of such lands. But a subject has no right to impose upon lands or other property any limitation of descent which is at variance with the ordinary law of descent applicable to his case [p. 17, cols 1 & 2.]

Villages transferred by the Government in exchange for villages included in a *talukdari sanad* must be treated as *talukdari* villages. [p. 218, col. 2.]

Where a house in Kaiser Bagh at Lucknow had been allotted to a *talukdar* for his use as such:

Held, that the *talukdar's* right of possession would on his death pass to his successor in the *talukdari* estate and not to his heirs under the personal law. [p. 220, col. 2.]

Appeal and cross appeal from a judgment and decree of the Court of the Judicial Commissioner, Oudh, dated the 4th March

(1) 13 A. 261; A. W. N. (1891) 13; 7 Ind. Dec. (N.S.) 103.

(2) 24 A. 257; A. W. N. (1902) 51.

(3) 25 A. 236; 30 J. A. 94; 7 C. W. N. 465; 5 Bom. L. R. 410; 8 Ser. P. C. J. 397 (P. C.),

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1907, and connected appeal from a judgment and decree of that Court, dated the 21st January 1909, each of the said decrees varying reports of the Subordinate Judge, Sitapur.

FACTS appear from the judgment.

Messrs. *De Gruyther*, K. O., and *Kyffin*, for the Appellant.—The word "accretion" in the Order in Council has the same meaning as it has under Hindu Law when it is used in connection with an impartible estate. The estate here was not made impartible by the Sanad of 1861. It was impartible by the family custom and the Sanad acknowledged that custom and made it perpetual. The villages were purchased from the income of the Taluqa and were, therefore, accretions to the Taluqa. The Taluqdar must be taken to have intended to incorporate them with the Taluqa: *Gonda Kooer v. Kooer Oodey Singh* (1), *Isri Dutt Koer v. Hansbutti Koerain* (2), *Sheolochun Singh v. Saheb Singh* (3), *Sarabjit Partap Bahadur Sahi v. Indarjit Partap Bahadur Sahi* (4) and *Lal Bahadur v. Kanhaya Lal* (5). The moveable property was also an accretions to the Taluqa as it was derived from it. The house in Lucknow was intended by the Government to form part of the Taluqa estate. The appellant was, therefore, entitled to succeed to the whole property. The fact that the name of the Taluqdar was entered in list 2 prepared under the Oudh Estates Act, 1869 (Act I of 1869), raised a presumption under section 10 that there was a family custom of descent to a single heir, and that custom attached to all acquired property which the Taluqdar intended by him to be incorporated with the family estates: *Thakur Ishri Singh v. Thakur Baldeo Singh* (6), *Janki Pershad Singh v. Dwarka Pershad Singh* (7)

(1) 14 B. L. R. 159; 3 Sar. P. C. J. 370 (P. C.).

(2) 10 I. A. 150; 10 C. 324; 13 C. L. R. 418; 7 Ind. Jur. 557; 4 Sar. P. C. J. 459; 5 Ind. Dec. (N. s.) 217 (P. C.).

(3) 14 I. A. 63; 14 C. 387; 11 Ind. Jur. 231; 5 Sar. P. C. J. 1; 7 Ind. Dec. (N. s.) 257 (P. C.).

(4) 27 A. 203; 2 A. L. J. 720; A. W. N. (1904) 244.

(5) 34 I. A. 65; 9 Bom. L. R. 597; 11 C. W. N. 417; 5 C. L. J. 340; 4 A. L. J. 227; 2 M. L. T. 147; 17 M. L. J. 228; 29 A. 244 (P. C.).

(6) 11 I. A. 135; 10 C. 792; 8 Ind. Jur. 331; 4 Sar. P. C. J. 528; *Rafique & Jackson's* P. C. No. 79; 5 Ind. Dec. (N. s.) 531 (P. C.).

(7) 20 Ind. Cas. 73; 40 I. A. 170; 35 A. 391; 25 M. L. J. 34; 14 M. L. T. 110; 17 C. W. N. 1029; 18 C. L. J. 200; 11 A. L. J. 818; (1913) M. W. N. 630; 15 Bom. L. R. 853; 16 O. C. 216 (P. C.).

and *Murtaza Husain Khan v. Mohammad Yasin Ali Khan* (8).

Messrs. *Dunne*, K. O., and *Dube*, for the Respondent.—There was no evidence that the Taluqdar intended to incorporate the villages he purchased with the Taluqa. At all events he had no power to make them descend in a manner at variance with the ordinary rules of descent under Hindu Law. No family custom of primogeniture was alleged or proved. The Taluqdar could not, therefore, make the non-Taluqdari property subject to any such custom. The cases relied on as to the descent of non-Taluqdari properties did not apply here. The cases cited as to property purchased by a Hindu widow out of her deceased husband's property, and as to members of a joint Hindu family incorporating self-acquired property with the joint family property, did not apply here, for in these cases there was a choice of two modes of descent. No grant of the house in Lucknow was produced, and there was nothing to show that grant was subject to the rule of primogeniture. Reference was also made to Crown Grants Act 1895 (Act XV of 1895), section 2, and the Oudh Estates Act, 1869 (Act I of 1869), section 7.

Mr. *De Gruyther* replied.

JUDGMENT.

SIR JOHN EDGE.—The suit in which these consolidated appeals have arisen came on appeal before the Board in 1905. The Board, which heard the appeal finally, decided several important questions which were in dispute between the parties, but did not finally dispose of some other questions which related to portions of the property which were in dispute in the suit, and in respect of the questions which were not then finally decided advised His Majesty that these questions should be remanded to the Court of the Judicial Commissioner of Oudh with power to that Court to remit the case to the Court of the Subordinate Judge for inquiry. The judgment of the Board is reported as *Thakur Sheo Singh v. Rani Raghubans Kunwar* (9). The Court of

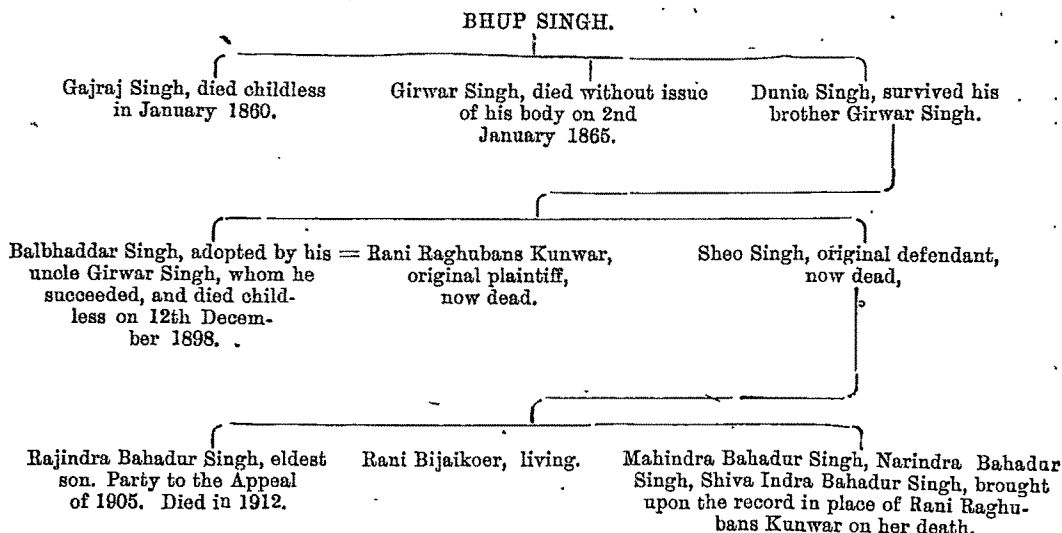
(8) 36 Ind. Cas. 299; 43 I. A. 269; 20 M. L. T. 262; 14 A. L. J. 1083; 15 Bom. L. R. 884; 31 M. L. J. 804; 38 A. 552; (1916) 2 M. W. N. 555; 25 C. L. J. 1; 19 O. C. 290; 1 P. L. W. 122; 21 C. W. N. 410; 4 O. L. J. 8 (P. C.).

(9) 32 I. A. 203; 2 C. L. J. 194; 27 A. 634; 9 C. W. N. 1009; 15 M. L. J. 352; 8 O. C. 317 (P. C.).

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the Judicial Commissioner made on the 4th March 1907 a decree which dealt with some of the questions in dispute and on the 21st January 1909 a further decree which dealt with the remaining questions in dispute and from those decrees these consolidated appeals have been brought. The original parties to the suit are dead and to

understand the position of the parties to these consolidated appeals it is advisable to state, so far as it is material for that purpose, the pedigree of the family to which they belong, so far as it has been proved or admitted in this litigation. The members of the family are Hindus.



The property to which the suit related was property, moveable and immoveable, of which Balbhadar Singh died possessed on the 12th December 1898. On his death his widow Rani Raghubans Kunwar and his brother Sheo Singh each claimed adversely to the other all the property of which Balbhadar Singh had died possessed. The Court of Revenue made an order for the mutation of names in favour of Sheo Singh, and he obtained possession of all the property, moveable and immoveable. Rani Raghubans Kunwar on the 6th February 1900 brought this suit against Sheo Singh for possession of all the moveable and immoveable property. She alleged that Balbhadar Singh had been adopted by his uncle Girwar Singh, and that Girwar Singh had by his Will devised all his property to Balbhadar Singh, who had enjoyed it until his death. Her suit was resisted by Sheo Singh, who alleged that all the property claimed by her appertained to Taluqa Mahewa and was impartible; that by a custom in the family females were excluded from the inheritance; that the succession to

the Taluqa was governed by section 22 of the Oudh Estates Act (I of 1869), under which he claimed that a brother was entitled in priority to the widow; and he denied that Balbhadar Singh had been adopted by Girwar Singh. Sheo Singh relied upon a Sanad of the 19th October 1859, by which the Government had granted Taluqa Mahewa to Gajraj Singh and his heirs without other limitation of the line of inheritance. At some period of the litigation a copy of a Sanad, which was granted by the Government to Girwar Singh in 1861, was produced, and the Board in 1905 held that the copy was admissible in evidence and that Girwar Singh had in fact surrendered to the Government the Sanad which had been granted to Gajraj Singh in 1859 and the estate which had been granted by it, and in lieu of that Sanad had accepted the Sanad of 1861. The Sanad of 1861 said expressly:—

"It is another condition of this grant that in the event of your dying intestate, or of any of your successors dying intestate, the estate shall descend to the nearest

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male heir according to the rule of primogeniture."

The Courts in India had held that the Sanad of 1861 could not, in law operate to substitute the line of descent prescribed by it for the line of descent prescribed by the earlier Sanad of 1859, and having found that Balbhaddar Singh had been adopted by Girwar Singh and had succeeded to Taluqa Mahewa under the Will of Girwar Singh, and that the alleged custom excluding females from the inheritance had not been proved, gave Rani Raghubans Kunwar a decree for possession. That alleged custom excluding females from inheritance was the only custom of the family which Sheo Singh attempted to prove.

In the appeal which came before the Board in 1905 from the decree of the Court of the Judicial Commissioner it was contended on behalf of Rani Raghubans Kunwar that Girwar Singh was not competent to surrender to the Government the Sanad of 1859; that the Government having granted by the Sanad of 1859 the estate to Gajraj Singh and his heirs, had nothing left to grant to Girwar Singh in 1861; and further, that the Government had no power to create by the grant of 1861 an estate descending by any rule of inheritance that was contrary to the ordinary law, which, as the family were Hindus, was the Hindu Law. The Board, however, held that Girwar Singh, being entitled by inheritance to everything that had passed to Gajraj Singh under the Sanad of 1859, was competent to surrender the Sanad of 1859 and to accept instead of it the Sanad of 1861, and had surrendered the Sanad of 1859 and the estate which had passed under it, and that the Government was competent to grant the Sanad of 1861. As to the contention that the Government had no power to grant to a Hindu, as it did by the Sanad of 1861, an estate which should descend on an intestacy to the nearest male heir according to the rule of primogeniture, their Lordships said: "Whatever force such a contention might otherwise have had appears to their Lordships to be removed by the Act to which their attention was called: 'The Crown Grants Act, 1895' ('Act XV of 1895'). That Act recites, amongst other things, that doubts have

arisen as to the power of the Crown to impose limitations and restrictions upon grants and other transfers made by it or under its authority, and it is expedient to remove such doubts. And section 3 enacts that—"all provisions, restrictions, conditions and limitations ever contained in any such grant or transfer, as aforesaid, shall be valid and take effect according to their tenor, any rule of law, Statute or enactment of the Legislature to the contrary notwithstanding."

When the appeal was being argued before the Board in 1905, the arguments addressed to their Lordships related only to the right to the possession of Taluqa Mahewa on the death of Balbhaddar Singh, and it appears to have been overlooked by Counsel during the arguments that the appeal also related to other property which was alleged to have been acquired by Balbhaddar Singh, and which had not formed part of the property granted by the Sanad of 1861. Before the judgment of the Board was delivered in 1905 the attention of their Lordships was drawn by Counsel to the fact that the appeal also related to such other property. In their judgment of 1905 their Lordships consequently said: "The present appeal relates mainly to Taluqa Mahewa and the argument before their Lordships dealt only with it. The principle adopted in this judgment only applies to that Taluqa, including, of course, any property that may have accreted to it since the date of the Sanad under which it is held. It has been pointed out by Counsel that the suit out of which the appeal arises related also to property said to have been acquired apart from the Taluqa. It seems clear that their Lordships have not materials before them to enable them to define what property (if any) other than the original contents of the Taluqa now passes as part of it." Their Lordships held that Taluqa Mahewa, as constituted at the date of the Sanad of 1861, with accretions (if any) or properties (if any) appurtenant to the Taluqa, had, on the death of Balbhaddar Singh, passed in accordance with the limitations of that Sanad to Sheo Singh as the next male heir according to the rule of primogeniture, and humbly advised His Majesty to make:—"a declaration that the Taluqa Mahewa as constituted at the date of the

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Sanad, with accretions (if any) or properties (if any) appurtenant to the Taluqa, has passed to the appellant, and that as to any other property of the deceased the decrees of the Courts below are not affected, and to order that it be left to the Court of the Judicial Commissioner, if it be found that there is a real controversy on the point, either itself to determine what property falls under one category and what under the other, or to remit the case for inquiry to the Court of the Subordinate Judge, and to order that, so far as may be necessary to give effect to the first part of the foregoing declaration, the decrees of the Courts below ought to be discharged and the suit dismissed."

That declaration was made by the Order in Council and the Court of the Judicial Commissioner remitted the case for inquiry to the Court of the Subordinate Judge.

The Court of the Subordinate Judge made two reports, one relating to the village in dispute, and the other to a house at Sitapur, a house at Lucknow, and moveable property of which Balbhaddar Singh had died possessed. Objections which were taken to each of these reports came at different dates before the Court of the Judicial Commissioner, and from the decrees of that Court made upon those reports these consolidated appeals have been brought.

Some of the learned Judges of the Court of the Judicial Commissioner misunderstood what their Lordships meant in 1905 by the terms "accretions" and "properties appurtenant" to Taluqa Mahewa. Their Lordships obviously did not mean to limit accretions to land which had gradually and imperceptibly by the action of water gone to the owner of the adjacent soil. No accretion of that nature had apparently been suggested by the parties to the suit. What was suggested was that Balbhaddar Singh had acquired property by purchase, and had added it to the estate which had been granted by the Sanad of 1861 to Girwar Singh. The facts were not before their Lordships in 1905 which would have enabled them to decide whether any lands had accreted to Taluqa Mahewa as it was constituted at the date of that Sanad. The Crown has

in British India power to grant or to transfer lands, and by its grant, or on the transfer, to limit in any way it pleases the descent of such lands. But a subject has no right to impose upon lands or other property any limitation of descent which is at variance with the ordinary law of descent of property applicable in his case. Sir Edward Chamier, then Mr. Chamier, Judicial Commissioner of Oudh, in his judgment on some objections taken to one of the reports of the Court of the Subordinate Judge, correctly stated the law in this respect as to the power of a subject, thus:—

"I take it that is settled law that a subject cannot make his property descendible in a manner not recognised by the ordinary law, and that he cannot subject it to a rule of descent such as is contained in the primogeniture Sanad granted to Girwar Singh. If this is so, it appears to me to follow that Balbhaddar Singh could not by express declaration, still less by mere volition, whether actual or presumed, subject property acquired by him to the rule of succession entered in the primogeniture Sanad granted to Girwar Singh."

With that statement as to the law their Lordships agree. It follows that in ascertaining what were the lands claimed by Rani Raghubans Kunwar in respect of which her suit was not dismissed in 1905, it must be ascertained what were the lands of which Balbhaddar Singh died possessed which were acquired by him and did not form part of Taluqa Mahewa as it was constituted at the date of the Sanad of 1861, and were not lands acquired by him from the Government in exchange for lands which were included in that Sanad. The Government had power to give to Balbhaddar Singh in exchange for Sanad lands other lands which had not been granted to Girwar Singh in 1861, and the lands so acquired by him in exchange would be subject to the rule of descent prescribed in the Sanad of 1861.

By the Sanad of 1861 the Government granted to Girwar Singh "the full proprietary right, title, and possession of Taluqa Mahewa, consisting of the villages as per list attached to the *kabuliyat* you have executed," subject to the payment of

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rent and the other conditions in the Sanad mentioned. The estate, which was granted to Girwar Singh in 1861, was the same estate which had been granted to Gajraj Singh in 1859 and had been surrendered to the Government by Girwar Singh. Unfortunately neither the *kabuliyat* which was executed by Girwar Singh in 1861 nor the *kabuliyat* which was executed by Gajraj Singh in 1859 has been found, but the lands granted in 1861 were lands of which the Government was then in a position to grant "the full proprietary right and title" to Girwar Singh.

When the case was remitted for inquiry to the Court of the Subordinate Judge, that Court reported that of the 166 villages for which Rani Raghubans Kunwar had obtained her decree, which was subject of the appeal in 1905, there was no controversy as to 108 of them; it was admitted that the 108 villages were Taluqdari villages, that is, that they were villages which were included in the Sanad of 1861. As to the remaining 58 villages the Subordinate Judge reported that Sheo Singh was entitled to 27 specified villages, and that Rani Raghubans Kunwar was entitled to 31 villages, which also were specified in the report. Rani Raghubans Kunwar filed objections to the findings of the Subordinate Judge as to 19 of the 27 villages which the Subordinate Judge had reported to be Taluqdari villages, and on the other side objections were filed as to the findings of the Subordinate Judge as to the 31 villages which he had reported to be non-Taluqdari villages, that is, villages not covered by the Sanad of 1861.

On the consideration of the report the Court of the Judicial Commissioner allowed the objections of Rani Raghubans Kunwar to the findings of the Subordinate Judge as to Chak Sarkhanpur, Chak Simri, and one-half of Hasnapur, and held that they were non-Taluqdari; and on the other hand, allowed the objections to the findings of the Subordinate Judge as to Sarkhanpur Marhuna, Puraina and Patti Bhupatpur, and held that they were Taluqdari villages, and overruled all the other objections, and made the decree of the 4th March 1907, which is one of the decrees now under appeal.

Their Lordships will now deal with the appeals in which the title to the villages is disputed before them. They will consider only those cases in which it appears from the record that the objections to the report of the Subordinate Judge which had been filed were persisted in by one or other of the parties in the Court of the Judicial Commissioner. It must be taken that the findings of the Subordinate Judge were correct in all those cases in which the objections to his findings were not supported in the Court of the Judicial Commissioner.

The villages Parai, Unchagaon and Khandwa Mitmau, which were non-Taluqdari villages, and were not included in the Sanad of 1861, are villages which the Government subsequently transferred to Balbhadar Singh in exchange for three of the Taluqdari Sanad villages or parts of them, and consequently must be treated as Taluqdari villages which on Balbhadar Singh's death descended to Sheo Singh.

The village Sarkhanpur Marhuna, which is distinct from Chak Sarkhanpur, must be taken to have been a Taluqdari village at the time when the Sanad of 1861 was granted, and to have been included in that Sanad. It descended on Balbhadar Singh's death to Sheo Singh. The Pleader for Rani Raghubans Kunwar gave up on her behalf all claim to the village.

Puraina was entered in the Summary Settlement of 1859 in the name of Janki Pershad as the proprietor. It had been mortgaged to Thakur Umrao Singh, under a mortgage with possession of 1245 Fasli (1837-1838), which became irredeemable by reason of Act XIII of 1866, and the Settlement Officer on the 30th June 1868 gave Balbhadar Singh, who was the legal representative of Thakur Umrao Singh, a decree for the full proprietary possession. Puraina was non-Taluqdari property at the time of the Sanad of 1861.

Patti Bhupatpur was entered in the Summary Settlement in the names of Jangu and Lachman as the proprietors. Balbhadar Singh obtained a decree for one third of the village on the 7th February, 1868, under a mortgage of conditional sale which had been granted in 1248 Fasli (1840-1841) by the then proprietors. In an application for partition Balbhadar Singh described Patti Bhupatpur as not comprised in any

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Taluqa, and in 1894 he purchased another one-third of the Patti. It was non-Taluqdari, and was not included in the Sanad of 1861.

Munda Nizampur was inherited by Balbhaddar Singh from Anand Kunwar, and could not have been included in the Sanad of 1861. It is non-Taluqdari.

Benipur was purchased by Balbhaddar Singh between 1880 and 1884, and was not included in the Sanad of 1861. It is non-Taluqdari.

Kasba Kheri. The register of the Summary Settlement does not show that it was settled with Gajraj Singh. No evidence has been referred to which shows with whom the village was settled, but as Rani Raghubans Kunwar stated in her plaint that Kasba Kheri had been settled with Gajraj Singh, it must be taken to have been included in the Sanad of 1861 and to be Taluqdari.

Rechan was found by the Subordinate Judge and by the Judicial Commissioner's Court to have been included in Taluqa Mahewa at the date of the Sanad of 1861. No evidence has been brought to the attention of their Lordships to show that those findings were not correct. Gajraj Singh paid revenue assessed in respect of Rechan. Rechan must be taken to be Taluqdari.

Obak Sarkhanpur. In the Summary Settlement Chak Sarkhanpur was entered in the name of Har Pershad as the proprietor. Balbhaddar Singh acquired it by purchase. It was not included in the Sanad of 1861 and is non-Taluqdari.

Chak Simri was entered in the Summary Settlement in the name of Mohan Lal. It was purchased by Balbhaddar Singh. It was not included in the Sanad of 1861, and is non-Taluqdari.

Hasnapur. One-half of Hasnapur was purchased in 1270 Hijri (1853) by Umrao Singh, and the other half in 1865 by Balbhaddar Singh. Consequently one half of the village was included in the Sanad of 1861 and is Taluqdari, and the other half is non-Taluqdari.

Nausar Jogipur. In the Summary Settlement this village was entered in the name of Gajraj Singh. In a mortgage deed Balbhaddar Singh stated that this

village was included in the Sanad. It must be taken that the village is Taluqdari.

Mukaddarpur. In a mortgage deed Balbhaddar Singh stated that this village was comprised in the Sanad. The Pleader of Rani Raghubans Kunwar stated at the hearing that Behari had sold it to Gajraj Singh, who, however, had not obtained possession until after the Summary Settlements. It must be treated as a Taluqdari village.

Bastauli. In the Summary Settlement the two halves of Bastauli were entered in the name of Gajraj Singh, and must be taken as Taluqdari.

Saharwa. In the Summary Settlement this village was entered in the name of Gajraj Singh. It must be taken to have been included in the Sanad of 1861 and as Taluqdari. Asawa, Banjargaon, Bhargawan, Jamnaha, Saunkia, Sansarpur and Kaimahra, all these villages were found by the Judicial Commissioner's Court to have been in the possession of Girwar Singh at the date of the Sanad of 1861. The Subordinate Judge and the Court of the Judicial Commissioner dealt with them as Taluqdari villages, and nothing has been brought to the attention of their Lordships to lead them to the conclusion that these villages, or any of them, were not included in the Sanad of 1861 and were not Taluqdari villages.

The result of their Lordships' view as to the villages is that to the list of villages set out in the decree of the 4th March 1907 of the Court of the Judicial Commissioner, in respect of which Rani Raghubans Kunwar was entitled to maintain her decree for possession, the villages Puraina and Patti Bhupatpur should be added, and that no village should be struck out of that list.

Their Lordships will now consider the decree of the Court of the Judicial Commissioner of the 21st January 1909, which was made on the hearing of the objections which were filed to the report of the Subordinate Judge which dealt with disputes as to a house in Sitapur, a house in Lucknow, and the moveable property of which Balbhaddar Singh had died possessed.

The house in Sitapur was acquired by Balbhaddar Singh, and never at any time was part of the Taluqdari estate which was

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granted to Girwar Singh by the Sanad of 1861. It is non-Taluqdari.

The house in the Kaiser Bagh at Lucknow. The right to the possession of this house does not depend upon the Sanad of 1861, which was granted to Girwar Singh upon the surrender by him to the Government of the Sanad of 1859, which had been granted to Gajraj Singh. The house in the Kaiser Bagh was not included in the Sanad of 1861. It is common ground that a house in the Kaiser Bagh was allotted by the Government to Girwar Singh in 1864 or 1865 for his use as the Taluqdar of Taluqa Mahewa. That house was demolished when the Canning College was built, and in place of it another house, the house now in dispute, was allotted by the Government to Balbhaddar Singh for his use as the Taluqdar of the Taluqa Mahewa. No Sanad relating to the house has been produced, nor has it been proved that any Sanad relating to the house was granted. But it may be inferred from the fact that the house was allotted to Balbhaddar Singh for his use as Taluqdar of Mahewa that such right to possession of it as he had passed not to his widow but to his successor in the Taluqdari of Mahewa.

The moveable property of which Balbhaddar Singh died possessed was not subject to the limitation of descent which was by the Sanad of 1861 prescribed for the villages which were included in that Sanad, and passed on his death to his widow, Rani Raghubans Kunwar.

The decree of the Court of the Judicial Commissioner, dated the 21st January 1909, should be varied by decreeing that the suit of Rani Raghubans Kunwar should stand dismissed so far as her suit related to her claim for the possession of the house at Lucknow.

Thakur Rajindra Bahadur Singh, who was brought upon the record as the representative of his late father, Sheo Singh, died in 1912, and Rani Raghubans Kunwar died in 1910, and their Lordships have been much pressed to advise His Majesty as to who is now entitled to the property other than Taluqa Mahewa as it was constituted at the date of the grant of 1861, in respect of which Rani Raghubans Kunwar brought her suit in 1900 in the

Court of the Subordinate Judge of Sitapur, but their Lordships are not in a position to tender such advice, and can only advise His Majesty as to the rights of the parties as they existed at the time when the decrees of the Court of the Judicial Commissioner now under appeal were made.

Their Lordships will humbly advise His Majesty that the decree of the Court of the Judicial Commissioner of the 4th March 1907 should be varied by adding to the list of villages set forth in that decree the villages Puraina and Patti Bhupatpur, and that the decree of the Court of the Judicial Commissioner of the 21st January 1909 should be varied by decreeing that the suit of Rani Raghubans Kunwar should stand dismissed so far as her suit related to her claim for possession of the house at Lucknow, and that so varied those decrees should be affirmed as of the dates when they were made respectively by the Court of the Judicial Commissioner, and should have effect accordingly as to the rights of the parties who were concerned at those respective dates and of those claiming under them. The costs of these consolidated appeals as between the parties to them shall be allowed.

Solicitors for the Appellant.—Messrs. *Downing Hardcock, Middleton and Lewis*

Solicitors for the Respondents.—Messrs. *T. L. Wilson & Co.*

Decrees modified.

ALLAHABAD HIGH COURT.
SECOND CIVIL APPEAL No. 557 OF 1917.
July 17, 1918.

Present:—Sir Henry Richards, Kt.,
Chief Justice and Mr. Justice Tudball.
SURAJBALI SINGH AND OTHERS—
DEFENDANTS—APPELLANTS.

versus

MOHAMMAD NASIR AND OTHERS—
PLAINTIFFS—RESPONDENTS.

Pre-emption—Custom, proof of—Wajib-ul-arz, entry in, value of.

When considering the existence or non-existence of a custom of pre-emption the language of the entry in the *wajib-ul-arz* which is relied upon as a proof of the custom should be taken into consideration. [p. 221, col. 2.]

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Where a *wajib-ul-arz* provided that when a stranger had obtained property under a sale or a mortgage, the co-sharers, in a certain order, were entitled to take the property in the case of a sale at sixteen years' purchase and in the case of a mortgage at eight:

Held, that the entry was wholly insufficient to prove a custom of pre-emption. [p. 221, col. 2.]

Second appeal from a decree of the District Judge, Azamgarh.

The Hon'ble Dr. Tej Bahadur Sapru, for the Appellants.

Mr. S. A. Haidar and the Hon'ble Syed Raza Ali, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for pre-emption. The plaintiff alleges that a custom of pre-emption prevailed and adduced in evidence an extract from the *wajib-ul-arz* of 1872. This is the only evidence adduced on behalf of the plaintiff of the existence of the custom. One has only to peruse the entry to come to the conclusion that it was almost impossible that this could have been a record of a custom. It provides amongst other things that as soon as a stranger has bought or mortgaged the property, the co-sharers in a certain order are entitled to take the property in the case of a sale at sixteen years' purchase and in the case of a mortgage at eight. It further goes on to record a right of a person to redeem a mortgage in which he has no interest whatever. As against this piece of evidence (if it can be so called), the defendant vendee adduced a decree of the year 1878. In that litigation the plaintiff, who now seeks pre-emption, had purchased a share in the village as a stranger. A suit was brought against him for pre-emption, the then plaintiff basing his claim upon this very entry in the *wajib-ul-arz*. The present plaintiff (then vendee) pleaded that there was no custom and that the record in the *wajib-ul-arz* was merely the record of a contract, which was not binding on his vendor, because it had not been verified by him. Reading the judgment in the previous litigation the then plaintiff and his advisers apparently hardly thought it possible to rely upon the entry in the *wajib-ul-arz* as the record of a custom. It was relied upon chiefly as the record of a contract. Had it been possible for the

then plaintiff to rely upon it as a custom, it would have been greatly to his interest to do so, because he would have been saved from any real or supposed obligation to prove that the *wajib-ul-arz* had been verified by the then vendor. It may be mentioned in passing that the *wajib-ul-arz* was then only about six years old, and presumably many of the persons who had verified it were still living. The lower Appellate Court has found in favour of the plaintiff. In doing so the learned Judge has not discussed, or apparently considered, the language in the record in the *wajib-ul-arz*. The language of that document ought certainly to have been taken into consideration when considering the existence or non-existence of the custom. In dealing with the previous litigation the learned District Judge says: "The only documentary evidence urged on behalf of the appellants is a copy of a judgment of the Subordinate Judge of Azamgarh, dated the 31st of May 1878. It appears that the plaintiff to this suit was a vendee in that case and that it was dismissed on a finding that a contract or custom of pre-emption was not proved. I think a solitary judgment does not rebut the presumption raised by the record of custom of pre-emption in the *wajib-ul-arz*."

From these remarks it would appear that the learned District Judge completely lost sight of the significance of the fact that the person who was now seeking to get the property had actually pleaded in the year 1878 that there was no right of pre-emption founded either upon custom or contract and that he had been successful in this plea. In our opinion there was no trial of the issue by the lower Appellate Court on the evidence and we are entitled to deal with the evidence ourselves. As already pointed out, the sole evidence in support of the existence of the custom was the entry in the *wajib-ul-arz*, which (as we have already said) on the very face of it almost disproves that it is the record of a custom; while on the other hand we have the plaintiff coming to this village as a stranger in the year 1878 after pleading successfully that there was neither custom nor contract. In our opinion the evidence was wholly insufficient to establish the existence of a custom. We accordingly

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allow the appeal, set aside the decrees of both the Courts below and dismiss the plaintiff's suit with costs in all Courts.

Appeal allowed.

MADRAS HIGH COURT.

CIVIL APPEAL No. 131 OF 1917.

April 11, 1918.

Present:—Sir John Wallis, Kt., Chief Justice, and Mr. Justice Spencer.

CHIRAVURI PATTABIRAMARAJU,

GENERALLY STYLED AS KELLAPALLI

CHINNA VENKATARAJU, MINOR, BY

FATHER AND GUARDIAN CHIRAVURI

BANGARRAJU—DEFENDANT No. 1

—APPELLANT

versus

'KALLAPALLI TIRAPATIRAJU'

AND OTHERS—PLAINTIFF AND DEFENDANTS

Nos. 2 AND 3—RESPONDENTS.

Hindu Law—Mitakshara—Adoption by widow—Consent of sapindas, nature of, requisite to validate adoption—Consent of remote reversioner, effect of.

An adoption made by a Hindu widow without a bona fide attempt to obtain the advice of her husband's sapindas, ignoring a nearer reversioner and securing the assent of one more remote, is invalid. [p. 223, col. 1.]

A Hindu widow made no attempt to adopt a son for 15 years after her husband's death but on her death-bed adopted her sister's daughter's son with the consent of a remote reversioner who was interested in the adopted boy, after sending a threatening letter to the nearer reversioner that, if he did not give his consent within 24 hours, she would adopt.

Held, that the adoption was invalid. [p. 224, col. 1.]

Appeal against the decree of the Court of the Temporary Subordinate Judge, Rajahmundry, in Original Suit No. 4 of 1916.

Messrs. P. Narayanamurthi and P. Rajagopalan, for the Appellant.

Mr. B. Narasimha Row and the Hon'ble Mr. T. Rangachariar, for the Respondents.

JUDGMENT.—The suit was brought to establish the plaintiff's title, as nearest reversioner, to succeed to certain immovable properties on the death of his eldest brother's widow Chinna Achayya and to recover possession of the said properties together with mesne profits and costs.

The suit was opposed by the 1st defendant, a minor alleged to have been adopted by the widow with the consent of her husband's Sapindas three days before her death. The plaintiff further

based his claim upon a deed of surrender alleged to have been executed in his favour by the widow three days before the adoption. When the Sub-Registrar came to the village on being sent for to register this deed, Chinna Achayya denied having executed it and consequently it was not registered. It has, however, become unnecessary to decide any questions as to the genuineness and validity of the surrender deed, as the plaintiff is undoubtedly entitled to succeed upon his relationship alone if it be found that no valid adoption was made. The case both at the original trial and at the hearing of the appeal preferred by the 1st defendant, who was unsuccessful in opposing the suit in the Temporary Sub-Judge's Court, turned upon the second issue, whether Achayya had authority from her husband to adopt, and if not, whether she obtained the assent of the Sapindas and whether such assent was sufficient to validate the adoption.

There is no evidence that Achayya was authorised by her husband to adopt a son after his death. The only oral evidence on the point is to be found in the statements of defendant's witnesses Nos. 5 and 6, and that is against the theory that she had her husband's authority. The adoption deed (Exhibit I) only mentions that she had the assent of one of the Sapindas and the notice to the plaintiff (Exhibit III) contains a mere assertion that her husband, at the time of his death, requested the plaintiff to see that an adoption of a boy to be selected by his wife was made, not that he then and there authorised her to adopt.

We may, therefore, proceed to consider the second part of this issue. The circumstances under which the Sapindas were consulted are most important for arriving at a just conclusion.

Achayya's husband died about the year 1900. For 15 years she made no attempt to adopt a son in order that she might perpetuate her husband's lineage and enable him to attain beatitude. When she was on her death-bed she was taken to the house of Somaraju, the son of another brother of her husband, probably as the Sub-Judge observes, to remove her from the plaintiff's influence. While

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there, she was given a written authority (Exhibit II) to adopt by Somaraju who is a more remote reversioner than the plaintiff, and she issued a notice (Exhibit III) to the plaintiff threatening that, unless he gave her the necessary authority within 24 hours, she would adopt a son on the strength of the authority of the more remote reversioner. These two documents purport to have been written on the same day (December 18th, 1915) as the surrender deed in the plaintiff's favour is alleged to have been executed and it is probable that Somaraju gave his authority to adopt (Exhibit II) even before the notice (Exhibit III) reached the plaintiff, seeing that the plaintiff deposed that he did not get it till late at night. They suggest that the widow, when dying, was very much under the influence of her relations, who were squabbling as to who should get her property. Finally, on December 21st, she adopted her own sister's daughter's son, an infant one year old, who, as we understand, was not within the *gotra* of her deceased husband. There is no question that this child (1st defendant) was in fact adopted, but we think that the learned Subordinate Judge was right in holding that the adoption was invalid because there was no *bona fide* effort on the part of the widow to take the opinion of the Sapindas in the way that the law requires. An adoption made without such *bona fide* effort is invalid, *vide Veera Basavaraju v. Balasurya Frasadrao* (1). To apply the test laid down by the Judicial Committee in *Vellanki Venkata Krishna Rao v. Venkata Rama Lakshmi* (2), can it be said in this case that there is such proof of assent on the part of the Sapindas as should be sufficient to support the inference that the adoption was made by the widow, not from capricious or corrupt motives or in order to defeat the interest of this or that Sapinda, but upon a fair consideration, by what may be called a family council, of the expediency of substituting an heir by adoption to the deceased husband. The answer must, under the above stated circumstances, be in the

negative. For 15 years, Chinna Achayya did not take the trouble to do anything towards making an adoption. In her last illness she seems to have made up her mind, or rather in all probability it was made up for her by her sister's daughter's husband Bangarraju, the father of the 1st defendant, to adopt a child out of the family of her own relations, and do so at all costs. Instead of consulting the advice of the nearest Sapinda beforehand, it is clear, to adopt the words of Mr. Justice Basbyam Aiyangar in *Subrahmanyam v. Venkamma* (3), "that she was determined to ignore him and not care for his advice or even give him an opportunity to advise her". The evidence of defendant's witnesses Nos. 7 and 8, that prior to Exhibit III Chinna Achayya orally asked the plaintiff for his assent to the adoption, was rightly disbelieved by the Subordinate Judge, as defendant's witness No. 7 was proved to have been gained over and to be an untrustworthy witness and as defendant's 8th witness was highly interested, being the natural father of the adopted boy. Exhibit III contains a threat of an intention to act on the authority of Somaraju, the remoter Sapinda, in preference to the plaintiff if he would not consent within 24 hours, it assumes that the plaintiff will not give his consent and that he is actuated by the improper motive of getting the whole property for himself. As the learned Subordinate Judge observes, this document shows that Chinna Achayya, when she gave the notice, had made up her mind to adopt and that she had no idea of consulting the plaintiff in the matter.

The object of getting the consent of Sapindas to adoption has been declared in *Venkamm v. Subramaniam* (4), which was followed in *Venkatarama Raju v. Bapamma* (5) to be to get an independent judgment on the expediency of the proposed adoption, but, as observed by Seshagiri Aiyar J., in *Adusumalli Krishnayya v. Adusumalli Lakshmi pathi* (6), the widow has no right to

(3) 26 M. 627 at p. 637; 13 M. L. J. 239.

(4) 30 M. 50; 17 M. L. J. 114; 2 M. L. T. 91; 11 C. W. N. 345; 5 C. L. J. 140; 9 Bom. L. R. 89; 4 A. L. J. 10; 34 I. A. 22 (P. C.).

(5) 26 Ind. Cas. 888; 39 M. 77; 27 M. L. J. 638; (1914) M. W. N. 911.

(6) 32 Ind. Cas. 253; 30 I. M. L. J. 265; 19 M. L. T. 286.

(1) 25 Ind. Cas. 3; (1914) M. W. N. 502.

(2) 1 M. 174 at p. 190; 1 Ind. Jur. 63; 4 I. A. 1; 26 W. R. 21; 3 Sar. P. C. J. 669; 3 Suth. P. C. J. 353; 1 Ind. Dec. (N. S.) 116 (P. C.).

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assume that it would be useless to consult the nearest reversioners, who are the natural advisers and protectors of the widow. There is not much of *bona fide* consultation about a threatening letter couched in the terms of Exhibit III.

We are, therefore, clearly of opinion that in this case there was an absence of any *bona fide* attempt to obtain the advice of the deceased husband's Sapindas before the adoption was made, and it follows that the adoption of the 1st defendant was in consequence not a valid adoption.

This appeal is dismissed with costs.

M. C. P.

Appeal dismissed.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 305 OF 1917.

August 19, 1918.

Present:—Mr. Justice Heaton and
Mr. Justice Hayward.

SAVLA TUKARAM MALI—PLAINTIFF

—APPELLANT

versus

SANTYA PARSHA MAHAR—DEFENDANT

—RESPONDENT.

Bombay Hereditary Offices Act (III Bom. of 1874), ss. 4, 18—Bombay Revenue Jurisdiction Act (X Bom. of 1876), s. 4 (a)—Mahar Vatan, existence of, question as to, determination of—Jurisdiction of Civil and Revenue Courts—Procedure.

Plaintiffs, villagers, brought a suit for an injunction to prevent the skins of their dead animals being taken by the defendants, who were village Mahars claiming the right as Vatan-dars. The suit was dismissed by the lower Courts on the ground that it was not cognizable by a Civil Court under section 18 of the Bombay Hereditary Offices Act and section 4 (a) of the Bombay Revenue Jurisdiction Act:

Held, (1) that the question whether there was or was not a Mahar Vatan was within the jurisdiction of the Civil Courts; [p. 225, col. 1.]

(2) that *prima facie* the skins belonged to the owners of the dead animals and that the plaintiffs were entitled to their injunction unless the Mahars could succeed in showing that there was an hereditary office, in which case the parties would have to be referred for the settlement of their disputes to the Collector under section 18 of the Bombay Hereditary Offices Act. [p. 224, col. 2.]

Appeal from the decision of the District Judge, Belgaum, in Appeal No. 136 of 1916, confirming the decree passed by the Subordinate Judge, Chikodi, in Civil Suit No. 29 of 1915:

Mr. A. G. Desai, for the Appellant.

Mr. Nilkant Atmaram, for the Respondent.

JUDGMENT.

HAYWARD, J.—The plaintiffs are villagers seeking an injunction to prevent the skins of their dead animals being taken by the defendants, who are village Mahars claiming the right as Vatan-dars.

The issues raised were—whether defendants had the right, whether they were Vatan-dar Mahars, and whether the suit was cognizable by the Civil Courts. The two former issues were not decided, as it was held that the suit was barred by section 18 of the Vatan Act, 1874, and section 4 (a) of the Bombay Revenue Jurisdiction Act, 1876.

It seems to me the suit must be remanded for trial on the merits. The skins would *prima facie* belong to the villagers who owned the dead animals, as pointed out in the case of *Yellapa Bhimapa v. Manakia* (1), and the villagers would *prima facie* be entitled to the injunction sought against the Mahars. This might, however, be rebutted by showing a certain, continuous, immemorial and reasonable custom in favour of the Mahars, as would appear from paragraphs Nos. 423 to 439 of Volume X of Halsbury's Laws of England. But if the right should be, as here pleaded, attached to an hereditary office vested in the Mahars, then the definition of its nature and extent would devolve exclusively on the Collector by section 18 of the Vatan Act, 1874, read with the third paragraph of clause (a) of section 4 of the Bombay Revenue Jurisdiction Act, 1876. It seems to me, therefore, that the villagers would be entitled to their injunction, unless the Mahars should succeed in showing that there is an hereditary office, that is to say, an office held hereditarily for the performance of duties connected with the administration within the meaning of the fourth paragraph and that they are Vatan-dars of that Vatan within the meaning of the sixth and seventh paragraphs of section 4 of the Vatan Act, 1874. If

(1) 8 B. H. C. R. A. C. J. 27.

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that should be established, the parties would have to be referred for the settlement of their disputes to the Collector under section 18 of the Vatan Act, 1874. It seems to me that the question whether there is a Mahar Vatan is within the jurisdiction of the Civil Courts. Provision has been made for the creation of new Vatan and for the commutation of service and management of old Vatan, but no provision has been made for enquiry into the existence of old Vatan by the Vatan Act, 1874. Nor would such enquiry appear to be barred by anything in the Revenue Jurisdiction Act, 1876. It has been recently held on a parity of reasoning in the case of *Raoji Fakira v. Dagdu Hanmata Mahar* (2) that the question who are Vatan-dars of a Mahar Vatan is likewise within the jurisdiction of the Civil Courts. It seems to me, therefore, that the suit must be remanded for these two matters to be determined and for disposal in the light of the above remarks under Order XLII, rule 23, Civil Procedure Code. Costs to be costs in the cause.

HEATON, J.—I concur.

Suit remanded.

(2) 36 Ind. Cas. 562; 18 Bom. L.R. 779; 41 B. 23.

PRIVY COUNCIL.

APPEALS FROM OUDH JUDICIAL COMMISSIONER'S COURT.

February 22, 1918.

Present :—Viscount Haldane, Lord

Sumner, Sir John Edge and Mr. Ameer Ali.

JURAWAN LAL AND ANOTHER—PLAINTIFFS
—APPELLANTS*versus*

BALDEO SINGH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Appeal to Privy Council—Question of fact—Burden of proof.

An appellant must realise that by bringing a question of fact, which has been carefully examined by Judges fully conversant with the habits and practices of the country, before the Privy Council he takes a heavy burden upon himself.

JUDGMENT.

LORD SUMNER.—The issue in this case was simply whether the plaintiff had or

had not paid certain money some twelve years before the trial. The burden of proof was on him. He did not go into the witness-box. He called no satisfactory evidence to account for the disappearance of the important contemporary documents, namely, the receipts, which he alleged had been in his possession. The evidence of his witnesses was flimsy and contradictory. At the trial he succeeded. The Court of the Judicial Commissioner, after a very careful examination of the evidence, held that he had not proved his case, and allowed the appeal. The Subordinate Judge had accepted his evidence, not because it had impressed him as truthful, for he called it unconvincing, but because he thought that there was some presumption that such a payment must have taken place. It has been urged upon their Lordships that such a payment was probable, though for reasons which appear to have escaped the trial Judge. They are, however, reasons applicable to parties who were traders or professional money-lenders, but it is admitted that the parties here were cultivators and peasants, to whom such reasoning is much less applicable.

Their Lordships cannot see their way to displace a carefully reasoned judgment of the Judicial Commissioner's Court, on a question of fact which commends itself to their view of the case, merely in order to restore a judgment of the Subordinate Judge, which did not rest on the favour with which he regarded the witnesses, but on a speculation of his own as to the probabilities, which does not appear to be satisfactory.

Their Lordships, while recognising to the full the appellant's legal and constitutional right to appeal in this case, think that it should be observed that, on a question of fact, which has been already carefully examined by Judges fully conversant with the habits and practices of the country, an appellant must realise that he takes a heavy burden upon himself by bringing such a case before this Board.

Their Lordships will humbly advise His Majesty that this appeal ought to be dismissed, but without costs as it is *ex parte*,
Appeal dismissed.

THANGI SHETTITHI v. DUJA SHETTI.

MADRAS HIGH COURT.

MISCELLANEOUS SECOND CIVIL APPEAL No. 26
OF 1917,

July 16, 1918.

Present:—Mr. Justice Spencer and

Mr. Justice Krishnan.

THANGI SHETTITHI—PLAINTIFF—

PETITIONER—APPELLANT

versus

DUJA SHETTI AND OTHERS—DEFENDANTS—

—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 182, cl. (5)
—Mortgage decree—Execution—Money deposited as security for costs—Application by decree-holder for payment out, whether application in execution or "step-in-aid of execution."

An application by a decree-holder for payment out of money deposited in Court, to be credited towards the decree amount, is an application for a "step-in-aid of execution" within the meaning of clause (5), Article 182 of Schedule I of the Limitation Act. [p. 227, col. 2.]

A *fortiori* is this the case where the deposit was made only as security and an order of Court is necessary to make it available for payment towards the decree amount. [p. 227, col. 2.]

Hem Chunder Chowdhry v. Brojo Soondary Debee, 8 C. 89; 10 C. L. R. 272; 4 Ind. Dec. (N. s.) 57, *Fazale Imam v. Metta Singh*, 10 C. 549; 5 Ind. Dec. (N. s.) 368, *Gunga Pershad Bhoomick v. Devi Sundari Dabea*, 11 C. 227; 5 Ind. Dec. (N. s.) 910 and *Ananda Mohan Roy v. Hara Sundari*, 23 C. 196; 12 Ind. Dec. (N. s.) 180, distinguished.

Venkatarayalu v. Narasimha, 2 M. 174; 1 Ind. Dec. (N. s.) 392, *Kerala Varma Valiya Rajah v. Shanganam*, 16 M. 452; 5 Ind. Dec. (N. s.) 1021, *Koormayya v. Krishnamma Naidu*, 17 M. 165; 3 M. L. J. 296; 6 Ind. Dec. (N. s.) 113, *Bapuchand Jethiram Gujar v. Mugutao*, 22 B. 340; 11 Ind. Dec. (N. s.) 809 and *Paran Singh v. Jawahir Singh*, 6 A. 366; A. W. N. (1884) 118; 4 Ind. Dec. (N. s.) 32, followed.

Plaintiff obtained a mortgage decree against defendants for sale of their family property mortgaged to her. Sixth defendant, against whom the decree was *ex parte*, applied to set it aside. His application was granted and a re-trial was ordered on his depositing Rs. 500 as security for costs. The amount was paid and the Court again passed a decree for sale in favour of plaintiff. Plaintiff applied for payment out of the said sum of Rs. 500 to her towards her decree amount and the payment was ordered. The plaintiff filed the present application in execution more than 3 years after the date of the revised decree, after giving credit for the Rs. 500 recovered in the previous application:

Held, that the previous application was an application for a "step-in-aid of execution" within the meaning of Article 182, Schedule I, of the Limitation Act and that, therefore, the present application, which was made within three years of the former, was not barred. [p. 227, col. 2.]

Appeal against the order of the District Court of South Kanara, in Appeal Suit No. 100 of 1916, preferred against the order of the Court of the Subordinate Judge, South

Kanara, in Regular Execution Petition No. 140 of 1915, in Original Suit No. 57 of 1909.

Mr. B. Sitarāma Row, for the Appellant.

Mr. K. P. Lakshmana Rao, for the Respondents.

JUDGMENT.—The question that arises for decision in this case is whether plaintiff's application for the execution of the revised mortgage decree for sale in Original Suit No. 57 of 1909 is barred by limitation or not. The application was made more than three years from the date of that decree, but plaintiff relies on his Execution Petition No. 17 of 1914 as giving him a fresh starting point under clause 5 of Article 182 of the Limitation Act. The lower Courts have differed in their view on the question whether that petition can be treated as one made in accordance with law for execution or to take some step-in-aid of execution, the Subordinate Judge holding in the affirmative and the District Judge in the negative. The decree-holder is the appellant before us. To understand the nature of his contention it is necessary to state the circumstances in which Execution Petition No. 17 of 1914 came to be put in.

Plaintiff sued the defendants, who are members of an Aliyasanthana family, for the recovery of her mortgage money by sale of the defendants' family property mortgaged to her and obtained a decree for sale. That decree was an *ex parte* one against the 6th defendant. He applied to set it aside and the Court granted his application on his furnishing security for costs. He accordingly deposited in Court a sum of Rs. 500 as security. The case was re-tried, but the Court again passed a decree in plaintiff's favour. That is the revised decree which is sought to be executed now. That provided that the mortgaged property should be sold and the sale proceeds, after defraying the expenses of the sale, be applied in paying plaintiff her mortgage amount, interest and costs Rs. 5,379-4-4 and the balance, if any, be paid to defendants and that if any balance still be due to the plaintiff it be paid by the 1st defendant as *ejaman* of the family; it also directed the 6th defendant to pay Rs. 22 for plaintiff's costs in the re-trial. In 1914 plaintiff applied against all the defendants to execute the above decree, praying that the sum of Rs. 500 paid into Court by the 6th de-

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defendant be paid out to her towards the decree amount. That application is the Execution Petition No. 17 of 1914 referred to above. Notice was ordered to all the defendants; the 6th defendant appeared and opposed but it is not clear from the record before us whether the other defendants appeared or not. The Court, after hearing arguments, directed that the Rs. 500 be paid to the plaintiff on account of costs and towards the partial satisfaction of the decree amount due to her. It may be mentioned that the costs included in the amount for which the property was ordered to be sold are more than Rs. 500. This money was subsequently paid out to plaintiff by the Court on her application. Plaintiff's present application gives credit for it towards the decree amount.

The District Judge holds that Execution Petition No. 17 of 1914, though in form an execution petition, is, in substance, only an application for payment to the decree-holder of a sum of money deposited in Court by one of the judgment debtors and as such is not an application to take any steps-in-aid of execution. He relies on the rulings of the Calcutta High Court in *Hem Chunder Chowdhry v. Brojo Soondury Debee* (1), *Fazale Imam v. Metta Singh* (2), *Gunga Pershad Bhoomick v. Debi Sundari Dabee* (3) and *Ananda Mohan Roy v. Hara Sundari* (4) in support of his view, distinguishing the Madras decisions cited to him; viz., *Venkatarayalu v. Narasimha* (5), *Kerala Varma Valiya Rajah v. Shangaram* (6) and *Koormayya v. Krishnamma Naidu* (7), on the ground that the money in the present case was not realised by any execution process. That does not seem to be a valid distinction. The District Judge overlooks the fact that, as the money was deposited only as security, an order of the Court was necessary to make it available for payment towards the decree amount. An application to the Court for such a purpose and for payment out of the money is thus clearly necessary; and such an application is one

in execution of the decree itself. In the Calcutta case, *Hem Chunder Chowdhry v. Brojo Soondury Debee* (1), which is followed in the subsequent cases, money was deposited towards the decree amount and no order of Court was necessary to make it available for the decree, the decree holder's application being merely for payment out. In the present case an order of Court was required to make the money available for the decree and getting such an order is a step-in-aid of execution. The Calcutta cases may, therefore, be distinguished. It may, however, be pointed out that even on the question as to whether an application for payment out of money in Court in execution is or is not an application for a step-in-aid of execution, there is a clear difference of opinion between the Calcutta High Court and this Court. We must adhere to our view, as there is no proper reason to depart from it. That view has been accepted by the Bombay and the Allahabad Courts. *Vide Bapuchand Jethiram Gujar v. Mugutrao* (8) and *Paran Singh v. Jawahir Singh* (9). As pointed out by Farran, C. J., in the Bombay case execution is not fully completed till the money has been actually paid by the Court to the judgment-creditor or to some one on his account. See page 344. The judgment of the District Judge on the point cannot, therefore, be supported.

Mr. Lakshmana Rao, for the respondents, has, however, tried to support the order of the lower Appellate Court on another ground. He contended that, under the decree in question as it is worded, no application for payment of money could have been made except for Rs. 22, costs of the re-trial, and, therefore, Execution Petition No. 17 of 1914, so far as it prayed for the payment of the decree amount in general, was not in accordance with law, as it asked for a relief not granted by the decree; and in so far as it asked for the payment of Rs. 22 by the 6th defendant, it was of no avail to save limitation against the contending defendants Nos. 1 and 4, as that part of the decree was not a joint decree under Explanation 1 of Article 182 of the Limitation Act. He relied on the case reported as *Ramakrishna Kadirvelusami v.*

(1) 8 C. 89; 10 C. L. R. 272; 4 Ind. Dec. (N. S.) 57.

(2) 10 C. 549; 5 Ind. Dec. (N. S.) 368.

(3) 11 C. 227; 5 Ind. Dec. (N. S.) 910.

(4) 23 C. 196; 12 Ind. Dec. (N. S.) 180.

(5) 2 M. 174; 1 Ind. Dec. (N. S.) 392.

(6) 16 M. 452; 5 Ind. Dec. (N. S.) 102.

(7) 17 M. 165; 3 M. L. J. 296; 6 Ind. Dec. (N. S.) 112.

(8) 22 B. 340; 11 Ind. Dec. (N. S.) 809.

(9) 6 A. 366; A. W. N. (1884) 118; 4 Ind. Dec. (N. S.) 32.

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Eastern Development Corporation (10) for the first part of his argument. We need not, however, consider whether we should follow this ruling, for, in the present case, the plaintiff's application, to which the defendants were all made parties, was actually allowed by the Court and her prayer to have the money paid towards the decree amount was granted. So long as that order is in force, the defendants cannot be heard to say that the plaintiff's application was not in accordance with law. If the order was vitiated by any irregularity, defendants should have applied to set it aside; they have not done so. The first part of this contention of the respondents should, therefore, be overruled and the 2nd part need not be considered.

In the result, the order of the District Judge must be reversed and that of the Subordinate Judge, restored with costs in this and the lower Courts. The application for execution will be returned to the Court of the Subordinate Judge for further disposal.

M. C. P.

(10) 43 Ind. Cas. 537.

Order reversed.

PATNA HIGH COURT.

SECOND CIVIL APPEAL NO. 255 OF 1917.

March 20, 1918.

Present:—Mr. Justice Roe and Justice Sir Ali Imam, Kt.

CHAKRAPANI NANDI AND OTHERS—
PLAINTIFFS—APPELLANTS*versus*Srimati GAYAMONI DAS AND OTHERS—
DEFENDANTS—RESPONDENTS.*Transfer of Property Act (IV of 1882), s. 43, applicability of—Erroneous representation—Knowledge of transferee, effect of.*

Before section 43 of the Transfer of Property Act can be brought into operation, there must in fact have been an inducement by erroneous representation. The section does not apply where the transferee has knowledge that the representation made by the transferor is not true. [p. 230, col. 1.]

Appeal from a decision of the Subordinate Judge, Manbhum, dated the 11th December 1916, confirming that of the Additional Subordinate Judge, Manbhum, dated the 11th July 1916.

Mr. Mritunjoy Lal, for the Appellants.*

Messrs. Naresh Chandrá Sinha and S. K. Mitter, for the Respondents.

JUDGMENT.—One Madhusudan Sen had three sons, Radhaballav, Ananta Lal and Haladhar Sen. He mortgaged a part of the property of the family for Rs. 2,500 to one Haradhan Das. In 1895 a decree was obtained upon this mortgage and the mortgaged property duly brought to sale. The price obtained was insufficient to cover the whole amount of the decree. Haradhan Das took steps to realise the deficit from the homestead of the family. Madhusudan was then dead. Two only of the sons Radhaballav and Haladar mortgaged the family dwelling house for eight hundred rupees to Tincouri De. Tincouri De obtained a decree upon this mortgage. In order to save the property from sale the sons of Radhaballav executed a mortgage on the 26th May 1904 in favour of the father of the plaintiffs for Rs. 1,999. The plaintiffs' father himself paid off Tincouri De's mortgage. The plaintiffs in due course on the 3rd of May 1912 obtained a mortgage decree and brought to sale the right, title and interest of their mortgagors which they alleged to be sixteen annas. Haladhar Sen was then dead. His widow put in a claim to a one-third share. She obtained an order under Order XXI, rule 100, releasing her share of the property. Ananta Sen filed a similar claim which was dismissed. The plaintiffs, therefore, instituted the present suit asking for the following reliefs:—

(1) That Haladhar's widow had no interest in the property mortgaged, and that, therefore, the plaintiffs were entitled to the whole property.

(2) That if it be found that Haladhar's widow had a one-third share, it be held that she and Ananta are liable to pay the money due to the plaintiffs on the ground that it was advanced for the payment of the debts of the father of Ananta Sen and Haladhar.

(3) That Ananta Sen and his wife be held liable for the sum paid by the plaintiffs' father in respect of the mortgage entered into by Haladhar Sen and Radhaballav.

The details of the claim upon which the second and third reliefs are sought

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are set forth in paragraph 8 of the plaint.

Briefly the proposition is: that the mortgage entered into by the sons of Radhaballav kept alive the mortgage given by Radhaballav and Haladhar Sen, and that the mortgage given by Radhaballav and Haladhar kept alive the mortgage given by Madhusudan Sen, and that, therefore, all the heirs of Madhusudan Sen are liable to contribute to the redemption of Madhusudan's mortgage generally and in particular to that part of Madhusudan's mortgage which was liquidated by the transaction to which Radhaballav and Haladhar were parties.

The leading issue framed in the case was:—Was the property of Madhusudan Sen held by the sons in *ajmali* or was it divided by metes and bounds? This issue was found against the plaintiffs by the learned Subordinate Judge and this decision was not contested in appeal before the learned Judge. On the issue: Are the defendants Nos. 2 and 3, that is to say, Ananta Sen and his wife, bound by the mortgage-deed executed by Radhaballav and Haladhar Sen, the learned Subordinate Judge was of opinion that under section 95 and section 43 of the Transfer of Property Act the plaintiffs' father acquired a charge on the $\frac{1}{3}$ rd share of the house. This charge extended to a half share of the money required to pay off the mortgage decree executed by Radhaballav and Haladhar, but that it was impossible to enforce this charge as an ordinary liability for contribution for the reason that the period of limitation for suits upon such a claim would be three years. It was further found as a fact by both the Courts that the mortgage made by the sons of Radhaballav was invalid by reason of defects in attestation. The suit was accordingly dismissed with costs, and the appeal was also dismissed with costs on grounds somewhat similar to those given by the learned Subordinate Judge.

In appeal to this Court, it is urged, firstly, that under section 95 of the Transfer of Property Act the defendant Gayamani Dasi is bound to contribute to the mortgage, and, secondly, that the suit is not barred by limitation for the reason that the liability to contribute was a charge

upon the property, and that, therefore, the limitation for such a suit would be 12 years. In answer to this claim it was pointed out by the respondents that the charge created by the payment of the whole mortgage debt by Radhaballav's sons vested, not in the plaintiffs' father who advanced the money, but in Radhaballav's sons who pledged their property as security for the advance. To meet this argument the appellants claim the benefit of section 43 of the Transfer of Property Act and assert that inasmuch as in the mortgage-deed the sons of Radhaballav erroneously stated that they were entitled to a sixteen-anna share in the property, any right vesting in them in regard to that property would vest in the plaintiffs.

The points, therefore, which we have to consider in this case are:—*Firstly*, whether the invalid mortgage given by Radhaballav's sons can bind anybody but Radhaballav's sons, and, *secondly*, whether on the basis of the decree obtained against Radhaballav's sons the plaintiffs can claim the benefit of the charge vesting in Radhaballav's sons without proof of the transaction as between them and Radhaballav's sons.

The first point presents to our minds no difficulty at all. All that the learned Subordinate Judge and all that the learned Vakil for the appellants has said with regard to the doctrine of subrogation may be perfectly true; but there can be no subrogation in respect of property of which there has been no new mortgage. It has been found as a fact, and the finding has been accepted, that Radhaballav's sons had no interest in $\frac{1}{3}$ rd share of this property. Nothing that they could do with respect to this $\frac{1}{3}$ rd share could affect the rights of the real proprietors, either by way of subrogation or by way of extending the liability of those proprietors. The lien on the share of Radhaballav's sons might be carried back over the prior mortgages, but there could be no extension forwards or backwards of the lien on Haladhar's share under a contract to which Haladhar was not a party.

Our difficulty with regard to the second point is that there was no suggestion in the pleadings that section 43 could operate to give the plaintiffs a charge upon the share of Haladhar. We may grant for

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the sake of the argument that in view of the decision, *Danappa v. Yamnappa* (1), the charge vested in Radhaballav's sons would pass to the plaintiffs under section 43, if indeed it were proved that there had been an erroneous representation. We may also grant for the sake of the argument that that mortgage having passed from the stage of contract to the stage of a decree, the plaintiffs would be entitled to claim any interest possessed by the sons of Radhaballav without further proof of their contract with the sons of Radhaballav. But there is ample authority for the proposition [*vide Gangahas v. Basvant Ballappa* (2) and *Pandiri Bangaram v. Karumoor Subbaraju* (3)] that before section 43 can be brought into operation there must in fact have been an inducement by erroneous representation. The question, therefore, of the applicability of section 43 depends upon the issue of fact:—Was the plaintiffs' father induced by the erroneous representation to advance the money to the sons of Radhaballav. There was no suggestion in the plaint of the facts bearing upon this question and no issue was raised upon it. We have, however, certain broad facts before us of which the chief is that the plaintiffs' father himself was a witness to the mortgage entered into by Radhaballav and Haladhar, and himself paid off the whole sum due under that mortgage. He must have been perfectly aware that Radhaballav was not the sole owner of this property; he must have known that Haladhar had an interest in it; he cannot now plead that he was misled by the assertion in the mortgage document executed by the sons of Radhaballav that they were in fact the sole proprietors of the property. In this view of the case there can be no question of the operation of section 43, and in no other view of the case could the plaintiffs possibly succeed. We are, therefore, of opinion that the suit was rightly dismissed and dismiss this appeal with costs in one set,

Appeal dismissed.

(1) 26 B. 379; 4 Bom. L. R. 61.

(2) 5 Ind. Cas. 866; 34 B. 175 at p. 182; 12 Bom. L. R. 143.

(3) 8 Ind. Cas. 388; 34 M. 159; 8 M. L. T. 285.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 31-B OF 1917.

August 8, 1918.

Present:—Mr. Mittra, A. J. C., and

Mr. Prideaux, A. J. C.

SITARAM SHEOKARAN—PLAINTIFF

—APPELLANT

versus

RAJARAM LATUJEE—DEFENDANT No. 7—

RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Arts. 142, 144
—Hindu Law—Adoption by widow—Adverse possession against widow, whether affects rights of adopted son.

Under the Hindu Law a son adopted by a widow does not derive his title from his adoptive mother, just as a reversioner does not derive his title from or through the widow. [p. 231, col. 1.]

Time, therefore, does not run against the adopted son prior to the date of his adoption and adverse possession against the adoptive mother does not affect his rights. [p. 231, col. 1.]

Hari Vithal Parulkar v. Waman Hari Dshpande, 2 Bom. L. R. 411, *Moro Narayan Joshi v. Balaji Raghunath*, 19 B. 809; 10 Ind. Dec. (N. S.) 543, *Kancharla Venkataratnam v. Kojanti Venkataramiah*, 25 Ind. Cas. 892; 27 M. L. J. 569; 16 M. L. T. 435, followed.

Appeal from the decree of the Additional District Judge, East Berar, dated the 27th March 1917; in Civil Suit No. 23 of 1915.

JUDGMENT.—One Sheokaran died on the 10th June 1902, leaving a widow Gopi Bai and his mother Kesarbai. Gopibai adopted the plaintiff Sitaram on the 19th September 1904. This appeal relates to field No. 138 sold on the 23rd June 1903 by Kesarbai to the defendant-respondent, Rajaram. Sitaram now sues for possession of this field and other fields with which we are not concerned in this appeal.

It has been held in the connected case, First Appeal No. 33B of 1917, that Kesarbai had no title to the property of Sheokaran, and had, therefore, no authority to sell field No. 138. The lower Court has dismissed the suit on the ground that it was instituted more than twelve years after the date of the sale. The suit, however, is within 2 years from the date of Sitaram's adoption. It is clear that Article 142 of the Limitation Act does not apply, as the plaintiff was never in possession of the field. It is contended for the appellant that the case is governed by Article 144 and that the adopted son's right accrued on his adoption. On the other hand, it is pointed out that the adverse possession of Kesarbai

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and her alienage commenced prior to the adoption, and this sale is not alleged to have been effected with the consent of the plaintiff's adoptive mother Gopi. The facts of the case are similar to those in *Hari Vithal Parulkar v. Waman Hari Deshpande* (1) in which Jenkins, C. J., and Candy, J., followed the earlier case of *Moro Narayan Joshi v. Balaji Raghunath* (2), where it was held that time did not run against the adopted son prior to the date of his adoption and that adverse possession against the adoptive mother did not affect the rights of the adopted son. An adopted son does not derive his title from the adoptive mother, just as a reversioner under the Hindu Law does not derive his rights from or through the widow; *Runchordas Vandravandas v. Parvatibai* (3). Reliance is placed on behalf of the respondent on a passage in the judgment in *Padajirav v. Ramrav* (4), in which the learned Judges were inclined to think that an adopted son might, under the special circumstances of the case, be held to derive his liability to be sued from or through the adoptive mother. Therefore, the adverse possession of both was allowed to be tacked to defeat the claim of a third party. The decision was based on the ground that the adopted son obtained possession from the adoptive mother. The case is no authority for the converse proposition that adverse possession against the widow can prejudicially affect the rights of the adopted son. The view which we have taken is supported by *Kancharlu Venkataratnam v. Kojanti Venkotaramiah* (5).

The result is that the appeal succeeds and the decree of the lower Court is modified by awarding the plaintiff possession of field No. 138. The plaintiff will get his costs from defendant No. 7 in both Courts on the value of the relief claimed against him.

Appeal allowed.

(1) 2 Bom. L. R. 411.

(2) 19 B. 809; 10 Ind. Dec. (N. S.) 543.

(3) 23 B. 725; 1 Bom. L. R. 607; 3 O. W. N. 621; 26 I. A. 71; 7 Sar. P. C. J. 543; 12 Ind. Dec. (N. S.) 485.

(4) 13 B. 160; 13 Ind. Jur. 229; 7 Ind. Dec. (N. S.) 107.

(5) 25 Ind. Cas. 692; 27 M. L. J. 569; 16 M. L. T. 435.

PUNJAB CHIEF COURT.
SECOND CIVIL APPEAL No. 564 OF 1918.

October 22, 1918.

Present:—Mr. Justice Wilberforce.

BAJID—PLAINTIFF—APPELLANT

versus

Musammat SATTO AND OTHERS—DEFENDANTS
—RESPONDENTS.

Restitution of conjugal rights, suit for—Disagreement between families of husband and wife, whether ground for refusing relief—Discretion of Court.

A mere disagreement between the families of the husband and the wife is not by itself a sufficient cause for refusing relief to the husband in a suit for restitution of conjugal rights. [p. 232, col. 1.]

In a suit for restitution of conjugal rights it was found that the marriage had not been consummated, that there was bad feeling between the families of the husband and of the wife and that the wife refused to go to her husband at the dictation of her parents:

Held, that under these circumstances relief could not be refused to the plaintiff. [p. 232, col. 1.]

Kalawati v. Bukhan, 17 Ind. Cas. 254; 215 P. L. R. 1912; 187 P. W. R. 1912, *Dhani v. Narain Singh*, 82 P. R. 1908; 147 P. W. R. 1908; *Zaida v. Jowai*, 34 Ind. Cas. 538; 46 P. R. 1916; 134 P. W. R. 1916; 148 P. L. R. 1916, distinguished.

Second appeal from the decree of the District Judge, Lyallpur, dated the 17th January 1918, reversing that of the Senior Subordinate Judge, Lyallpur, dated the 22nd November 1917, granting decree for restitution of conjugal rights.

Lala Ram Ohand Manchanda, for the Appellant.

Mr. Devi Dyal, for the Respondents.

JUDGMENT.—In this case the District Judge of Lyallpur has accepted an appeal against the decision of the Subordinate Judge granting the plaintiff a decree for restitution of conjugal rights against Musammat Satto, his wife, and for an injunction against her father and mother. The District Judge held that two facts were established, viz., that the marriage had not been consummated, and that there was bad feeling between the two families, and in view of these facts and the judgments reported as *Kalawati v. Bukhan* (1), *Dhani v. Narain Singh* (2) and *Zaida v. Jowai* (3) he has considered that his discretion should be used in favour of the girl. It is argued before me that the District Judge has based his decision on judgments in no way relevant

(1) 17 Ind. Cas. 254; 215 P. L. R. 1912; 187 P. W. R. 1912.

(2) 82 P. R. 1908; 147 P. W. R. 1908.

(3) 34 Ind. Cas. 538; 46 P. R. 1916; 134 P. W. R. 1916; 148 P. L. R. 1916.

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to the present case. It is pointed out that in *Zaida v. Jowai* (3) restitution was refused on account of eight years' desertion and the puberty of the girl coupled with non-consummation of the marriage. In *Dhani v. Narain Singh* (2) the husband had been guilty of 16 years' desertion, and his object in suing for the return of an old woman suffering from goitre was merely to obtain possession of a marriageable daughter. In *Kalawati v. Bukhan* (1) the circumstances were also peculiar.

In the present case the marriage of *Musammatt Satto* took place in exchange for the marriage of *Musammatt Jowai*, the plaintiff's sister, with the paternal uncle of *Musammatt Satto*. There have been disagreements between the plaintiff's sister and her husband, and *Musammatt Jowai* has left her husband's house. Probably on account of these disagreements a criminal charge was made by plaintiff's brother against two uncles of *Musammatt Satto*. The charge may have been a true one but proceedings were dropped. The only other fact worthy of notice in the case is that the marriage took place in 1914 when the girl was 13 years of age. She was, therefore, 16 years of age in 1917, when this suit was instituted. Consummation of the marriage has also not taken place. It is also most significant that it is not even alleged that the plaintiff himself has figured in any family quarrel.

To the above circumstances, it is clear, the judgments referred to by the lower Appellate Court have not the slightest application. It is also clear that the girl herself, who is not even acquainted with her husband, has no reasonable personal ground for refusing to live with him. She is merely acting at the dictation of her father and mother who are annoyed on account of events connected with *Musammatt Jowai*. It is also obvious, that the right of a husband to obtain the return of his wife would become a dead letter if relief were refused in a case of this description. Every case in which parents refuse to send the girl to her husband is due to some disagreements between the families and this by itself is no sufficient cause for refusing relief.

For the above reasons I accept the appeal and give plaintiff a decree for the relief claimed against all the defendants.

Appeal accepted.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1549 OF 1917.

July 16, 1918.

Present:—Mr. Justice Phillips and

Mr. Justice Kumaraswami Sastri.

RUDRAVARAM VENKATASUBBIAH—

PLAINTIFF—APPELLANT

versus

RUDRAVARAM VENKATA SESHAIYA

AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, rr. 54, 57, O. XXXVIII, rr. 6, 6, 7, 11—Attachment ordered before but effected after judgment, effect of—Execution application, dismissal of, effect of, on attachment.

An attachment which is ordered in a suit before judgment cannot be treated as a nullity merely because, as a matter of fact, the attachment is not actually completed until after judgment. [p. 234, col. 1; p. 235, col. 2.]

Order XXI, rule 57, Civil Procedure Code, has no application to attachments ordered under Order XXXVIII, rule 5. [p. 233, col. 2; p. 235, col. 2.]

Bavuddin Sahib v. Arunachalla Mudali, 22 Ind. Cas. 351; 26 M. L. J. 215, *Kosuri Suraparaju v. Mandapaka Narasimham*, 26 Ind. Cas. 81; 1 L. W. 932 and *Ganesh Chandra Adak v. Banwari Lal Roy*, 14 Ind. Cas. 345; 16 C. L. J. 86; 16 C. W. N. 1097, followed.

Sewdut Roy v. Sree Canto Maity, 33 C. 639 at p. 648; 10 C. W. N. 634, not approved.

Per *Phillips J.*—When a Court makes an order under Order XXXVIII, rule 6, Civil Procedure Code, that order cannot be deprived of all force by the mere failure of the executive officers of the Court to carry it out before the decree is passed. [p. 234, col. 1.]

Per *Kumaraswami Sastri, J.*—There is nothing in Order XXXVIII, rules 5 to 12, Civil Procedure Code, requiring that the actual attachment in pursuance of the order directing conditional attachment should be made before the passing of the decree. Attachment of the property in the manner prescribed by Order XXI, rule 54, is a purely ministerial act. Any delay of the officers of Court in effecting the attachment should not prejudice the decree-holder and the validity of the order of attachment under Order XXXVIII, rule 6, should not depend on the date when it is actually effected. An attachment ordered before judgment invalidates an alienation made after the property is actually attached in pursuance of the order, even though the actual attachment was made after the passing of the decree. [p. 234, col. 2; p. 235, col. 1.]

Second appeal against the decree of the District Court, Cuddapah, in Appeal Suit No. 33 of 1915, preferred against the decree of the Court of the District Munsif, Cuddapah, in Original Suit No. 208 of 1913.

FACTS appear from the judgment.

Mr. N. R. K. Thathachariar (with him Mr. K. P. Ramakrishna Aiyar), for the Appellant.—The attachment here was actually made after judgment, though the

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order for attachment was made before. It could not, therefore, affect plaintiff's rights under his purchase. Order XXXVIII, rule 11, Civil Procedure Code, makes it clear that the attachment should be completed before decree.

Assuming that the attachment was valid, on an application to execute the decree, it became an attachment in execution and under Order XXI, rule 57 the attachment ceased when the execution application was dismissed. *Sewdut Roy v. Sree Oanto Maity* (1).

Mr. B. Somaya (with him Mr. B. Ramaswamiah), for the Respondents.—The attachment order was made before judgment and it is immaterial when it was actually given effect to. The order of Court should not be treated as a nullity simply by the accident of the attachment being effected after decree was passed. Mistakes and omissions of ministerial officers should not be made to prejudice the party in whose favour the order was made. The order passed under Order XXXVIII, rule 5, is not vacated by reason of the decree being passed before the actual attachment. Rule 11 should not be so construed as to render attachments made in pursuance of rule 5 invalid if completed after decree. It only makes unnecessary a re-attachment for purposes of execution.

Order XXI, rule 57, has no applicability to attachments under Order XXXVIII. The former rule applies only to property attached in execution and not to attachment before judgment. Order XXXVIII, rule 11, only dispenses with the necessity for re-attachment in such cases.

JUDGMENT.

PHILLIPS, J.—In this case the 1st defendant attached the plaint property before judgment in connection with a suit filed against the 3rd defendant, *viz.*, Original Suit No. 137 of 1910. The plaintiff subsequently purchased the property. The question is whether at the time of the plaintiff's purchase the property was subject to the attachment by the 1st defendant. Two points are raised now: (1) that the original attachment was invalid as

having been completed after the decree in the suit was passed; and (2) that even if the attachment was valid, it became an attachment in execution when the decree was sought to be executed and ceased to exist under the provisions of Order XXI, rule 57, Civil Procedure Code. So far as the second contention is concerned, the matter is practically concluded by authority: *Vide Bavuddin Sahib v. Arunachalla Mudali* (2), *Ganesh Chandra Adak v. Banwari Lal Roy* (3) and *Kosuri Suraparaju v. Mandapaka Narasimham* (4). No doubt in *Sewdut Roy v. Sree Oanto Maity* (1) there is an observation by Woodroffe, J., that the attachment before judgment on application to execute the decree becomes attachment in execution. Except for that one observation, I can find no other authority in support of the proposition that the nature of the attachment is altered by the filing of an execution application. I am not at all inclined to adopt this view in opposition to the authority of the cases above cited.

In support of the first proposition, reliance is placed on the language of Order XXXVIII, rule 11, of the Civil Procedure Code, which is as follows:—"Where property is under attachment by virtue of the provisions of this Order and a decree is subsequently passed in favour of the plaintiff, it shall not be necessary upon an application for execution of such decree to apply for a re-attachment of the property." No doubt under this rule it would appear at first sight that the attachment must have been completed before the decree was passed in order to give a party the benefit of the rule, that is to say, the benefit of not being obliged to apply for re-attachment of the property, when he wishes to execute his decree. In the present case it is not necessary to consider whether re-attachment was necessary, and we need only consider whether the property was validly attached under Order XXXVIII. Attachment was applied for and an order of attachment was passed before judgment was actually pronounced. But the attachment was not effected until a few days after the date of the decree.

(2) 22 Ind. Cas. 351; 26 M. L. J. 215.

(3) 14 Ind. Cas. 345; 16 C. L. J. 86; 16 C. W. N. 1097.

(4) 26 Ind. Cas. 81; 1 L. W. 932.

(1) 33 C. 639 at p. 643; 10 C. W. N. 634.

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This being so, can it be said that there was any attachment before judgment? No doubt the order was passed under rule 6 (1) before the decree, and if the order had been carried out at once, there could have been no doubt in the matter. Can it be said that the fact that there was delay in carrying out the order of the Court has deprived the Court of its powers to make such order effectual? The scope of Order XXXVIII is unquestionably limited to attachment before judgment, and all its provisions are set forth with a view to securing the plaintiff in the suit up to the time that he obtains a decree. It would be only by applying this limited scope of the Order to the present case that we would be justified in ruling that the attachment actually effected after the decree was ineffectual and void. It has been held in *Sivakolundu Pillai v. Ganapathi Iyyar* (5) that when an application for renewing attachment under section 46, Civil Procedure Code, has been put in before the expiry of the two months described in the proviso to that section and an order of the Court has not been passed until after the two months expired, the date of the application should be deemed to be the date of the order extending time. On the other hand the appellant's Vakil relies on *Venkataselapathirao v. Kameswaramma* (6), deciding that the written order of the Appellate Court staying execution does not take effect from its date but only from the date of its communication to the executing Court. Neither of these cases is really directly in point, and the question has to be decided on general principles. It seems to me that when a Court makes an order under Order XXXVIII, rule 6 of the Civil Procedure Code, that order cannot be deprived of all force by the mere failure of the executive officers of the Court to carry it out before the decree is passed. The attachment, when effected, is an attachment made in pursuance of an order to attach before judgment and must be treated as an attachment before judgment and not as a nullity merely because, as a matter of fact, the attachment is not completed until

after judgment. To adopt the opposite view would be to allow a formal judicial order to be upset by the negligence or default of a subordinate ministerial officer. The language of Order XXXVIII, rule 11, is also in favour of my view, for it does not refer to "an attachment made before judgment" but to an attachment "by virtue of the provisions of this Order," and an attachment made in pursuance of an order under rule 6 could be such an attachment in spite of its being completed after decree. I find, therefore, that the attachment in the present case was a valid attachment. The claim for damages is certainly premature.

The second appeal is accordingly dismissed with costs.

KUMARASWAMI SASTRI, J.—The plaintiff is the appellant. The 1st defendant instituted a suit (Original Suit No. 137 of 1910) against the 3rd defendant and on the same date applied for attachment before judgment. Notice was directed to the defendant and interim attachment was ordered under Order XXXVIII, rule 5 of the Civil Procedure Code, on the 17th February 1910. The attachment was actually effected on the property on the 26th February 1910. Meantime a decree was passed in the suit on the 21st February 1910. After decree the decree-holder applied for execution on the 3rd January 1912 and the 10th July 1912, but both the applications were dismissed for default of prosecution. The plaintiff herein purchased the property on the 27th April 1911 and sued for a declaration that the decree in Original Suit 137 of 1910 was satisfied and was unexecutable and in the alternative for damages. The lower Courts dismissed the plaintiff's suit on the grounds, *inter alia*, that the purchase of the plaintiff, being subsequent to the attachment, was invalid against the decree holder and that the suit for damages was premature.

As regards the first point it is contended by the appellant that the attachment having been actually effected after passing of the decree, it is invalid and that even if valid, the dismissal of the execution application for default put an end to the attachment under Order XXI, rule 57, of the Code of Civil Procedure. I am unable to agree with either of the contentions. There is nothing in Order XXXVIII, rules 5 to 12,

(5) 34 Ind. Cas. 392; 3 L. W. 336.

(6) 43 Ind. Cas. 214; 41 M. L. 151; 22 M. L. T. 330; 33 M. L. J. 515; 6 L. W. 617; (1917) M. W. N. 785.

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(which deal with attachments before judgment) requiring that the actual attachment in pursuance of the order directing conditional attachment should be made before passing of the decree. Rule 5 empowers the Court to direct conditional attachment of the property specified in the application, when at any stage of the suit it is satisfied that the defendant is about to dispose of the whole or any part of his property or is about to remove it from the local limits of the Court's jurisdiction. An order duly passed under rule 5 cannot be *ipso facto* vacated by reason of the decree supervening before actual attachment is effected in manner specified by rule 54, Order XXI, unless there is something in rules 5 to 12 to that effect. It is contended that rule 11 of Order XXXVIII refers to an attachment and subsequent decree and that by implication it negatives the validity of an attachment made subsequent to decree in pursuance of a previous order under rule 5. All that rule 11 states is that it shall not be necessary to re-attach, if before decree has been passed property has been attached in pursuance of an order under rule 5. The section is only an enabling one and relieves the decree-holder from going over the same process again after decree if he has attached the property while the suit is pending. It is unnecessary to consider whether, if the attachment ordered before was made after decree, the section would apply so as to dispense with attachment after the filing of the execution application. The invalidity of the attachment order under rule 5, effected after decree, is one thing and the necessity for re-attachment owing to the terms of rule 11 not having been complied with is another. The case is one of first impression and I think there is neither reason nor authority for holding that the mischief to prevent which rule 5 was enacted is nonetheless because of the passing of a decree subsequent to the order. It is argued that the party could re-attach, but a re-attachment would take sometime (especially if the property is situate at some distance from the Court) and should the order under rule 5 cease to have any effect immediately on the passing of the decree, there is nothing to prevent alienation between the date of the decree and the date when the attachment is

actually effected in manner specified by Order XXI, rule 54, as under section 64 the attachment invalidates an alienation only when the alienation is after the actual compliance with the provision of rule 54. Attachment of the property in manner prescribed by Order XXI, rule 54, is a purely ministerial act. Any delay of the officers of Court in effecting the attachment should not prejudice the decree-holder and the validity of the order of attachment under rule 5, Order XXXVIII, should not depend on the date when it is actually effected. I am of opinion that an attachment ordered before judgment invalidates an alienation made after the property is actually attached in pursuance of the order, even though the actual attachment was made after the passing of the decree.

It is argued that the dismissal of the execution application puts an end to the attachment before judgment and reliance is placed on an observation of Woodroffe, J., in *Sewdut Roy v. Sree Canio Maity* (1), to the effect that on an application for execution being filed "the attachment before judgment enures and becomes upon and by virtue of the application an attachment in execution." The question whether rule 57 of Order XXI, which expressly refers to cases where property is attached in execution of a decree, can be extended to cases of attachment before judgment merely by reason of the provision of rule 11 of Order XXXVIII dispensing with the necessity for re-attachment was considered by Sadasiva Aiyar and Spencer, JJ., in *Bavuddin Sahib v. Arunachalla Mudali* (2), and we agree with them in holding that rule 57 of Order XXI has no application to attachments effected under rule 5 of Order XXXVIII. A similar view was taken in *Kosuri Suraparaju v. Mandapaka Narasimham* (4).

As regards the claim to damages, it is premature as the decree has not been executed and plaintiff did not at the date of the suit suffer any damages. The decree may never be executed by sale of the property purchased by plaintiff, and there is no reason why he should get the consideration paid by him by way of damages and also keep the property. It is open to him to pay the amount due on the decree in respect of which the property is attached and recover it

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by proper proceedings, but his case is that the decree has been satisfied.

The second appeal fails and is dismissed with costs.

M. C. P.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 722 OF 1914.

December 14, 1915.

Present:—Sir Henry Drake-Brockman, Kt., J. C.

BALIBHADRADAS—DEFENDANT—

APPELLANT

versus

MIRCHILAL AND OTHERS—PLAINTIFFS—

RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 100 (1) (c)—Procedure, mistake in, not affecting merits—Appeal, second, whether lies—Custom, evidence of—High Court, whether can go into evidence in second appeal—Insolvency—Property acquired after adjudication—Insolvent, power of, to deal with property.

In a case where a custom differing from the general law is set up, the High Court is not precluded in second appeal from considering whether the evidence adduced suffices to establish all the elements (antiquity, continuity and certainty) necessary to constitute a valid custom. [p. 237, col. 1.]

Desai Ranchhodas Vithaldas v. Rawal Nathubhai Kesabhai, 21 B. 110 at p. 115; 11 Ind. Dec. (N. S.) 75, *Kakarla Abbayya v. Raja Venkata Papayya Rao*, 29 M. 24; 16 M. L. J. 8, *Hashim Ali v. Abdul Rahman*, 28 A. 698; 3 A. D. J. 467; A. W. N. (1906) 187, *Ram Bilas v. Lal Bahadur*, 30 A. 311; A. W. N. (1908) 112; 5 A. L. J. 456; 4 M. L. T. 169 and *Sardar Singh v. Ajit*, 2 C. P. L. R. 141, followed.

During the pendency of a suit, the plaintiff having died, his son, who had been adjudged an insolvent during the lifetime of his father, was admitted to continue the suit. The defendants did not raise any objection in the Court of first instance to his substitution. An objection was raised in the first Appellate Court but was rejected. The objection being repeated in the second Appellate Court:

Held, that even if there was an error, the merits were unaffected thereby and section 100 (1) (c), Civil Procedure Code, precluded a second appeal on that point. [p. 238, col. 2.]

Failing intervention by the Court or the Receiver in which an insolvent's property has vested, the insolvent has the same power of acting in respect of after-acquired property as he had before the insolvency. [p. 238, col. 2.]

Kristocomul Mitter v. Suresh Chunder Deb, 8 C. 556; 12 C. L. R. 253; 4 Ind. Dec. (N. S.) 353, *Fatima-bibi v. Fatimabibi*, 16 B. 452; 8 Ind. Dec. (N. S.) 780 and *Sriramulu Naidu v. Andalammal*, 30 M. 145; 17 M. L. J. 14, followed.

Appeal from the decree of the District Judge, Wardha, in Civil Appeal No. 115 of 1914, decided on the 29th September 1914.

Messrs. J. O. Ghosh and Atmaram Bhagwant, for the Appellant.

Mr. M. R. Bobde, for the Respondents.

JUDGMENT.—The suit out of which this second appeal arises was filed by one Harbakhsh, father of the present respondents. He sought to obtain accounts of a partnership which admittedly existed between the defendant, who is the present appellant, and one Bansilal, who died while still partner on the 14th January 1910. Harbakhsh, who died early in 1912 while the suit was proceeding in the Court of first instance, was Bansilal's full brother and claimed to have been joint with him. Alternatively he alleged that if separate from Bansilal, he was entitled as Bansilal's heir by virtue of a caste custom which excludes daughters from inheriting. Bansilal admittedly left a daughter him surviving.

The defendant pleaded that Harbakhsh and Bansilal were separate and denied the alleged custom. He went on to say that such a custom is unreasonable, and added what reads like a half admission of a practice to exclude daughters that the custom is "not ancient and continuous." To this, the plaintiff replied that the custom of Marwaris to exclude daughters is ancient, continuous and reasonable.

The trial Judge found that Harbakhsh and Bansilal were separate but that the custom alleged was proved. The defendant appealed to the District Judge, who also pronounced in favour of the custom.

The main contention advanced in this Court on behalf of the defendant is that the evidence accepted by the Courts below is not sufficient in law to establish the custom excluding daughters.

It will be convenient to dispose at the outset of an objection by the respondents to the effect that whether or not a custom exists is a question of fact, and that there being evidence proper for consideration the decision appealed from cannot legally be impeached at this stage. *Hureehur Mookerjee v. Judoonath Ghose* (1) and *Bai Shirinbai v. Kharshedji Nasarvanji* (2) contain remarks

(1) 10 W. R. 153.

(2) 22 B. 430 at p. 437; 11 Ind. Dec. (N. S.) 869.

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which at first sight support this contention. The former, however, indicates also that if the decision is reached "in any way illegally", it can be attacked even in second appeal. In the latter the judgment of the High Court shows that the record contained indisputably a large body of evidence in support of the custom set up. On the other hand, there is considerable authority in favour of the view that the High Court may consider whether the evidence adduced suffices to establish all the elements (antiquity, continuity, certainty, etc.) necessary to constitute a valid custom differing from the general law: see *Desai Ranchhoddas Vithaldas v. Rawal Nakhubhai Kesabhai* (3), *Kakarla Abbayya v. Raja Venkata Papayya Rao* (4), *Hashim Ali v. Abdul Rahman* (5), *Ram Bilas v. Lal Bahadur* (6). In *Sardar Singh v. Ajit* (7) Crosthwaite, J. C., upset a finding that a custom of inalienability was established, the case being argued before him by experienced Counsel who would not have been likely to overlook so obvious an objection as finality of the finding. In the present case the appellants' contention is that the practice of excluding daughters is not proved to be so ancient and so binding on the conscience of the caste (Mahesari Bania) to which Harbakhsh belonged as to have ripened into a custom. I hold on the authorities last cited that this is a good ground of second appeal.

Before examining the evidence I would observe that it includes no judicial decision, a form of proof the value of which was recognised in *Shimbhu Nath v. Gayan Chand* (8). The learned District Judge has referred to passages in Mayne on Hindu Law and Usage (8th Edition, pages 783, 788 and 789), which show that the exclusion of daughters is by no means unknown in India but relate for the most part to inhabitants of the Punjab and Oudh. The families concerned in *Bhau Nanaji Utpat v. Sundrabai* (9) and *Pranjivan Dayaram v. Bai Reva* (10) were Brahmans. In the former the priestly duties

(3) 21 B. 110 at p. 115; 11 Ind. Dec. (N. S.) 75.

(4) 29 M. 24; 16 M. L. J. 8.

(5) 28 A. 693; 3 A. L. J. 437; A. W. N. (1903) 187.

(6) 30 A. 311; A. W. N. (1908) 112; 5 A. L. J. 456; 4 M. L. T. 169.

(7) 2 C. P. L. R. 141.

(8) 16 A. 379; A. W. N. (1894) 123; 8 Ind. Dec. (N. S.) 246.

(9) 11 B. H. C. R. 249.

(10) 5 B. 482; 3 Ind. Dec. (N. S.) 318.

required of the family had some bearing on the decision, while in the latter the property concerned was of special character, namely, a *bhagdari* village, and the custom of preferring males to females was found to obtain among Muhammadan no less than among Hindu *bhagdars*. The Mahesari Banias are a mercantile and commercial class according to J. N. Bhattacharya's "Hindu Castes and Sects" (pages 203 and 211) they came originally from Central India and are specially marked for business capacity. Their case is certainly very different from that of the warlike Bhate Sultan class whose custom of excluding daughters was recognised by the Privy Council in *Bajrangji Singh v. Manokarnika Bakhsh Singh* (11). No doubt it is natural enough for one family to dislike property passing into another. On the other hand, a daughter may be unmarried when a succession opens and whether married, widowed or unmarried, her claim on her father's affection must always be a special one. Altogether then there seems to be no *prima facie* ground for supposing that the Mahesaris exclude daughters from inheriting.

Turning to the plaintiff's evidence it seems to me strikingly defective on the points of antiquity and continuity. He set up a custom common to all Marwaris i. e., to persons whose territory of origin is Marwar. The witnesses who speak on the point are his 2nd, 4th, 5th, 7th, 10th, 11th and 13th. Of these the oldest (No. 5) is only 45, several being considerably younger. Not one seems to occupy a position of any particular standing. Madan Gopal (P. W. No. 2) lives at Bombay and speaks of two cases which occurred—one quite recent and the other unplaced in time—at Nagpur. In each of his instances a brother excluded a daughter, but it is by no means clear that the brothers were really separate in estate, for they messed together. Shrikisan Das (P. W. No. 4) and Mohan Lal (P. W. No. 7) refer to one case of exclusion only, which they allege to have occurred in the well-known family of the late Rai Bahadur Bansilal Abirchand. Even that was only 25 years ago, and it is only Shrikisan Das who definitely asserted that

(11) 30 A. 1; 12 C. W. N. 74; 9 Bom. L. R. 1348; 6 C. L. J. 763; 3 M. L. T. 1; 5 A. L. J. 1; 35 I. A. 1; 17 M. L. J. 605; 11 Q. C. 78 (P. C.).

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the brothers who excluded the deceased's daughters were separate from the deceased. Considerably better evidence about this exclusion might well have been adduced, for the present head of the late Rai Bahadur's family, Sir Kasturchand Daga, lives at Kamptee and sometimes stays at Hinganghat. Ram Prasad (P. W. No. 5) and Mathura Das (P. W. No. 10) are said to be brothers, though different father's names are shown against them at the head of their depositions. They say that they excluded a separated uncle's daughter, but particulars given by Ram Prasad make it clear that the succession only opened in 1912. Ram Prasad mentions also the case of Rai Bahadur Bansilal Abirchand and two others, one 20 years old and the other undated. Bindraj (P. W. No. 11) seems to be alone in speaking of an undated instance which occurred in his native town of Rupnagar. Suraj Khan (P. W. No. 13), aged 26, is another instance of a separated nephew excluding a daughter: he says he succeeded 10 or 12 years ago, but his evidence must be regarded as interested, for he is related to the plaintiff and indebted to the defendant.

Against this very limited array of instances there is certainly very little evidence from the defendant's side. He examined two Oswals and one Marwari. Kaluram (D. W. No. 4) said:—

"I know of no case in which a daughter amongst us became an heir. I know of no case in which the property went to another in the lifetime of the daughter."

This witness is only 26 years old and could not well be expected to know much one way or the other. Motilal Oswal (D. W. No. 5), aged 41, deposed thus:—

"I know of no case in which a daughter inherited her father's separate property. Amongst us females do not inherit; a male, however distant, would succeed."

For the respondents this passage, part of the cross-examination, is relied on, but its value strikes me as very small, inasmuch as it is no part of the plaintiff's case that all females are excluded and his own witness Ram Prasad gave an instance of a widow succeeding. Sawairam (D. W. No. 6) is a Mahesari and his brother Chunilal is married to the daughter of the plaintiff's deceased brother Bansilal; according to him his sister-in-law is Bansilal's heir.

Having given the entire evidence my careful consideration, I conclude that the alleged custom has not been established. It is unnecessary, therefore, to decide whether Harbakhsh's son Mirchilal was wrongly admitted to continue the spit on his father's death by reason of his having been adjudged insolvent in his father's lifetime. The appellant's objection to the procedure adopted was not raised in the Court of first instance, and I am disposed to agree with the District Judge that if there was an error the merits are unaffected thereby. If this view is correct, section 160 (1) (c), Civil Procedure Code, would preclude a second appeal on the point. Moreover, there is authority for the position that failing intervention by the Court or Receiver in which the insolvent's property has vested, the insolvent has the same power of acting in respect of after-acquired property as he had before insolvency: see *Kristomul Mitter v. Suresh Chunder Deb* (12), *Fatimabibi v. Fatimabibi* (13) and *Sriramulu Naidu v. Andalammal* (14).

The respondents ask for a remand for the purpose of contesting in the lower Appellate Court the decision that Harbakhsh and Bansilal were separate. There is, however, no indication in the record that before the District Judge they sought to support the decree in their favour on a ground decided against them. I, therefore, decline to remand the case.

The appeal succeeds, the decrees of the lower Courts are set aside and the claim is dismissed with costs in all three Courts.

Appeal allowed.

(12) 8 C. 556; 12 C. L. R. 253; 4 Ind. Dec. (N. S.) 358.

(13) 16 B. 452; 8 Ind. Dec. (N. S.) 780.

(14) 30 M. 145; 17 M. L. J. 14.

BOMBAY HIGH COURT. FULL BENCH.

FIRST CIVIL APPEAL NO. 76 OF 1916.

July 30, 1918.

Present:—Sir Basil Scott, Kt., Chief Justice,
Mr. Justice Macleod and Mr. Justice Shah.

HANMANTRAM RADHAKISAN—
PLAINTIFF—APPELLANT

versus

SHIVNARAYAN ASURAM—DEFENDANT
—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXX,

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r. 7, Sch. II, cl. 20—Minor, party to dispute—Reference to arbitration by next friend—Award filed and decree passed without opposition—O. XXXII, r. 7, applicability of—Decree, whether binding on minor.

When a dispute, to which a minor is a party, is submitted to arbitration out of Court by the next friend of the minor and the award made upon such submission is brought into Court by the next friend under clause 20 of the Second Schedule to the Civil Procedure Code, and the Court is asked to file it and thereafter pass a decree upon it, the opposite party not objecting, the Court is not bound to sanction the agreement to have the award filed and a decree passed upon it, as for the benefit of the minor, or to certify the decree, nor is the minor entitled to the protection of Order XXXII, rule 7 of the Civil Procedure Code. [p. 243, col. 2; p. 244, col. 2.]

Where a minor through his next friend applies that an award be filed and a decree passed upon it, and the other party to the reference raises no objection to the application, and the award is filed and a decree passed in accordance with it, it cannot be said that there has been any agreement on behalf of the minor with reference to the suit in which the next friend is acting, although were the minor the defendant in such a suit as is numbered under clause 20 of the Second Schedule, it might be that a promise given on behalf of the minor to allow the award to be filed without opposition and a decree passed in accordance with it would be an agreement on behalf of the minor with reference to the suit within the meaning of Order XXXII, rule 7 of the Civil Procedure Code. [p. 242, col. 2; p. 243, col. 1.]

First appeal from the decision of the First Class Subordinate Judge, Poona, in Suit No. 395 of 1912.

On the appeal coming on for hearing before Beaman and Heaton, JJ. on the 18th March 1918 the Court made the following

ORDER OF REFERENCE TO A FULL BENCH.

BEAMAN, J.—(March 18, 1918.)—The mother of the plaintiff, his natural guardian, referred certain partnership disputes between the plaintiff and the defendant to arbitration. The plaintiff was then a minor. The plaintiff's mother took the award to Court, and applied under clause 20 of the Second Schedule, Civil Procedure Code, for a decree in terms of the award, the defendant consenting. A decree was passed, but not certified to be for the benefit of the minor. Finding himself dissatisfied with the award and the decree passed upon it, the plaintiff through his mother as guardian has brought

this suit to have the decree set aside on the ground, *inter alia*, of fraud. It is contended before us that whether there was fraud or not the plaintiff is clearly entitled under Order XXXII, rule 7, Civil Procedure Code, to have the decree set aside, and the question is, whether he is so entitled or not? Were the point free from authority, I should have had no hesitation in holding that he was. So it was held upon exactly similar facts in the case of *Mahadev Balkrishna Kelkar v. Krishnabai* (1) by Parsons and Ranade, JJ. But a Division Bench consisting of Sir Lawrence Jenkins and Chandavarkar, JJ., came to a contrary conclusion in the case of *Vithaldas v. Dattaram* (2), and very definitely overruled the earlier decision. This was not through inadvertence, since the judgment of the lower Court was expressly based upon the case of *Mahadev Balkrishna Kelkar v. Krishnabai* (1). It is plain that the later decision could not have been given in opposition to the earlier without reference to a Full Bench, but for the latitude allowed Courts in shutting their eyes or not to case-law which is not in the authorized reports. It is significant that although the Court must have known that it was overruling the decision of Parsons and Ranade, JJ., when it decided the case of *Vithaldas v. Dattaram* (2), no reference is to be found in the judgment to that decision. We find here then a direct and irreconcilable conflict of judicial decision. We have no other course open to us than to refer the point to a Full Bench for authoritative settlement. In doing so I will state as briefly as I can, why, with all respect to the learned Judges responsible for it, I think the later decision wrong, and the earlier decision right.

It is true that the words of Order XXXII, rule 7, will not apply to the agreement to refer out of Court, made by any one acting for a minor. It is nonetheless true that all such agreements are in essence contractual, since their effect is to abridge or extend, as the case may be, strict contractual rights. But since *ex hypothesi* such agreements to refer and resultant references as well as awards made on them, are

(1) (1896) P. J. 603.

(2) 26 B. 298; 3 Bom. L. R. 837.

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outside the control of the Court and beyond its jurisdiction, such cases are not within the contemplation of Order XXXII, rule 7. Such submissions to arbitration by guardians *de facto* of minors and awards upon them would, I apprehend, always be voidable by the minor concerned on attaining his majority just as all his other contracts would, to the same extent, subject to the same conditions. But when a Court has intervened, the case is radically different. Upon general principles, and neglecting for a moment the actual language of Order XXXII, rule 7, it is safe to say that whenever and upon whatever procedure, under what conditions so ever, a Court has made a non-contentious decree, a decree, that is to say, which is analysable into a decree by consent, affecting a minor's rights, that decree must be certified to be for the minor's benefit, and if it is not, then it is voidable (without there being any need to prove fraud) at the minor's option. This statement of general principles, which I believe to be universal and without any exception, is a necessary consequence of the rule that all Courts when dealing with the affairs of minors are charged with a special duty, the duty, that is, of protecting the minor's interests. It is not enough that a guardian *ad litem* should be appointed; when a compromise is effected, that is to say, whenever the Court does not decide for itself what the minor's rights are, it is bound, before making a decree in terms of the compromise, to satisfy itself as far as it can that the minor has been properly protected, and that his interests have not been sacrificed any way. If the Court does not do this, and what is more, place it clearly on record that it has done so before binding the minor by its decree, it has fallen short of its duty, and its decree is at once voidable at the minor's option on attaining majority. Such being the widest scope of the law, and expression of the principle upon which it rests, it will be seen that the actual language of Order XXXII, rule 7, really does cover every proper case. And there is no difficulty at all in showing that it covers the case before us, as well as the case before the Court in *Vithaldas v. Dattaram* (2). The learned Judges there appear to have thought that the only agreement in question was the

agreement, out of Court, to refer the matters in difference to arbitration. That, however, is not so. Where a suit has been brought and the parties (one of them being a minor) submit to arbitration under the control of the Court, it has been held that the agreement to submit is not such an agreement as is contemplated in Order XXXII, rule 7, and does not require the sanction of the Court. There are two answers here. 1. In strictness this is an agreement and the mere fact that the Court grants the application amounts by implication to the Court sanctioning it up to that point. 2. But it is obvious that the Court cannot at that stage decide, whether the agreement is or is not for the benefit of the minor. That can only be known when the award is made. It may be very much in the minor's favour, or it may be very much against him. The same is true of a like agreement made before the parties have come to Court at all. But while in the former case I suppose no one would contend that the Court need not sanction the decree upon the award and declare it to be for the minor's benefit, the decision under examination holds that this is quite unnecessary when the preliminary steps, the reference to arbitration, and the award were anterior in time to the Court having any knowledge of the facts or jurisdiction over the parties. In every case of the kind a decree by consent implies an agreement somewhere, and if the Court is wholly ignorant of the fact of any such agreement having been made, at the time it was made, or the terms upon which it was made, nevertheless before it can pass a decree it is in a position to ascertain, from the terms of the decree it is asked to make and a comparison between those terms and the facts which it will insist upon knowing, whether the underlying agreement has been for the minor's benefit or not. The validity of this general statement is not touched, much less impaired, by the circumstance that in the particular case before us the application under clause 20 of the Second Schedule was made by the minor. If the matter was from that moment to go through uncontested up to decree, then the terms of the award were evidence enough of what agreement had been come to by the parties, and material

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enough to put the Court on enquiry whether before converting it into a decree the Court would take it to be for the benefit of the minor. Now if we return to Order XXXII, rule 7, and compare its language with clause 20 of the Second Schedule, it is plain that an application under the latter will at once take the form of a suit, in which if a minor is a party he must be either plaintiff or defendant. He must, therefore, be represented. He must have a guardian. Either, in any particular case, he had or he had not. If he had, then one at least of the verbal difficulties stated in the Court's judgment in *Vithaldas v. Dattaram* (2) is removed. If he had not, then the decree could not possibly stand. No decree could be made by any Court affecting a minor's rights unless the minor were represented in the suit. Thus we have in effect a suit in which the minor represented in fact by the guardian, his mother, is plaintiff, and the defendant here was the defendant. The prayer of the plaint is to decree an agreement which has been arrived at by process of arbitration out of Court. All its terms are now known, that is to say, the terms of the result of the agreement to refer, namely, the contents of the award. The law permits, and, therefore, of course contemplates defences. This, like any other suit, may be contentious. But if it is not, if both parties say to the Court, we are agreed in desiring your decree in the terms we have laid before you, and if one of those parties is a minor, surely this is an agreement within the letter, as it most certainly is within the spirit, of Order XXXII, rule 7. Else it appears to me that minors would be exposed to gross abuses everywhere. Their nominal guardians might always submit their disputes to arbitration, and bring in an award asking for a decree in terms of the award after settling with the nominal defendant, and the Court would only have to pass a decree without taking the trouble to investigate the merits to bind the minor, and so make itself the instrument, and the most effective instrument, of defrauding him of his just rights. Of course it may be answered that excluding a minor in these circumstances from the protection of Order XXXII, rule 7, does not mean that he is wholly deprived of redress. He can still prove that he

was not adequately represented, or that the consent decree was obtained by fraud. But these are often difficult ways, when many years have passed. I see no reason at all why the minor should not have the much simpler, the much easier, the unqualified relief provided by Order XXXII, rule 7.

In my opinion the answer to the question which I would refer to the Full Bench is that all cases of the kind do fall within the language and intention of Order XXXII, rule 7, and that in the case before us the plaintiff is entitled to have the decree set aside.

The following is the question referred to the Full Bench:—

When a dispute to which a minor is a party has been submitted to arbitration out of Court, and the award made upon such submission has been brought into Court under clause 20 of the Second Schedule, Civil Procedure Code, and the Court has been asked to file it and thereafter pass a decree upon it, neither party objecting, is not the Court bound to sanction this agreement to have the award filed and a decree passed upon it, as for the benefit of the minor, and so also certify the decree? and if the Court fails to do so, is not the minor entitled to the protection of Order XXXII, rule 7, Civil Procedure Code?

HEATON, J.—(March 18, 1918.)—The facts out of which arises the dispute before us are these: The plaintiff is a minor; his father was a partner in a firm; on his death disputes arose as to the business of the firm. It was agreed to refer these disputes to arbitration, this agreement being signed by the mother and natural guardian on behalf of the plaintiff. An award was made. The plaintiff through his mother as guardian applied to the Court as provided by paragraph 20 of the Second Schedule to the Civil Procedure Code that the award should be filed. Thereupon the application was numbered and registered as a suit, notices were issued, there was no contest and eventually a decree was made in terms of the award.

The minor now, again through his mother as guardian, sues to avoid the decree on the ground that he is entitled to do so by the provisions of rule 7 of Order XXXII. The question before us is, whether

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he is entitled to do so or not, whether, in short, rule 7 of Order XXXII governs the case. If it does, the plaintiff certainly can avoid the decree, if there was an agreement as to, or a compromise of, the suit entered into without the leave of the Court. First of all we have to determine, whether there was an agreement or compromise. I think there was. Where, as here, there was a suit to file the award followed after due notice to the defendants by a decree without contest, we must, I think, assume either a tacit or explicit agreement that the award should be filed. It may be urged that this is a question of fact; if so, we can determine it in this appeal which is a first appeal. But when this view, that there was a tacit or explicit agreement between the plaintiff and defendants that the award should be filed without contest, was mentioned in argument, there was no objection made, as I understand, to the assumption. I, therefore, assume that there was a tacit or explicit agreement. If there was an agreement either express or tacit, then there was, it seems to me, an agreement of the kind contemplated by rule 7 of Order XXXII. Suppose there had been a contest in the suit and that then the contest had been dropped and the award filed by consent. If so, it could not, I think, be successfully argued that rule 7 of Order XXXII would not apply. Equally to my thinking it cannot be argued successfully that the rule does not apply when there is no contest.

The point is one of great general importance, for if that rule does not apply to uncontested decrees obtained on awards, the door is opened to the evils in their worst form which the rule is intended to prevent: for we know how easily widows are cajoled or deceived and how often they are induced to sacrifice the interests of minor sons.

My learned brother has explained that a reference to a Full Bench is imperative in this case. It is the more so because in a recent case of *Kheratali Roshanalli v. Mahmatali Nadarali* (3) we delivered a judgment which in principle is irreconcilable with the judgment in *Vithaldas v. Dattaram* (2). For myself I venture still to think that we are right and that the judgment in *Vithaldas's case* (2) was not right; at least

(3) Second Appeal No. 711 of 1916.

would not be right now, for the words of section 141 of the Code are so explicit as to compel us to apply rule 7 of Order XXXII to suits on awards as well as to other suits. When we dealt with Second Appeal No. 711 of 1916 [*Kheratali Roshanalli v. Mahmatali Nadarali* (3)], however, our attention was not called to the decision in *Vithaldas's case* (2).

Mr. Bahadurji (with him Mr. S. Y. Abhyankar), for the Appellant.

Messrs. Setalvad and Coyajee (with them Mr. S. R. Bakhale), for the Respondents.

JUDGMENT OF THE FULL BENCH.

SCOTT, C. J.—The question referred to the Full Bench is as follows:—When a dispute to which a minor is a party has been submitted to arbitration out of Court, and the award made upon such submission has been brought into Court under clause 20 of the Second Schedule, Civil Procedure Code, and the Court has been asked to file it and thereafter pass a decree upon it, neither party objecting, is not the Court bound to sanction this agreement to have the award filed and a decree passed upon it, as for the benefit of the minor, and so also certify the decree? and if the Court fails to do so, is not the minor entitled to the protection of Order XXXII, rule 7, Civil Procedure Code?

It is necessary to read this question with the main facts in the suit, namely, that a reference to arbitration was made, or agreed to, by a mother on behalf of her minor son, and after the award was published, the mother on behalf of the son applied under clause 20 of the Second Schedule of the Civil Procedure Code that the award should be filed in order that a decree might be passed upon it. The minor thus became, through his next friend, the applicant.

If the other party to the reference raises no objection to the application, and the award is filed and a decree passed in accordance with it, it does not appear to me that it can be said that there has been any agreement on behalf of the minor with reference to the suit in which the next friend is acting, although were the minor the defendant in such a suit as is numbered under clause 20 of the Second Schedule, it might be that a promise given on behalf of the minor to allow the award to be filed

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without opposition and a decree passed in accordance with it would be an agreement on behalf of the minor with reference to the suit. If a plaintiff gets everything that he applies for without objection by the defendant, it cannot be said that there is a decree by consent in the strict sense of that term. It is only a decree upon the submission of the defendant. The fact that the defendant does not object would not impose upon the Court the necessity of sanctioning anything as a condition precedent to filing the award and passing a decree upon it. The judgment of Mr. Justice Heaton, one of the referring Judges, puts the question of agreement as a matter of assumption of an undisputed fact. He says: "Where, as here, there was a suit to file the award followed after due notice to the defendants by a decree without contest, we must, I think, assume either a tacit or explicit agreement that the award should be filed. It may be urged that this is a question of fact; if so, we can determine it in this appeal which is a first appeal. But when this view, that there was a tacit or explicit agreement between the plaintiff and defendants that the award should be filed without contest, was mentioned in argument, there was no objection made, as I understand, to the assumption. I, therefore, assume that there was a tacit or explicit agreement." That assumption, as it seems to me, comes to this, that the defendant let it be known that he was not objecting to the filing of the award. I do not think that that amounts to an agreement or compromise on behalf of the minor plaintiff with reference to the suit within the meaning of Order XXXII, rule 7. It also appears to me that there is no conflict between the two cases alluded to in the referring judgments. Mr. Justice Parsons and Mr. Justice Ranade say in *Mahadev Balkrishna Kelkar v. Krishnabai* (1): "It is admitted that the sanction of the Court was not obtained either to the original agreement of reference to arbitration made by Vinayak Balkrishna Kelkar on behalf of his sons or to the agreement of the same person that the award should be filed or to the decree. It is, in our opinion, essential under section 462 of the Code that the

leave of the Court should have been obtained to the agreement before a decree was passed on it." That, as I understand, is the second agreement mentioned, namely, that the award should be filed. That would be an agreement on behalf of a minor defendant after the application had been numbered as a suit. In *Vithaldas v. Dattaram* (2) Sir Lawrence Jenkins delivering the judgment of the Court said: "Can, then, the decision be supported on the ground that there has been no such leave as section 462 contemplates? We think not. That section obviously contemplates the existence of a guardian and a pending litigation; but here, when the agreement was entered into, there was neither a guardian for a suit nor a suit." I infer from the judgment in the case of *Mahadev Balkrishna Kelkar v. Krishnabai* (1) that the Court there was of opinion that the original agreement of reference, before there had been any application numbered as a suit, would not require the leave of the Court.

The question referred, must, I think, be answered in the negative.

MACLEOD, J.—The suit in which this reference has been made was filed by the plaintiff, a minor, to set aside the decree passed in his favour on an award. The agreement to refer was made on his behalf by his mother as his guardian, and the grounds on which he applied to have the decree set aside were that the accounts submitted to the arbitrators by his deceased father's partner were not correct, that his guardian was not in possession of true information at the time of the award, and that the award had been obtained by fraud. In the trial Court the suit was dismissed.

In first appeal, the eighth ground of appeal was as follows: "The decree passed on the award contravenes the provisions of Order XXXII, rule 7 of the Civil Procedure Code." When the appeal came on for argument this point seems to have been raised as a preliminary point, for if it was successful, there was no necessity to go into the question of fraud. The difficulty in dealing with the point arises from the fact that it was not taken at the hearing and there is, therefore, no evidence on the record of any

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agreement which had been entered into on behalf of the minor with reference to the suit by his next friend, and, therefore, the agreement which has now been relied upon by the appellant had to be assumed from the facts already recorded.

Now the only agreement entered into by the minor's guardian was the agreement to refer. But it was argued for the appellant, as far as I can gather, that the agreement to refer implied a further agreement that when the award was made on the reference, it was to be filed and a decree passed on it under paragraph 20 of the Second Schedule. In the first place, I do not think that we can infer, from the agreement to refer the matter in dispute to arbitration, a further agreement to abide by the award, but even if we could, the agreement to refer was made before suit and any further agreement implied therein would also be before suit. All that appears on the record to have happened was that the award was made in favour of the minor. His guardian then filed an application under paragraph 20 of the Second Schedule that the award should be filed. Sub-paragraph (2) states that the application should be in writing and should be numbered and registered as a suit between the applicant as plaintiff and the other parties as defendants. Sub-paragraph (3) states that the Court should direct notice to be given to the parties to the arbitration, other than the applicant, requiring them to show cause, within a time specified, why the award should not be filed; and under paragraph 21, where the Court is satisfied that the matter has been referred to arbitration, and that an award has been made thereon and where no ground such as is mentioned or referred to in paragraph 14 or paragraph 15 is proved, the Court shall order the award to be filed and shall proceed to pronounce judgment in accordance with the award. Notice in the ordinary course was issued, the application came on for hearing, and the defendant raised no objection to the award, such as he might have raised under paragraph 14 or 15 of the Second Schedule. After that it was the Court's duty to pronounce judgment in accordance with the award. Therefore, it cannot be said that there had been any agreement by the guardian after the application to file

the award had been made and the matter became a suit, which required the sanction of the Court under Order XXXII, rule 7.

But even assuming that the defendant, after the application to file the award had been made, had promised that he would not take any objection under paragraphs 14 and 15 of the Second Schedule, it cannot be said that there was an agreement by the minor's guardian which would come within rule 7 of Order XXXII. The mere fact that the defendant consented that a decree should be passed in accordance with the award, which involved no action on the part of the guardian, would not in any sense constitute an agreement by the guardian. Therefore, dealing with the question which has been referred, I should be inclined to say that if the defendant in a suit by a minor plaintiff registered under paragraph 20 of the Second Schedule, Civil Procedure Code, raises no objection to the award being filed, and a decree passed thereon, there is no agreement by the guardian of the minor such as would come within the meaning of Order XXXII, rule 7. Therefore, I agree with what has been said by the learned Chief Justice. I may also add that there does not seem to me to be any conflict between the decisions referred to in the referring judgments, in *Mahadev Balkrishna Kelkar v. Krishnabai* (1) and *Vithaldas v. Dattaram* (2). In the first case the minor was a defendant and his guardian had agreed to judgment against him, while in the latter the only agreement on the record was the agreement to refer which was made, as in this case, at a time when no suit was in existence. *Mahadev Balkrishna Kelkar v. Krishnabai* (1) was referred to in the argument and the learned Judges evidently considered that it did not cover the case before them.

SHAH, J.—I agree with the learned Chief Justice. I only desire to add that the question referred to us is rather in a general form, and that my answer must be taken to be limited to the question read with reference to the undisputed facts of the case.

Reference answered.

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PATNA HIGH COURT.

APPEAL FROM ORIGINAL ORDER NO. 10 OF 1917.

August, 9, 1918.

Present:—Mr. Justice Jwala Prasad and Mr. Justice Coutts.

B. KESHAWESARINDRA SAHI—

APPELLANT.

versus

Rani DEBENDRA BALA DASSI—

RESPONDENT.

Transfer of Property Act (IV of 1882), ss. 88, 89—Civil Procedure Code (Act V of 1908), O. XXXII, r. 3, O. XXXIV, r. 5—Limitation Act (IX of 1908), Sch. I, Art. 18—Mortgage suit—Preliminary decree—Order absolute under section 89, Transfer of Property Act after 1st January 1909, validity of—Execution of decree—Estoppel—Objection not taken in previous proceedings, whether can be taken in subsequent proceeding—Application asking for sale of different properties, whether in continuance of previous application—Mistake in entering date of decree, whether material defect—Minor judgment-debtor—Guardian, appointment of—Formal order, absence of, effect of—Sale, setting aside of—Limitation for execution, commencement of.

Where before the coming into force of the Civil Procedure Code of 1908, a preliminary decree in a mortgage suit had been obtained under section 88 of the Transfer of Property Act, and the judgment-debtor having made default in payment of the decretal amount, an application for an order absolute under section 89 of the Act had been made, and notice served on the judgment-debtor:

Held, (1) that the proceedings for order absolute were pending proceedings and, were not, therefore, under section 6 of the General Clauses Act, affected by the repeal of section 89 of the Transfer of Property Act; [p. 249, col. 1.]

(2) that, therefore, the decree to be executed was the preliminary decree made absolute by the order of the Court, and that the proceedings being under section 89 of the Transfer of Property Act no final decree was necessary. [p. 249, col. 1.]

Where an order absolute for the sale of mortgaged properties was made under section 89 of the Transfer of Property Act during the lifetime of the mortgagor judgment-debtor and with notice to him and no objection was taken by him, it is not open to his legal representative to question the validity of the order made in execution proceedings. [p. 250, col. 1.]

Where several successive applications for execution of a decree are admitted and orders are passed thereon by a competent Court, without any objection being taken by the judgment-debtor regarding the validity of the decree, it is not open to him in a subsequent execution proceeding in respect of the same decree to contend that there is in fact no decree which can be executed. [p. 250, col. 2.]

Where in an execution proceeding the Court by its action has given its sanction to the appearance of a person as guardian of a minor judgment-debtor and that person has so appeared and acted on behalf of the minor, the absence of a formal order of appointment under Order XXXII, rule 3, of the Civil Procedure Code, is not fatal to the proceedings and the minor is bound by them. [p. 253, col. 1.]

A decree-holder is entitled to treat an application for execution of a decree as in continuation of a previous application even when he wants to proceed to sell different properties. [p. 255, col. 2.]

An execution proceeding can only be vitiated by material defects. [p. 256, col. 1.]

A mistake in entering the date of the decree in an application for execution is not a material defect so as to vitiate the proceedings. [p. 254, col. 2.]

Where an execution sale is set aside on account of the fraud of one of the judgment-debtors in collusion with the auction-purchaser, the decree-holder has, under Article 181 of Schedule I of the Limitation Act, three years from the date of the setting aside of the sale within which to execute the decree. [p. 257, col. 1.]

Appeal against an order of the Subordinate Judge, Chapra.

Messrs. Syed Hasan Imam, Rajendra Prasad and Ambica Prasad Upadhaya, for the Appellant

Sir Rash. Behari Ghose, Messrs. Purnendu Narayan Sinha, Shorashi Charan Mitter and Naresk Chandra Singh, for the Respondent.

JUDGMENT—This is an appeal against an order of the Subordinate Judge of Chapra rejecting a petition of objection filed under section 47 of the Code of Civil Procedure in an execution case. The following are shortly the facts of the case:—

On the 29th August 1902 one Ramsunder Sahi, who was commonly known as the Lal Sahab of Manjha, borrowed Rs. 3,40,000 from the estate of Kumar Sirish Chandra Sinha of Paikpara near Calcutta by mortgaging his estate. At that time the Paikpara estate was in the hands of a Receiver, Mr. Mitter. On the 6th November 1902 Kumar Sirish Chandra Sinha died leaving a Will, which had been executed by him on the 18th June 1902. By this Will his mother, Rani Devendra Balla Dassi and Kumar Satish Chandra Sinha were appointed executors. On the 24th July 1903 the executors applied for probate of the Will but the Receiver continued in possession. On the 7th April 1904 Mr. Mitter was discharged from the Receivership and one Mr. Halder was appointed. On the 13th September 1907 Mr. Halder sued on the mortgage. On the 26th May 1908 he obtained a preliminary decree. On 1st December 1908 he applied, under section 89 of the Transfer of Property Act, for an order absolute for sale of the mortgaged property. The order absolute was passed on the 2nd January 1909 and on the 27th January 1909 the

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first application for execution was filed. This was registered as Case No. 14 of 1909. On the 18th February 1909 a notice under Order XXI, rule 66, of the Code of Civil Procedure was served and received by the Am-Mukhtear of the judgment debtor. Subsequently on the 22nd February 1909 the decree-holder asked for time to make substitution in place of Lal Sahab, the judgment-debtor who had died. Time was allowed and on the 5th March 1909 the decree-holder applied to substitute Hira Sahab, the brother of Lal Sahab deceased. The order of substitution was made on the 13th March 1909 and on the same date a notice was ordered to be issued to Hira Sahab under Order XXI, rule 66. It was then discovered that Lal Sahab had left two Wills, one in favour of Pertap Sahi, minor son of Sheo Pertap Sahi, and another in favour of Keshwa Sevendra Sahi, minor son of Hira Sahab, and that probate of both Wills had been applied for. The decree-holder, therefore, asked for substitution of both these minors and their fathers. Substitution was made but no guardian was appointed for the minors, and again notices under Order XXI, rule 22, were ordered to issue. These notices were served and subsequently notices were issued under Order XXI, rule 66. Hira Sahab and his son did not appear. On the 6th August 1909 the Receiver of the judgment-debtor's estate made a payment of Rs. 6,039 to the decree-holder and on 21st August 1909 Sheo Pertap Sahi objected to the valuation. A miscellaneous case was started and the proceedings in the execution case were stayed until the hearing of this objection. On the 9th October 1909 the objection petition was dismissed and the execution case was also disposed of, another petition being ordered to be filed. The matter of the Will was amicably settled and probate was ordered by the District Judge to be granted to Hira Sahab as guardian of the minor appellant on 28th September 1909, but it was never taken out.

On the 15th November 1909 a second application for execution was made by the Receiver of the decree-holder's estate. The application was made against Hira Sahab for himself and as guardian of his minor son, but no guardian was actually appoint-

ed by the Court. On the 20th November 1909 there was an order for issue of notices under Order XXI, rule 66, and on the 1st December 1909 an application was made by the decree-holder that Rs. 2,000 had been paid by the Receiver of the judgment-debtor's estate. The sale proclamation was then issued and the 7th February 1910 was fixed for the sale. Meanwhile Mr. Halder died and an application was made on behalf of the decree-holder for time to make substitution. Hira Sahab objected to time being granted, and eventually the following order was passed by the Court:—"The present case should be disposed of, leaving it to the legal representative to make another application for execution."

By this time another Receiver Mr. Mozumdar had been appointed and on the 18th March 1910 he made another, the third, application for execution against Hira Sahab for self and as guardian of the minor, which was registered as Case No. 44 of 1910. Again no guardian was appointed. The usual notices were served and the 2nd May 1910 was fixed as the date for the sale. Before the date fixed for the sale the decree-holder asked for permission to bid. This was granted, but at the same time Hira Sahab who had appeared on his own behalf filed a petition of objection to the execution proceedings on the ground that there was a mistake in the list of properties. The decree-holder asked to be allowed to amend the execution petition, but this was refused and on the 28th May 1910 the execution application was dismissed, the decree-holder being directed to make a fresh application.

On the 6th August 1910 Mr. Mozumdar made the fourth application for execution, which was registered as Case No. 107 of 1910. Again no application was made for the appointment of a guardian and no guardian was appointed by the Court. The 17th November 1910 was fixed for the sale, but on that date Hira Sahab filed an objection under section 47 of the Code of Civil Procedure and the execution case was adjourned *sine die*. The decree-holder then made an application, stating that the Receiver of Lal Sahab's estate had paid in Rs. 5,000 on the 22nd November 1910 on account of the decree, and on the 7th

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January 1910 the execution case was disposed of. The miscellaneous case was taken up and disposed of on 29th May 1911.

On the 14th June 1911 Mr. Mozumdar made the fifth application for execution, which was registered as No. 118 of 1911 and a date was fixed for the return of the notices under Order XXI, rule 66, but on that date the minor filed an objection under section 47 of the Code of Civil Procedure through Hira Sahab, his father, and his guardian objected to himself (Hira Sahab) being made a party. This application was allowed and on the same date the execution case was dismissed. An appeal was filed to the High Court against the order dismissing the execution case and it was ordered to be revived and proceeded with. The record was received back in the lower Court on the 16th January 1912 and the 9th March 1912 was fixed for hearing the objection. The objection was disallowed and the 3rd June 1912 was fixed for the sale. Subsequently the decree-holder certified payment of Rs. 4,435. The execution case was then taken up and the sale took place on the 11th June 1912, the properties being purchased by the Maharaja of Hathwa. There was an application to set aside the sale, which was rejected. An appeal was preferred to the High Court and the order of rejection was set aside. The case was then re-heard by the Subordinate Judge, who set aside the sale on the 31st May 1916.

On the 11th July 1916 the 6th application for execution was presented. This application was presented by Rani Devendra Balla Dassi, who is the executrix of the estate of Kumar Sirish Chandra Sinha. She stated that the persons against whom the decree was sought to be executed were "Babu Keshavendra Sahi, minor son of Babu Hari Harendra Sahi *alias* Hira Sahab deceased, as the sole legatee under the Will of the original mortgagor judgment-debtor, Babu Shaym Sevendra Sahi *alias* Lal Sahab deceased (of which Will probate was ordered to issue to the said Hira Sahab but not actually issued or taken out) and also as one of the heirs of his father, the said Babu Harendra Sahi *alias* Hira Sahab deceased, through his said minor's mother and guardian *Musammat* Dulhin Birja

Koer, who was appointed guardian by order of the High Court in Miscellaneous Appeal No. 311 of 1913." There are also two others against whom the application is directed, namely, the sons of Hira Sahab. An objection to this execution was made on behalf of Keshavendra Sahi under section 47 of the Code of Civil Procedure, in which the points urged before the Subordinate Judge were—

"(1) That there is no final mortgage decree and the decree stated in column 3 cannot be legally put into execution.

"(2) That the execution petition is not according to law.

"(3) That Rani Devendra Bala Dassi is not competent to file the application for execution, as she has not disclosed the right by which she makes the application and she has not taken any step to get herself substituted in place of the previous decree-holder.

"(4) That the present execution is barred by limitation as against the petitioner, he not having been made a party in the previous execution so that he is not bound by anything done or any order passed in those cases.

"(5) That Babu Chander Sekhar Prasad Singh, the Receiver of the mortgaged property, not being made a party to the execution case, cannot proceed.

"(6) That the decree-holder is not entitled to get the costs of the previous execution cases."

The learned Subordinate Judge by his judgment of the 9th December 1916 has overruled all the objections and directed the execution to proceed. The minor judgment-debtor has appealed to this Court.

The first point taken in appeal is that the execution proceedings are illegal, inasmuch as there is no final decree for the sale of the mortgaged properties as required by Order XXXIV, rule 5, of the Code of Civil Procedure, and hence there is no decree to be executed. The mortgage-decree was passed on the 25th of May 1908 under section 88 of the Transfer of Property Act (IV of 1882) directing the amount due on the mortgage bond with costs and interest to be paid within six months and "on default the mortgaged properties to be sold for the realisation of the sum,"

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The sum specified in the decree was not paid within the time fixed for payment and on the 1st December 1908 the decree-holder filed an application, praying that under the provisions of section 89 of the Transfer of Property Act an order absolute for the sale of the mortgaged properties might be made. On the same date the Court directed notice to issue on the judgment-debtor to show cause why the decree *nisi* should not be made absolute and fixed the 2nd January 1909 for disposal. This notice was served upon the judgment-debtor and on the 10th December 1908 the Court accepted the service as sufficient.

On the 2nd January 1909 the following order was passed on the order sheet in Mortgage Suit No. 235 of 1907: "Defendant is absent though served with a notice, which seems to have been received by his Mookhtear. The decree *nisi* will now be made absolute with costs." (P. 195.) The Court at the same date made the following endorsement in its own hand on the certified copy of the decree filed by the judgment-debtor. "Decree *nisi* made absolute, *vide* order dated 2nd January 1909, with costs, Rs. 2-8-9." This order was copied by a clerk of the Subordinate Judge's office on the original decree and signed by him: this copy does not bear the signature of the Court.

Mr. Hasan Imam on behalf of the judgment-debtor contends that as the present Code of Civil Procedure had come into force on the 1st January 1909 and as amongst other sections of the Transfer of Property Act, sections 88 and 89 were repealed (Schedule V of the Code of Civil Procedure) and in lieu of them Order XXXIV, rules 3 to 5, of the Civil Procedure Code were substituted, a decree absolute as required by Order XXXIV, rule 5, should have been prepared, and that without such a decree the property could not be sold. He urges that the amendment prescribed a new rule of procedure, and that, therefore, the Court had no jurisdiction to make an order under section 89 which had been repealed by the Code of Civil Procedure. Clause 2 of rule 5 requires that when the payment mentioned in a preliminary mortgage-decree under rule 4 is not made, the Court shall, on application made in that behalf by the plaintiff,

pass a decree that the mortgaged property or a sufficient part thereof be sold and that the proceeds of the sale be dealt with as mentioned in rule 4 of the same order. This rule of the Code of Civil Procedure then made this change, that while under section 89 of the Transfer of Property Act the Court was only required to pass an order absolute for sale of the mortgaged property, rule 5 requires the Court to make a "decree" for sale of the mortgaged property. This amendment was due to a conflict of decisions in the different High Courts as to whether the right of the decree holder to execute the decree accrued after the passing of the preliminary decree under section 88 of the Transfer of Property Act, or after an order absolute under section 89 of the Act and also as to whether the period of three years' limitation for the execution of the decree should run from the date of the preliminary decree or from the date of the order absolute. In support of his contention that a final decree is necessary in this case, Mr. Hasan Imam has relied on the case of *Mahant Krishna Dayal v. Sakina Bibi* (1). In that case the decree absolute under section 89 of the Transfer of Property Act was made long before the new Code of Civil Procedure came into force, the application for execution of the decree was made 12 years after the date of the decree, and it was held that the case was governed by the new Code of Civil Procedure, under section 48 of which the execution was barred. This case has no application to the present case.

It has not yet been definitely settled whether in cases in which the preliminary decree has been passed under section 88 of the Transfer of Property Act, an application made for a decree absolute is governed by the Civil Procedure Code or not. In the case of *Madhab Moni Dasi v. Pamela Lambert* (2) Mukherji, J., was of opinion that no final decree need be prepared under the new Code of Civil Procedure in order to enforce the preliminary decree passed under section 88 of the Transfer of Property Act. In *Amolak Chand*

(1) 34 Ind. Cas. 27; 1 P. L. J. 214; 20 C. W. N. 952; 2 P. L. W. 370.

(2) 6 Ind. Cas. 537; 37 C. 796; 15 C. W. N. 337; 12 C. L. J. 328.

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v. *Sharat Chandra* (3) Sir Lawrence Jenkins considered this case but thought that the point did not directly arise, and as there was no necessity to decide the point in the case before him the question was left open. It is also unnecessary for us in this case to consider the point, because the proceeding to make the decree absolute was pending at the time when the Code of Civil Procedure came into force, and the contention of Sir Rashbehari Ghose on behalf of the decree-holder respondent is that this being so and a notice of the application for an order under section 89 having been served on the original mortgagor, the repeal of section 89 does not affect the proceedings pending under that section. This contention is based on section 6 of the General Clauses Act and it appears to us that it must prevail.

In the case of *Mungul Pershad Dicit v. Griya Kant Lahiri* (4) their Lordships of the Judicial Committee held that an application for execution of a decree is an application in the suit in which the decree has been obtained, and that nothing contained in section 2 or in part 2 of Act IX of 1871 shall apply to suits instituted before the 1st April 1873, and hence nothing contained in Schedule II of that Act extended to an application for execution of a decree in a suit instituted before that date. In *Umesh Chunder Das v. Chunchun Ogha* (5) it was held that the mortgage was executed before the Transfer of Property Act came into force and when Regulation XVII of 1806 was in force and notice for foreclosure had been served in a proceeding under that Regulation, the proceeding already commenced was saved by section 6 of the General Clauses Consolidation Act I of 1858 and the new procedure would not apply. Mitter, J., further held that the mortgagee had obtained not only an inchoate right, that is, a mere chance which might be developed into a substantive right, but had acquired a vested right as a mortgagee, and, therefore, the new Transfer of Property Act would not destroy that right. This was also the view taken in the case

of *Baij Nath Pershad Narain Singh v. Moheswari Pershad Narain Singh* (6) and in *Mohabir Pershad Narain Singh v. Gungadhur Pershad Narain Singh* (7) and also in the case of *Madhab Moni Dasi v. Pamela Lambert* (2), where an application for an order absolute under section 89 of the Transfer of Property Act was made on the 9th September 1908 and was pending at the time when the new Code of Civil Procedure came into force.

In the present case the application to make the decree absolute was made before the new Civil Procedure Code came into force, and the right of the decree-holder to sell had already accrued by the default of the judgment debtor to pay the decretal amount within the time fixed in the preliminary decree of the 26th May 1905. The right to apply for the sale of the property had become vested in the decree-holder and notice of the application had been served. The order absolute was an order made in continuation of the mortgage suit which had been instituted before the Civil Procedure Code came into force and of the preliminary decree which had been made prior to the passing of that Act. The proceeding for order absolute was, therefore, a pending proceeding and was governed by the Transfer of Property Act. This being so, the decree which was to be executed was the preliminary decree of the 26th May 1908, which the order of the Court dated the 2nd January 1909 made absolute and the proceedings being under section 89 of the Transfer of Property Act, no final decree was necessary.

The learned Subordinate Judge, in his judgment on the application made to set aside the sale, has said that the order absolute passed in this case was in accordance with the usual practice in cases under section 89 of the Transfer of Property Act. There is no reason to doubt that this is so, and in fact it would appear that in cases under section 89 of the Transfer of Property Act even an order absolute is unnecessary and it is sufficient that there is an order for sale passed on an application of the decree-holder. This was the view in the cases quoted as

(3) 11 Ind. Cas. 943; 38 C. 913; 16 C. W. N. 49.

(4) 8 C. 51; 11 C. L. R. 113; 8 I. A. 123; 4 Sar. P. C. J. 249; 4 Ind. Dec. (N. S.) 32 (P. C.).

(5) 15 C. 357; 7 Ind. Dec. (N. S.) 822.

(6) 14 C. 451; 7 Ind. Dec. (N. S.) 300.

(7) 14 C. 599; 12 Ind. Jur. 26; 7 Ind. Dec. (N. S.) 397.

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Phul Chand Ram v. Nursingh Pershad Misser (8), *Gunindra Prosad v. Bainath Singh* (9), *Venkataram v. Ohinna Ramayya* (10) and *Appa Rao v. Krishna Ayyangar* (11).

Apart from this, however, it appears to us that it is not now open to the appellant to object to the decree which is sought to be executed. The order absolute for the sale of the properties was made during the lifetime of the original judgment-debtor, Lal Sahab, and with notice to him. No objection was taken by him and the appellant, as his legal representative, cannot, therefore, question the validity of the order made.

Further, the present application is the sixth application which has been made in these execution proceedings and in each of them notices have been served on Hira Sahab for himself and as guardian of the present appellant, and no objections have been taken either to the form of the decree or that a final decree was not prepared. Even in the petition of the minor through his mother as guardian, dated the 10th July 1912, the decree was not attacked. Before the Subordinate Judge, however, the matter was pressed and was decided against the appellant by his separate judgment of the 25th January 1916. No appeal was preferred against this order of the Subordinate Judge to the High Court. In the case of *Mungul Pershad Ditchit v. Grija Kant Lahiri* (4), which has been followed in a very long series of cases by all Courts in India, their Lordships of the Privy Council in a judgment which was delivered by Sir Barnes Peacock held that although the execution of a decree may have been actually barred by time, yet, if an order for such execution has been regularly made by a competent Court, having jurisdiction to try whether it was barred by time or not, such order, although erroneous, must, if unreversed, be treated as valid. This principle has also been recognised by their Lordships of the Judicial Committee in the case of *Malkarjun v. Narhari* (12), where a sale

had taken place after the notice having been wrongly served upon a person who was not the legal representative of the judgment-debtor, it was held that the sale was not a nullity and cannot be treated as invalid as the Court had power to decide wrongly as well as rightly. In the case of *Kamjas v. Sheo Prasad* (13) the notice of an application under section 89 was issued upon the mother as guardian of the minor judgment-debtor on the 21st November 1912, but was returned unserved as the mother was dead. It was held that so long as the order absolute subsists, it is enforceable and its operation cannot be impugned. If by any reason the order was defective, the remedy of the appellant was to get it set aside in accordance with law, but until it is set aside its validity cannot be questioned in execution proceedings. In the case of *Moti-Ram v. Banke Lal* (14) it was held that it was not open to the plaintiff to question the validity of a final decree made under Order XXXIV, rule 5, on the ground that that decree did not agree with the preliminary decree passed under rule 4 of that Order, when that objection was not taken by him when the final decree was passed. In the case of *Gunindra Prosad v. Bainath Singh* (9) it was held that a mortgagee is precluded from raising the objection that the sale of the mortgaged property in execution of the decree in the mortgage suit is invalid, by reason of the decree nisi in that suit not having been made absolute if such objection is not raised at an earlier stage of the proceedings. The reason for these decisions is that litigants should be compelled to make all objections that they may have to make at the earliest opportunity; they should not be allowed to make objections piecemeal and thus interminably prolong litigation. In the present case applications for execution were admitted and no objection was taken regarding the decree and orders having been regularly made on these applications by a competent Court—it is not now, in our opinion, open to the judgment-debtor to contend that there is in fact no decree which can be executed.

(8) 28 O. 73.

(9) 31 O. 370.

(10) 24 M. 695.

(11) 25 M. 537.

(12) 25 B. 337; 5 C. W. N. 10; 2 Bom. L. R. 927; 27 L. A. 216; 10 M. E. J. 363; 7 Sar. P. C. J. 739 (P. C.).

(13) 28 A. 163; 2 A. L. J. 640; A. W. N. (1905) 241.

(14) 47 Ind. Cas. 954; 16 A. L. J. 685.

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The next point which has been urged is that Rani Devendra Bala Dassi is not competent to file the application for execution. The first contention in regard to this is that by the Will of Sirish Chandra Sinha the Rani has no interest in the property, because his eldest son is the only surviving son and that the property went to him under the Will on his attaining the age of 18. This interpretation of the Will does not appeal to us, and there is not sufficient evidence to enable us to decide the question of the eldest son's age. It is also not at all certain that the youngest son is dead. Neither of these points was raised in the lower Court, nor were they enquired into, and it is unnecessary to go into them here, because the Rani was appointed executrix by the order of the High Court along with Suresh Chandra Sinha on the 24th July 1903. Suresh died on the 30th January 1908, and she became the sole executrix of the Will and the whole of the property vested in her. The High Court by its order of the 20th November 1912 discharged the Receiver of the estate and made it over to the Rani Devendra Bala Dassi as the sole executrix. On the 6th January 1913 she made an application to be substituted in place of Mr. P. K. Mozumdar as executrix of the estate and the Court accordingly ordered the substitution to be made. Under section 112 of the Probate and Administration Act a legatee cannot take until the executor has assented to the payment of the legacy. This the Rani has never done, so that not only was she competent to make this application but at the time it was made being executrix she was the only person who was entitled to execute the decree.

The next point which has been taken by Mr. Hasan Imam is in regard to limitation, and his first contention is that as it was not until August 1916 that Dulhin Birja Koer, the minor judgment-debtor's mother, was appointed guardian, that is, after the sixth execution application had been made, the minor was not represented until then and this being so, the application has been made more than three years from the date of the decree and is barred by limitation. The facts in regard to this matter are shortly as follows:—

During the pendency of the first execution proceeding the decree-holder discovered that Lal Saheb had died and that he had executed two Wills, one in favour of Sheo Pertap Sahi and the other in favour of the present appellant, Keshwarendra Sahi. On learning this he applied for substitution of the names of both the minors and their fathers for themselves and as guardian of their minor sons, stating that the present appellant was a minor and was under the guardianship of his father and lived with him. The Court ordered substitution to be made as prayed and notice under Order XXI, rule 22, to issue. The notice was as a matter of fact served, as was held by the Court in its order of the 17th April 1909. This execution application was disposed of and subsequently, when the dispute regarding the Wills had been settled in favour of Keshwarendra Sahi, the decree-holder made a second application for execution against Hira Saheb or himself and as guardian of his minor son, the present appellant. This course the decree-holder followed in all subsequent applications for execution including the fifth. In none of these cases, however, was there any order of the Court appointing Hira Saheb as guardian *ad litem*. The question for consideration is whether under these circumstances the minor was legally represented by Hira Saheb in the execution proceedings. There is no contention that Hira Saheb did not act as guardian of the minor throughout all these execution proceedings. It was held, however, by the Calcutta High Court in its order at pages 4, 5 and 6 of the paper-book that in the 5th execution proceeding he had filed the petitions dated the 4th and 11th June 1912, in which he applied only on behalf of himself without making the minor a party and that in these applications he acted against the interest of the minor. The facts regarding these petitions have been very fully discussed in the judgment of the learned Subordinate Judge dated the 15th January 1916/31st May 1916, in which he directed that the sale to the Maharaja of Huthwa should be set aside. The sale in that case was fixed for the 3rd June 1912. This date was a holiday, so the matter came up on the following day.

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On that date Hira Saheb applied to the Court on his own behalf, without making the minor a party, asking for time in order to enable the Maharani of Huthwa to get permission from the Calcutta High Court to purchase the property at the execution sale. This permission was obtained and on the 11th June 1912, which was the date of the adjournment of the sale, the sale actually took place. On that Hira Saheb again, without joining the minor, made a petition to the Court asking that the property which had been advertised in 48 lots should be sold in one lot. This was done and the property was purchased by the Maharajah of Huthwa. On the 10th July 1912 an application was made on behalf of the minor by his mother to have the sale set aside. In this application she stated that the minor was properly described to be under the guardianship of his father and she admitted that the father acted as guardian throughout. Her only charge against Hira Saheb was that he was not protecting the interest of the minor by applying for setting aside the sale. The reason suggested in her application was that the eldest son of Hira Saheb was married to the daughter of the Maharani of Hathwa, the auction-purchaser, but the marriage is said to have taken place in May 1910, long after several executions of the decree. This application by the minor's mother was refused, but on appeal to the High Court the order was set aside and the matter was referred to the Subordinate Judge for re-hearing. For reasons given in his judgment, the learned Subordinate Judge found that there had been irregularity in the matter of sale which had caused great loss to the minor, and, as has already been said, he set aside the sale. In his judgment he found that Hira Saheb acted against the interest of the minor in making the petitions of the 4th and 11th June 1912.

We are not satisfied that the learned Subordinate Judge has taken a correct view of this case and Hira Saheb's conduct is capable of an entirely different construction. A very simple explanation of Hira Saheb making the applications on the 4th and 11th June 1912 in his own name and not on behalf of the minor is that he did not wish to bind the minor. After the

sale when Hira Saheb found that the property was purchased by the Huthwa Raj at 13 times the net income, which was a breach of the arrangement that the purchase should have been 25 times the net income, Hira Saheb negotiated with the Huthwa Raj to give up the purchase and with the decree-holder to take a usufructuary mortgage of the entire property by advancing Rs. 44,000 over and above the amount of the decree. The Maharani of Huthwa, by a petition to the Court, agreed to give up her purchase. From this it would appear that Hira Saheb was really not acting against the interests of the minor. It is also significant that during the hearing of the application for setting aside the sale the allegation of fraud against Hira Saheb was admitted to be not proved, and the learned Subordinate Judge accepted this. We ourselves are of opinion that all that can be urged against Hira Saheb in regard to the sale matter is that he committed an error of judgment in making the applications of the 4th and 11th June 1912.

Even, however, if we accept that in regard to the sale Hira Saheb acted contrary to the interest of the minor, it has nowhere been suggested that before the 4th June 1912 he acted contrary to his interest, nor can it be suggested that he had any interest adverse to him. He applied for and obtained an order for probate of the Will of Lal Saheb for the minor. It is true that he did not actually take out the probate, probably because he did not wish to pay the fees which were heavy. By getting the grant of probate he renounced whatever interest he may have had as brother of Lal Saheb in the property, and throughout the execution proceedings he, as has been found by the learned Subordinate Judge, "fought tooth and nail to thwart the decree-holder." There can be no doubt on this point. Hira Saheb from time to time made various objections to the execution of the decree, all in the interest of the minor. In the 5th application he filed a petition on behalf of the minor dated the 8th July 1911, expressly stating that he had no interest in the estate of Lal Saheb, that the entire estate belonged to his minor son, and that he himself ought not to be made a party to the execution proceedings. The Court allowed the petition and on

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appeal being made to the High Court by the decree holder Hira Saheb appeared on behalf of the minor and contested that appeal. Taking the worst view of the case, therefore, up to the 4th June 1912 Hira Saheb not only had no adverse interest to the minor but he was doing everything in his power to assist the minor in resisting the claims of the decree-holder. Moreover, Hira Saheb was the obvious guardian of the minor, being not only his father but his executor by implication under the Will. It is true that Hira Saheb was never appointed guardian *ad litem* by the Court and that under the Code of Civil Procedure the Court is bound to appoint a proper person to act on behalf of a minor, but it has been held in a large number of cases that, although no formal appointment has been made, where the Court by its action has given its sanction to the appearance of a person as a guardian, the absence of a formal order of appointment is not necessarily fatal to the proceedings. This was the view taken in the following cases, *Midnapore Zemindari Company v. Gobinda Mahto* (15), *Krishna Pershad Singh v. Gosta Behari Kundu* (16), and by their Lordships of the Privy Council in the cases of *Hari Saran Moitra v. Bhubaneswari Debi* (17) and *Wakian v. Banke Behari Pershad Singh* (18). In this last case in which the law has been very fully discussed, their Lordships of the Privy Council set aside a decree of the Full Bench of the Calcutta High Court reported as *Suresh Chander Wum Chowdhury v. Jagat Chunder Deb Chowdhurani* (19). Mr. Hasan Imam for the respondent has in his argument referred to the judgment of the Calcutta High Court at pages 4, 5, and 6 of the paper-book, by which the matter of setting aside the sale of the 11th April 1916 was remanded to the learned Subordinate Judge for further hearing. In that judgment the learned Judges said that the minor was not represented in the petition of the 4th and 11th of June 1912, and they made some further remarks which might suggest that they held that the minor had not been repre-

sented in the execution proceedings at all. This cannot be so, however, because if they had intended to hold that the minor was not represented in the execution proceedings at all, the sale would have been void so far as the minor was concerned and they would not have remanded the case for re-hearing. It is, therefore, clear that there is no finding of the learned Judges in that case that the minor was not represented in the execution proceedings. All that they intended to hold was that he was not represented in the applications of the 4th and 11th June 1912. Further, Mr. Hasan Imam has relied in support of his proposition that the minor was not represented on the cases reported as *Rashid-un-nisa v. Muhammad Ismail Khan* (20), *Hanuman Prasad v. Muhammad Ishaq* (21), *Partab Singh v. Bhabuti Singh* (22), *Singaravelu Pillai v. Murugesu Pillai* (23) and *Purna Ohandra Kumar v. Bejoy Chand* (24). In the case reported as *Rashid-un-Nisa v. Muhammad Ismail Khan* (20), above referred to, a married woman was acting as guardian without the appointment of the Court. As a married woman was at that time incompetent to represent a minor, the case has no bearing on the present case. In the cases of *Hanuman Prasad v. Muhammad Ishaq* (21), *Partab Singh v. Bhabuti Singh* (22) and *Singaravelu Pillai v. Murugesu Pillai* (23), above referred to, the guardian who acted had an adverse interest to the minor and acted adversely to the interest of the minor. In the case of *Purna Ohandra Kumar v. Bejoy Chand* (24) their Lordships held that the minor plaintiff, who was not properly represented in the suit, would be bound by the decree if he had any interest in the Patni during the period for which the rent decree was obtained and in order to ascertain that, their Lordships remanded the case to the Court below. These cases are clearly distinguishable from this case and from the case

(15) 8 C. L. J. 31.
 (16) 5 C. L. J. 434.
 (17) 16 C. 40; 15 I. A. 195; 12 Ind. Jur. 373; 5 Sar. P. C. J. 198; 8 Ind. Dec. (N. S.) 27.
 (18) 30 C. 1021; 30 I. A. 182; 7 C. W. N. 774; 5 Bom. L. R. 822; 8 Sar. P. C. J. 512 (P. C.).
 (19) 14 C. 204; 7 Ind. Dec. (N. S.) 135.

(20) 3 Ind. Cas. 864; 31 A. 572; 13 C. W. N. 1182; 10 C. L. J. 318; 6 A. L. J. 822; 11 Bom. L. R. 1225; 6 M. L. T. 280; 19 M. L. J. 631; 36 I. A. 168 (P. C.).

(21) 28 A. 137; A. W. N. (1906) 229; 2 A. L. J. 615.

(22) 21 Ind. Cas. 288; 35 A. 487; 17 C. W. N. 1165; 25 M. L. J. 492; 11 A. L. J. 901; (1913) M. W. N. 785; 14 M. L. T. 299; 16 O. C. 247; 18 C. L. J. 384; 16 Bom. L. R. 1001; 40 I. A. 182 (P. C.).

(23) 12 Ind. Cas. 69.

(24) 18 Ind. Cas. 559; 17 C. W. N. 549; 18 C. L. J. 18.

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reported as *Walian v. Banke Behari Pershad Singh* (18), in which the principles which must govern the present case are laid down. The minor was, therefore, properly represented by his father certainly up till the date of the application made on the 4th June 1912 and in our opinion throughout the proceedings, and the omission of a formal order to appoint him as such under Order XXXII of the Code of Civil Procedure will not vitiate these execution proceedings by which the minor is, therefore, bound, particularly as it is not disputed that the minor appellant, as the representative of the mortgagor, is liable for the mortgage-decree.

Apart from this, however, on the 8th February 1915 during the pendency of the 5th execution case the High Court directed that the mother should be appointed guardian of the minor and she was allowed to prosecute the application to set aside the sale on his behalf. Subsequently a formal application was made to the Court and she was formally appointed guardian in August 1916 in the present execution. If then there was any defect in the representation of the minor, it was made good as soon as his mother was appointed guardian, and this appointment must be held to relate back to the date of the 5th application for execution made in June 1912. That application itself was within three years of the date of the decree. The minor was, therefore, properly represented and the execution was taken out within time. This was the view taken in *Khem Karan v. Hardayal* (25), *Rup Chand v. Dasodha* (26), *Peary Mohan v. Narendra Nath* (27), *Jivat Dube v. Kali Oharan Ram* (28) and *Ohhayunnessa Bibi v. Kazi Basirar Rahman* (29). There are numerous other cases on this point to which it is unnecessary to refer.

The next point urged is that the applications for execution are not made in accordance with law and that the last application is not made in continuation of the

(25) 4 A. 37; A. W. N. (1881) 129; 6 Ind. Jur. 382; 2 Ind. Dec. (N. S.) 667.

(26) 30 A. 65; A. W. N. (1907) 290; 3 M. L. T. 58; 4 A. L. J. 343 n.

(27) 5 Ind. Cas. 404; 37 C. 229; 14 C. W. N. 261; 7 A. L. J. 125; 7 M. L. T. 63; 11 C. L. J. 220; 12 Bom. L. R. 257; 20 M. L. J. 171; 37 I. A. 27 (P. C.).

(28) 20 A. 478; A. W. N. (1898) 128; 9 Ind. Dec. (N. S.) 666.

(29) 5 Ind. Cas. 532; 37 C. 399; 11 C. L. J. 285.

previous applications. In support of the contention that the applications are not in accordance with law, Mr. Hasan Imam points to certain defects in drawing up the various applications for execution. The defects to which he refers are (1) that the correct date of the decree has not been entered; (2) that all payments which were made under the decree have not been mentioned in the applications; (3) that the properties mentioned in the different applications are not the same; and (4) that the parties are not the same. We are of opinion that there are no material defects in any of the execution applications and we are prepared to agree with the learned Subordinate Judge that the proceedings were all one continuous proceeding, but it is unnecessary to go into this question in detail because the 5th application for execution made on the 14th June 1911 was made within three years of the date of the decree, so that if there are no material defects in the 5th application or the last application and this last application is made in continuation of the 5th application, it is not barred by limitation. It is, therefore, only necessary to deal specifically with defects in so far as they relate to the 5th application for execution and the present application.

The first defect referred to is in regard to the date of the decree. The 5th application gives the date of the decree as the 26th May 1908, that is to say, the date of the preliminary decree. The argument that this date is incorrect has no force because, as we have already held, what was to be executed was the preliminary decree and there was no necessity for any final decree. Apart from this, however, even if there were a mistake in the date of the decree, it cannot be considered to be a material defect because there could be no doubt in the mind of the judgment debtor as to the intention of the decree-holder or as to what decree it was intended to execute. That a mistake in the date of the decree is not a material defect was held in *Jivat Dube v. Kali Oharan Ram* (28).

The next defect pointed out is in regard to non-entry of payments. The payments which had been made towards the decree are not entered at all in the 5th application, but the entry in column 7 is as follows :—

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"Rs. 4,65,535-5-9 besides interest which may be found due up to the date of sale according to the calculation of the office at the rate of six per cent. per annum."

The various payments were all noted in the registers and, as the learned Subordinate Judge has held, in preparing the account the office would certainly consider them in making the calculation and processes would issue for the amount arrived at on such calculation. The fact, therefore, that these payments were not mentioned in the application for execution was not a material point and could not possibly prejudicially affect any one. We, therefore, agree with the learned Subordinate Judge that the non-entry of previous payments was not a material irregularity which would be fatal to the application.

The third defect urged is that some of the properties mentioned in the former execution application are not identical with those in the present application. In the body of each of the execution petitions the decree-holder has expressly stated that the properties to be proceeded against are the mortgaged properties, and the schedules refer to these mortgaged properties. It is true that there are some apparent differences in the description of the properties as mentioned in the 5th application and the present application, but they are not material differences. Some of the villages mortgaged are not traceable and in respect of one of the properties the judgment-debtor had only a limited interest which on his death reverted to the Bettiah Raj. In respect of these properties the decree-holder has made an application, dated the 22nd July 1917, that she does not want to proceed against them. As regards one property Godna Masehri, it is described as Masehri only. This is a trivial mistake. The Court below has overruled the objection in regard to the slight difference in the description of properties, on the ground that the mortgaged properties consist of 150 villages scattered over a large part of the District which bear many Touzi Numbers and the trivial mistakes referred to above have been rectified in the last application. The Subordinate Judge has held that the property as a whole sought to be sold is not different from the property mentioned in the previous applications. With this view we

agree. Further, we may add that no objection on the ground of difference of properties was taken in the petition of the 2nd September 1916, either generally or specifically. The objection was taken for the first time on the 21st December 1916 and on the authority of *Mungul Pershad Ditchi v. Grija Kant Lahiri* (4), to which we have already referred, we are of opinion that the appellant was precluded from taking this objection. The case of *Bihari Lal Misr v. Jagarnath Prasad* (30) also supports this view.

The last defect urged is that the names of the parties are not the same. The difference is that in the 5th execution, Hira Sahab being dead, his two sons, in addition to the minor appellant have been made parties. The minor appellant has been described as a legatee and as heir of Hira Sahab. The other two sons are described as his heirs. It has already been pointed out that probate of the Will of Lal Sahab has not yet been taken out. The decree-holder, therefore, made Hira Sahab as well as his minor son who was mentioned as a legatee in the Will parties to the execution proceedings and when Hira Sahab died, his sons were substituted in his place. It appears to us that this course adopted by the decree-holder was justified. He did not know who the heirs were and in order to make himself secure he brought all the sons of Hira Sahab on to the record. We are supported in this view by the case of *Akikunnissa Bibee v. Roop Lal Das* (31).

Lastly, it has been contended that the relief sought in the present application is different from the reliefs sought in the previous applications. There is no force in this contention. The decree-holder has throughout prayed for the sale of the mortgaged properties as required by Order XXI, rule 11 J—(ii). It was held in the case of *Bihari Lal Misr v. Jagarnath Prasad* (30) that the decree-holder was entitled to treat the application in continuation of a former one, even when he wanted to proceed to sell different properties. Mr. Hasan Imam has relied upon the case of *Virasami v. Athi* (32),

(30) 28 A. 651; A. W. N. (1906) 152; 3 A. L. J. 845.

(31) 25 O. 133 at p. 136; 13 Ind. Dec. (N. S.) 90.

(32) 7 M. 595; 8 Ind. Jur. 613; 2 Ind. Dec. (N. S.) 998.

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where the relief sought in the first application was for sale and in the subsequent application for the arrest of the judgment-debtor. The reliefs, therefore, were obviously different under Order XXI, rule 11J, sub-clauses (ii) and (iii), and this case has no application to the present case. None of the defects, then, pointed out to us either singly or taken as a whole are material defects, and without material defects the execution proceedings could not be vitiated. It is hardly necessary to refer to authorities on this point, but a reference may be made to the Full Bench case of *Gopal Chander Manna v. Gasain Das Kalay* (33), *Ramayyan v. Kadir Bacha Sahib* (34), *Mathura Prosad v. Anurago Koer* (35) and *Kalka Dube v. Bisheshar Patak* (36).

The applications for execution then are not vitiated by any material defect, they must, therefore, be held to have been made in accordance with law. The 6th application is, in our opinion, an application made in continuation of the 5th, and unless the execution applications previous to the 5th application were properly determined and legally disposed of, the present application for execution will also be in continuation of those former applications. A reference to the orders disposing of the several applications will show that none of these applications were disposed of in accordance with law. The decree-holder was not guilty of any fault or laches in the prosecution of the executions. She is, therefore, entitled to treat the present application in continuation of the former ones in spite of the order of the Court dismissing them. That the last application is in continuation of the 5th application is in accordance with the decision of *Ohamier, C. J.*, in a similar case, *Kaniz Zohra v. Syam Kisen* (37). In that case it was contended that the application was neither in form nor in fact an application made in continuation of the 2nd application and that it could not be held that the application was one made in continuation of the previous application, because that had in fact been dismissed. The learned Chief

Justice in that case remarked as follows :—

"It seems certain that the Legislature could not have intended that further execution of a decree should be prevented by the fact that execution proceedings remained pending in the Courts for many years. In the present case as the 3rd application was one asking the Court to sell the identical property which had been sold before, I think that we should hold that the application was one made in continuation of the previous application."

That case, in so far as this point is concerned, is indistinguishable from the present case and the view taken appears to us to represent the true intention of the Legislature. The same view was also taken in *Rameshwar Singh v. Rateshwar Singh* (38), *Qamar-ud-din Ahmad v. Jawahir Lal* (39). Mr. Hasan Imam has relied on the ruling reported as *Mahant Krishna Dayal v. Sakina Bibi* (1). In that case a decree was obtained in 1896 and was several times put in execution by the decree-holders. Several applications for execution were made, the last but one being made on the 6th of September 1912. It was dismissed for want of prosecution on the 5th of December 1912 and the last application, which was the one being dealt with, was made on the 18th of July 1913. It was held that the Civil Procedure Code of 1908 did not give a fresh starting point for limitation, and that the execution application was barred as being made more than 12 years from the date of the decree sought to be executed. It was further held that the application was not one made in continuation of the previous application, because the relief asked for was different from the relief claimed in the previous application and was directed against property which was not touched by the former application. It is also to be noted that the application of the 6th September 1912 was dismissed for want of prosecution and hence the subsequent application could not be in continuation of it; *Dhukiram Srimani v. Jogendra Ohandra Sen* (40). The aforesaid case in the Patna Law Journal has obviously no bearing on the present case. In the present case the last application

(33) 25 C. 594; 2 C. W. N. 556; 13 Ind. Dec. (N. S.) 392.

(34) 31 M. 68; 17 M. L. J. 596; 3 M. L. T. 254.

(35) 5 Ind. Cas. 579; 14 C. W. N. 481.

(36) 23 A. 162; A. W. N. (1901) 31.

(37) 39 Ind. Cas. 89; 2 P. L. J. 115; 1 P. L. W. 73; (1917) Pat. 133.

(38) 18 Ind. Cas. 841; 17 C. L. J. 125.

(39) 27 A. 334; 2 A. L. J. 397; 1 C. L. J. 381; 9 C. W. N. 601; 15 M. L. J. 258; 32 I. A. 102; 7 Bom. L. R. 433; 8 Sar. P. C. J. 810 (P. C.).

(40) 5 C. W. N. 347.

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is clearly an application made in continuation of the 5th application, it is by the same parties for the sale of the same properties, and apart from the fact that it is also in continuation of the earlier applications for execution, both this and the 5th application having been made in accordance with law, the 6th application is not barred by limitation. Even, however, if the 6th application were not in continuation of the 5th application it would not, in our opinion, be barred by limitation. The sale held in the course of the 5th application was set aside on the 30th May 1916 and the present application was made on the 11th July 1916. The right to execute the decree against the minor accrued to the decree-holder after the sale was set aside and the limitation would be three years from the date of the order setting aside the sale under Article 181 of the Limitation Act, as held in the case of *Raghunath Sahay Singh v. Lalji Singh* (41). It would, therefore, not matter whether the previous execution was defective or not, or whether the present application is in continuation of the 5th execution application or is a fresh application. In either case it would not be barred by limitation. In the case of *Abdul Khayar v. Reazuddin* (42) it was held that even when the sale was set aside in consequence of the decree-holder's fraud and where the fraud was practised by the decree-holder after his first application for execution, the time would run from the date of the setting aside of the sale. The present case is stronger, inasmuch as the sale was set aside not on account of any fraud committed by the decree-holder but on account of the fraud of one of the judgment-debtors in collusion with the auction-purchaser. The Court on the 31st May 1916 set aside the sale and on that very day it dismissed the execution case.

It is hardly necessary to notice another argument which has been placed before us in the case, that probate of the Will of Lal Sahab not having been taken out, the minor was not the legal representative of Lal Sahab under section 187 of the Indian Succession Act and Hira Sahab fully represented the estate throughout the exe-

cution proceedings. In this view of the case also the whole of the execution proceeding has been regular and the decree-holder can proceed against the present appellant after the death of Hira Sahab, which occurred less than three years before the date of the last application for execution.

In the result we dismiss this appeal with costs.

Appeal dismissed.

ODDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEALS NOS. 123 AND 148 OF 1916.

July 15, 1918.

Present:—Pandit Kanhaiya Lal, A. J. C., and Mr. Daniels, A. J. C.

Babu ADITYA PRASAD—DEFENDANT—
APPELLANT

versus

MUHAMMAD MUBARAK ALI SHAH—

PLAINTIFF—RESPONDENT.

Evidence Act (I of 1872), s. 92, proviso (6)—Oral evidence to prove relation of document to existing facts, admissibility of—Oudh Rent Act (XXII of 1886), s. 7A, applicability of—Ex-proprietary rights, relinquishment of, validity of—Proprietary rights, failure of consideration in respect of—Compensation, whether can be allowed—Transfer of Property Act (IV of 1882), s. 55—Vendor and purchaser—Vendor, whether entitled to claim interest on unpaid purchase-money.

Where an instrument is ambiguous or contains a description which is imperfect or inaccurate as to existing facts, evidence is receivable of all the circumstances surrounding the instrument for the purpose of throwing light on its interpretation, for it is by these, as by a lamp, that the instrument has to be read. [p. 260, col. 1.]

Where the language of a document is not clear and applies partly to one set of existing facts and partly to another, the rights possessed by the vendor may be helpful in determining to which set of facts the description in the sale-deed was intended to apply. [p. 260, col. 1.]

The prohibition contained in section 7A of the Oudh Rent Act applies only to the sale of ex-proprietary rights or the relinquishment thereof for consideration. Where a person sells what he does not own, agreeing at the same time not to claim ex-proprietary rights therein, the vendee can claim compensation for the failure of the vendor to make good his proprietary title. [p. 261, col. 2.]

(41) 23 C. 397; 12 Ind. Dec. (N. S.) 264.

(42) 1 Ind. Cas. 341; 13 C. W. N. 521.

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Under section 55 of the Transfer of Property Act a vendor has a right to claim interest on the unpaid purchase-money, unless he has by his own conduct disentitled himself to it. [p. 261, col. 2.]

Appeal against the decree of the Subordinate Judge, Gonda, dated the 30th June 1916.

Messrs. A. P. Sen and J. K. Banerji, for the Appellant.

The Hon'ble Mr. Watir Hasan, Messrs. A. Shaw and Mahmud Beg, for the Respondent.

JUDGMENT.—These appeals arise out of a claim brought by the plaintiff, Mubarak Ali Shah, for the recovery of the unpaid portion of the purchase-money due to him with interest thereon under a sale effected by him in favour of Achambhit Lal, the father of the defendant, on the 3rd June 1905. The sale comprised a 5 annas 7 pies 4 *kirants* share in the village Lonawan Dargah, bearing Hadbast No. 668, with the hamlets and other lands appertaining thereto and included 20 *bighas* of *sir* and *khudkasht* lands, stated to have been held by the vendor. The sale was effected in lieu of Rs. 22,968, out of which Rs. 2,500 formed the consideration for the relinquishment by the vendor of his possession over the *sir* and *khudkasht* lands, or in other words, of such ex-proprietary or occupancy rights as he might acquire therein by virtue of the sale. With the exception of Rs. 11,885 left in deposit with the vendee for payment to the vendor at any time he might require it by instalments or otherwise before the end of August 1905, the rest of the consideration was received by the vendor. Out of the said sum of Rs. 11,885, Rs. 5,465-15-6 have since been admittedly received by the vendor. The dispute in these appeals relates only to the balance of Rs. 6,419-0-6 and the interest payable thereon.

It appears that after the execution of the said sale-deed two rival suits for pre-emption were filed, one by *Musammāt Ruqaiya Bibi* and the other by *Musammāt Latif-un-nisa*, both of whom were sisters of the vendor and also co-sharers in the village. They alleged that a portion of the consideration entered in the sale-deed was fictitious. The suit of *Musammāt Ruqaiya Bibi* ultimately failed, because it was originally filed in a wrong Court and

when filed again in the proper Court it had become barred by time. *Musammāt Latif-un-nisa* succeeded in getting a decree for pre-emption subject to the payment of Rs. 6,419-0-6 to the vendor, Mubarak Ali Shah, and the balance of Rs. 16,548-15-6 to the vendee (Exhibit 7). This decree was passed on the 4th February 1910. On the 2nd March 1910 *Musammāt Latif-un-nisa* paid Rs. 6,419-0-6 to the vendor out of Court. The balance was deposited in Court for payment to the vendee. These payments were not, however, considered to be an adequate compliance with the decree and her claim for pre-emption consequently failed.

Musammāt Latif-un-nisa then got a decree against Mubarak Ali Shah for the refund of the money which she had paid to him with interest thereon at 6 per cent. per annum. She realized the same from Mubarak Ali Shah on the 2nd March 1910. In the present suit Mubarak Ali Shah seeks to recover Rs. 6,419-0-6, being the balance of the purchase money payable to him, with interest thereon by the enforcement of his lien over the property sold. The main defence was that the vendee did not get possession over a 5 annas 7-pies 4-*kirants* share of the land comprised in Chak Gudar Shah, which, according to the defendant, formed part of the property sold, and that the vendor also failed to deliver possession over 20 acres of the *sir* area in their entirety, which he had agreed to sell. It is contended that in consequence of the failure of the plaintiff to place the vendee in possession of Chak Gudar Shah and the whole of the *sir* area, the vendee was entitled to compensation in respect of the same. It was further pleaded that Rs. 2,000 had been paid to the vendor, the receipt of which was acknowledged by him in the course of the suit for pre-emption filed by *Musammāt Latif-un-nisa*; but that plea is not now pressed.

The Court below found that the plaintiff had not agreed to sell any portion of the land comprised in Chak Gudar Shah. It held that the plaintiff sold to the father of the defendant only a 5 annas 7 pies 4 *kirants* share in the village Lonawan Dargah proper, on the representation that it, comprised, 20 acres of *sir* and *khudkasht*

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lands, and the defendant was entitled to Rs. 1,625 on account of compensation for the failure of the plaintiff to secure him in possession of the entire *sir* and *khudkasht* area agreed to be sold. It decreed the claim accordingly for Rs. 4,794-0-6 but allowed no interest on it. Both the parties appeal.

The first question for consideration is whether any portion of the land situated in Chak Gudar Shah was comprised in the sale. The sale-deed describes the property sold as a 5 annas 7 pies 4 *kirants* share in the village Lonawan Dargah, bearing Hadbast No. 668, together with all hamlets, lands, etc., appertaining to the same. It gives the boundaries of the village and further states that the sale shall include a 5 annas 7 pies 4 *kirants* share "without subtraction or reduction, in all *purwas*, hamlets and lands, etc., tanks, *pukhta* and *kham* wells, Dargah and mosque, etc., etc. along with income from presents, etc., together with village sites, *dih*, *dabar*, reeds, straw, fish, *jalkar*, *bankar*, *tinni*, *pasahi*, etc., etc., fruit bearing and non fruit bearing trees, and all *sayer* items, etc., *zemin-dari* rights, *parjawat*, *chaukidar* and *patwari* rates, houses of tenants, etc., etc., whatever there exists or may come to exist hereafter, and appertaining to the village Lonawan aforesaid, without exception to any right or thing." (Exhibit B 2.) It is admitted that the village Lonawan Dargah is divided into several Mahals, one of which is the Mahal in which the vendor owned a 5 annas 7 pies 6 *kirants* share. His father owned the entire 16 annas of that Mahal and though on his death in 1895 the name of the plaintiff alone was entered in the revenue papers in succession to him, the widows and the daughters of the deceased subsequently succeeded in obtaining their shares, leaving the plaintiff owner of only a 5 annas 7 pies 4 *kirants* share on the date of the above sale. His father also owned a 4-annas share in another Mahal, called Chak Gudar Shah, in respect of which a deed of trust was executed by him, dedicating the property for certain specific purposes. The former was ancestral property, the latter was obtained by him by purchase from Beni Madho. The revenue assessed on the former was Rs. 1,000 and that on the latter Rs. 125. There was no necessary

connection between the main village of Lonawan Dargah and this Chak, except that they were surveyed together and given a single *hadbast* number in the settlement records. There were separate *khewats* prepared in respect of the main village and the Chak area (Exhibits 23 and 24). The share-holders of the main village were not necessarily co-sharers of the Chak; and the shares too, where the co-sharers were common, were not the same. In other words, the village proper and the Chak were separate entities both for the purposes of the settlement records and the payment of revenue, though they formed separate parts for survey purposes of the same *hadbast* number. The hamlets and land referred to in the sale-deed were the hamlets and land appertaining to the village proper, that is, within the Mahal and not outside it. The sale-deed makes no reference to the Mahal known as Chak Gudar Shah, in which the plaintiff holds no proprietary share. The mention of the *hadbast* number is only a part of the general description and is by itself insufficient to establish that the vendee acquired any rights to the Chak by virtue of the sale. Being an independent Mahal, the Chak is in no way appurtenant to the village proper and there is nothing to show that the rest of the description of the share sold or the boundaries given in the sale-deed cover it.

Section 92, proviso 6, of the Evidence Act (I of 1872), lays down that any fact may be proved which shows in what manner the language of a document is related to existing facts. In *Balkishen Das v. W. F. Legge* (1) their Lordships of the Privy Council pointed out that while the intention of the parties to a deed could be gathered only from a consideration of the documents themselves, such extrinsic evidence of circumstances could be admitted as might be required to show the relation of the written language to the existing facts. In *Maung Kyin v. Ma Shwe La* (2) the view

(1) 22 A. 149; 4 O. W. N. 153; 2 Bom. L. R. 523; 27 I. A. 58; 7 Sar. P. C. J. 601; 9 Ind. Dec. (N. S.) 1130.

(2) 42 Ind. Cas. 642; 45 C. 320; 15 A. L. J. 825; 33 M. L. J. 643; 3 P. L. W. 185; 6 L. W. 777; 22 C. W. N. 257; 23 M. L. T. 36; 27 C. L. J. 175; 20 Bom. L. R. 278; (1918) M. W. N. 300; 9 L. B. R. 114; 11 Bur. L. T. 21; 44 I. A. 236 (P. C.).

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taken was by no means different, for all that their Lordships of the Privy Council there say is that as against the parties to an instrument or their representatives, the reception of oral evidence should be confined to the ambit prescribed by section 92 of the Indian Evidence Act. In other words, where an instrument is ambiguous or contains a description which is imperfect or inaccurate as to existing facts, evidence is receivable of all the circumstances surrounding the instrument for the purpose of throwing light on its interpretation, for it is by these, as by a lamp, that an instrument has to be read. The rights possessed by the vendor may not afford a test for determining the nature of the interest which he intended to convey; but where the language of a document is not clear and applies partly to one set of existing facts and partly to another, the rights possessed by the vendor may be helpful in determining to which set of facts the description in the sale-deed was intended to apply. If the *haddast* number be taken by itself, it might be wide enough to include the entire area which it represents: but the description of the share conveyed and the nature of the interest held, read with the fact that Chak Gudar Shah was a separate revenue entity not owned by the vendor and that the extent of the share held by the vendor therein as a trustee was not the same, leave no room for doubt that the Chak could not have been intended to be included in the sale.

The subsequent conduct of the parties is not inconsistent with the above construction. It is admitted that the vendee never got possession of even an inch of land in Chak Gudar Shah. Yet we find him admitting in the application for mutation of names, filed by him soon after his purchase, that he had received possession over the whole of the property sold. In the suit filed by *Musammāt Latif-un-nisa* for pre-emption, the vendee similarly admitted that he owed some money to Mubarak Ali Shah in respect of the sale in question and that Mubarak Ali Shah had not infringed any of the conditions of the sale-deed (Exhibit 6). It is, however, significant that in the

written statement filed by the vendee and his son, the present defendant, in the previous suit instituted by the present plaintiff for the recovery of the unpaid portion of the purchase-money, there was no allegation that the land in Chak Gudar Shah was included in the sale, and no compensation was claimed for the failure of the vendor to deliver possession over it. We agree with the learned Subordinate Judge in thinking that the plea that Chak Gudar Shah was included in the sale is an afterthought and that at the time of the execution of the sale-deed the parties did not contemplate that it was part of the same. The vendee, moreover, admitted in his previous deposition of the 21st July 1908 that before purchasing the property he had ascertained its income by looking into the certified copies and private papers of Mubarak Ali Shah, that he had also enquired from the people of the village and learnt that the land was worth Rs. 25 per *bigha kham*, the total area being 1,300 or 1,400 *kacha bighas* (Exhibit 6). The defendant similarly admits in his deposition in the present suit that he had an opportunity of seeing the *khetāuni* and other papers relating to the property sold before agreeing to the purchase. It is unlikely in the circumstances that the vendee or the defendant would have omitted to make an explicit mention of Chak Gudar Shah, otherwise known as Mahal Mazhar Husain, in the sale-deed or omitted to take possession of it, if it was included. In a suit filed by *Musammāt Ruqaiya Bibi* against Mubarak Ali Shah in 1901 for the recovery of possession of her share of the property left by her father, one of the matters in dispute was whether Chak Gudar Shah was *wāqf* property. The defendant appeared as a Pleader in that case for *Musammāt Ruqaiya Bibi* and argued that it was not *wāqf* (Exhibits 21 and 22). He could not, therefore, have been unaware of the existence of the Chak or of the nature of the rights which Mubarak Ali Shah held therein. His failure to take possession of Chak Gudar Shah for more than 11 years subsequent to the sale is inexplicable, except on the hypothesis that he treated the Chak as excluded from the sale.

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The next question for consideration is whether the plaintiff sold the entire 20 *bighas* of *sir* and *khudkasht* lands specified in the sale deed or only a proportionate share therein and whether the defendant is entitled to claim any compensation for the failure of the plaintiff to secure him in possession of more than a proportionate share. The terms of the sale-deed on this point are clear and specific. The sale purports to convey the entire 20 *bighas*, specifying the numbers borne by them; and the application for mutation filed by the plaintiff in pursuance thereof says the same (Exhibits B 3 and B-5). The plaintiff apparently treated them as belonging exclusively to him and as he was not able to secure possession of more than a 5 annas 7 pies 16 *kirants* share of the same, the defendant is entitled to claim compensation for the portion of which he was deprived. In the sale-deed the vendor is stated to have received from the vendee Rs. 2,500 on account of *sir* and *khudkasht* lands, the right to cultivate which the vendor agreed to relinquish. There is a further covenant that if the vendor fails to put the vendee in possession thereof he shall be liable to pay damages at the rate of Rs. 3 per *bigha kham* or that if he claimed any *sir* or *khudkasht* land and any right of his, occupancy or ex-proprietary, in respect thereof was declared, he shall pay to the vendee the price of the same at the rate of Rs. 35 per *bigha kham*. That covenant cannot, however, be specifically enforced; and all that the vendee can claim is a reasonable compensation for that, of which he has been deprived. The Court below has rightly allowed the defendant a proportionate amount out of Rs. 2,500 on account of the loss suffered by him.

It is contended on behalf of the vendor that the agreement to relinquish ex-proprietary rights for consideration was in contravention of section 7A of the Oudh Rent Act (XXII of 1886), which was added by U. P. Act XII of 1901, and was, therefore, void. So far as the 10 annas 14 pies 16 *kirants* share of the *sir* and *khudkasht* lands are concerned, the sale was, however, a transfer of the alleged proprietary rights which the vendor claimed therein in addition to an agreement to give up possession and

relinquish any ex-proprietary rights, which might be acquired by reason of the transfer. Section 7A of the Oudh Rent Act does not cover that portion of the contract which relates to the sale of the proprietary rights, and the decisions in *Murlidhar v. Pem Raj* (3) and *Bhikham v. Ghasi Ram* (4) do not apply to the sale of such rights. As pointed out in *Ikramullah v. Moti Chand* (5), which was confirmed by their Lordships of the Privy Council in *Moti Chand v. Ikram Ullah Khan* (6), the prohibition applies only to the sale of ex-proprietary rights or the relinquishment thereof for consideration. Where a person sells what he does not own, agreeing at the same time not to claim ex-proprietary rights therein, the vendee can claim compensation for the failure of the vendor to make good his proprietary title.

The Court below has rightly allowed the defendant a set-off for Rs. 1,625, but has erred in refusing to allow the plaintiff interest on the balance of the purchase-money due to him. Under section 55 of the Transfer of Property Act, a vendor has a right to claim the unpaid purchase-money with interest; but he cannot claim any interest prior to the 2nd March 1910, because, as the Court below has pointed out, he has by his own conduct disentitled himself to it. By virtue of the sale he was to have received the money by instalments or otherwise, as he might require it by the end of August 1905. According to the accounts filed by the defendant, various items were paid to him from time to time up to the 16th November 1905 (Exhibit B 49). The two suits for pre-emption followed, in which the present plaintiff pleaded that the sale in favour of the father of the defendant was fictitious. It could not be reasonably expected from the present defendant, in the face of that statement of the vendor and the claims for pre-emption then pending, that he should

(3) 22 A. 205; A. W. N. (1900) 10; 9 Ind. Dec. (N. S.) 1167.

(4) 10 O. C. 243.

(5) 11 Ind. Cas. 17; 33 A. 695; 8 A. L. J. 826.

(6) 39 Ind. Cas. 454; 39 A. 173; 15 A. L. J. 150; 5 L. W. 383; 21 M. L. T. 267; 32 M. L. J. 383; 21 C. W. N. 616; 19 Bom. L. R. 433; 26 C. L. J. 24; (1917) M. W. N. 453 (P. C.).

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have made any further payments till the claims for pre-emption were finally decided. The claim of *Musammāt* Latif-un-nisa failed on the 7th February 1911 (Exhibit B-22) and the claim of *Musammāt* Ruqaiya Bibi had failed earlier. The plaintiff became entitled thereafter to claim the unpaid purchase-money with interest thereon from the 7th February 1911 at 6 per cent. per annum. He received the balance of the purchase-money now claimed by him from *Musammāt* Latif-un-nisa on the 2nd March 1910, but he had to refund the same with interest at the above rate (Exhibits 2 and 3). In other words, he did not receive the benefit of that payment and as from the date when the suits for pre-emption ended, he is entitled to be placed in the same position in which he would have been, had no payment been made.

The appeal of the defendant is, therefore, dismissed with costs and that of the plaintiff allowed with proportionate costs here and hitherto in so far that he will be entitled to interest at 6 per cent. per annum on the sum of Rs. 4,794-0-6 allowed to him by the Court below from the 7th February 1911 till the date of payment. A fresh decree will be prepared in terms of Order XXXIV, rule 4, of the Code of Civil Procedure, and six months' time will be allowed for payment. In other respects the decree passed by the Court below will be confirmed.

Decree modified.

PRIVY COUNCIL.

APPEAL FROM THE CALCUTTA HIGH COURT.

May 30, 1918.

Present:—Lord Buckmaster, Sir John Edge, Mr. Ameer Ali and Sir Walter Phillimore, Bart.

Maharaja RANJIT SINGH BAHADUR

—APPELLANT.

versus

MAHARAJ BAHADUR SINGH—

RESPONDENT.

Limitation Act (XV of 1877), Sch. II, Arts. 113, 144—Bengal Village Chaukidari Act (VI B. G. of 1870), s. 51—Chaukidari chakran lands, resumption of—Patnidar,

rights of—Suit for possession by patnidar—Limitation—'Contract,' meaning of.

The word "contract" primarily means a transaction which creates personal obligations, but it may, though less exactly, refer to transactions which create real rights. It is in this latter sense that it is used in section 51 of the Bengal Village Chaukidari Act and the rights thereby reserved to *patnidars* and others on the transfer to the *zemindar* of *chaukidari chakran* lands, comprehensively included in the word "contracts", are real rights, the enforcement of which is secured not by a suit for specific performance, but by a suit for possession. [p. 264, col. 2; p. 265, col. 1.]

Where, therefore, a *patnidar* sued the *zemindar* to recover possession of such lands:

Held, that the Article applicable to the suit was not Article 113 but Article 144 of Schedule II of the Limitation Act, 1877, and that the period of limitation accordingly was not three but twelve years. [p. 264, col. 2; p. 265, col. 1.]

Consolidated appeal from seven decrees of the Calcutta High Court, reversing those of the District Judge, Birbhum.

FACTS.—The respondent was *patnidar* or *dar patnidar* of villages included in seven *patni* grants from the appellant as *zemindar*. Government resumed the *chaukidari chakran* lands within these villages under Bengal Act VI of 1870 and transferred them to appellant. Respondent claimed the lands under section 51 and his right to possession being denied, brought seven suits in the Munsif's Court for possession. Appellant pleaded, *inter alia*, that the suits, which were instituted at periods from five to eight years after the transfers, were barred by limitation, the Article applicable according to him being Article 113, which allows three years only. This contention was accepted by the District Judge, who on appeal from the Munsif dismissed the suits, but the High Court (Chitty and Teunon, JJ.) reversed this decision and decreed the suits, holding that the Article applicable was Article 144, by which the period of limitation is 12 years from the date when possession became adverse.

Hence this appeal.

Mr. De Gruyther, K. C. (with him Mr. Eddis), for the Appellant.—The suits were for specific performance of contracts and were barred by Article 113. The respondent's rights arose solely out of covenants to be implied in the *patnis* and by virtue of section 51 of Bengal Act VI of 1870, which provides that the transfer shall be subject to rights of contract,

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Ranjit Singh v. Kali Dasi Debi (1). The decree in that case was to execute a conveyance on certain terms, not one for possession. Up to the date of the transfer from Government the *patnidar* had no right to the lands: he had only an implied right to get a conveyance on terms to be fixed. The contract was that the *zemindar* shall, if Government gives him the *chaukidari chakran* lands, execute a lease in the *patnidar's* favour. If there were no such contract, then the transfer to the *zemindar* was absolute and not subject to any obligation under section 51 of the Village Chaukidari Act (Bengal Act VI of 1870) [Reference was made to *Hari Narain Mozumdar v. Mukund Lal Mundal* (2).]

Mr. Upjohn, K. C. (with him Sir W. Garth), for the Respondent.—The argument against me rests on a strict construction of the word "contract" in section 51. I say the word is wider, like the Roman transaction it includes conveyance. The contract here is one under which a third person gets a right to land. Lord Parker in *Ranjit Singh v. Kali Dasi Debi* (1) laid down that the object of section 51 was to preserve the rights of third persons, not personal rights, but real rights—rights in the land. Here a real right was created when each *patni* was granted, long before the *Chaukidari Act*, which merely lays down that if other persons have real rights on the land, those rights shall prevail against the *zemindar*. There was no contract in the technical sense nor are we applying for performance of any, we are simply enforcing a real right on statutory terms. We ask for possession. Who ever heard of a decree for possession in a suit for specific performance before execution of any conveyance? Further, in all these cases judgments are given for mesne profits. There is nothing in the nature of specific performance here, there is no date fixed for the performance of the contract. Article 113 has no application, the proper Article is 144.

[LORD BUCKMASTER.—The decree is that you shall pay Rs. 58 till the rent is fixed by a future suit. Is that right?]

(1) 40 Ind. Cas. 981; 44 I. A. 117; 21 C. W. N. 609; 32 M. L. J. 565; 15 A. L. J. 390; 25 C. L. J. 499; 19 Bom. L. R. 462; 2 P. L. W. 1; (1917) M. W. N. 459; 6 L. W. 101; 44 C. 841; 22 M. L. T. 489 (P. C.).

(2) 4 C. W. N. 814.

We have to pay Rs. 58 anyhow and may have to pay more. It is like having an equitable right. A man's claim in equity is subject to terms to be imposed by the Court.

Mr. DeGruyther, K. C., replied.

JUDGMENT.

LORD BUCKMASTER.—This is a consolidated appeal against seven decrees of the High Court of Calcutta dated the 5th March 1913. These decrees were made in seven suits instituted by the respondent on the 10th and 20th September 1904 against the appellant and others claiming to recover possession and settlement of certain *chowkidari chakran* lands in villages of which the appellant is the *zemindar*. It is unnecessary to deal with the history and vicissitudes of the litigation, as the only question that now arises for determination is whether the suits were barred by the Indian Limitation Act, 1877. This Statute, as is well known, fixed different periods of limitation within which suits of different characters should be brought. The appellant contends that Article 113 of the Second Schedule of that Statute regulates the rights of the parties in the present case, while the respondent asserts that the period is fixed by Article 144 of the same Schedule. By the terms of the Schedule, Article 113 is stated to apply to a suit for specific performance of a contract, the period of limitation is fixed at three years and the time from which the period begins to run is stated to be the date fixed for the performance, or if no such date is fixed, the date when the plaintiff has notice that performance is refused. Article 144, on the other hand, relates to a suit for possession of immoveable property or any interest therein not thereby otherwise specially provided for, the period is twelve years, and the time from which the period begins to run is when the possession of the defendant becomes adverse to the plaintiff. If Article 113 applies the appellant is entitled to succeed. But it is admitted that he must fail if Article 144 prescribes the true period.

The circumstances out of which the action arose can be briefly stated. The respondent is the *patnidar* of half and *darpatnidar* of the other half of the village of Gopalpur, and is *patnidar* of six other villages, all of the said villages being

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within the *zemindari* of the appellant. Some of the lands in these villages included in the *patni* and the *darpatni* were originally held as *chowkidari chakran* lands, but in June 1898 these lands were all resumed by the Collector under the Bengal Act VI of 1870, and then transferred to the appellant. It is unnecessary to state the history of these lands, the circumstances attaching to their tenure and the respective rights of the parties when they were resumed by the Collector, for all these matters have been fully dealt with in a judgment of this Board in the case of *Ranjit Singh v. Kali Dasi Debi* (1). It was there decided that upon such resumption and transfer to the *zemindar* as is provided by the Bengal Act VI of 1870, the *patnidar* or the *darpatnidar* is entitled under section 51 to possession of the *chowkidari chakran* lands. That right depended upon the interpretation given by the Board to section 51 of Act VI of 1870. This section operates to transfer the land to the *zemindar*, "subject to all contracts theretofore made in respect of, under, or by virtue of, which any person other than the *zemindar* may have any right to any land, or portion of his estate or tenure, in the place in which such land may be situate."

Lord Parker in delivering the judgment of the Board, while commenting upon the fact that these words were not happily chosen, expressed the opinion that their obvious intention was to preserve the rights of third parties. He said:—

"They contemplate a case in which the village in which the resumed lands are situate has been made the subject of a contract by the *zemindar*, or those through whom he claims and that under this contract some third party may have interest in the lands resumed. They are wide enough to include, and in their Lordships' opinion do include, the rights of a *patnidar* under a *patni* grant by virtue of which the *patnidar* is lessee of the *zemindar's* interest in the lands resumed, and also the rights of a *darpatnidar* under a *darpatni* grant."

There is, therefore, no longer any question as to the right of the respondent to the lands, but the appellant's contention is that as the rights of the *patnidar* are reserved under the words referred to, they

must be assumed to be contractual rights, that consequently a suit to enforce those rights must be a suit for specific performance, and that the date from which the Statute begins to run must be the date of the grants to the *zemindar*. Their Lordships are unable to accede to this contention. It does not follow that because the rights originally arose by virtue of a grant declared to be a contract within the meaning of section 51 they are, therefore, rights, contractual in the sense that the contract by its terms creates and regulates the personal obligations and duties of the grantor in the circumstances that have arisen. At the time when the *patni* grants were made the resumption of the *chowkidari chakran* lands was not even contemplated, and the grant necessarily contains no reference whatever to the circumstances that would arise and the relationships that would exist in the event of the Government resuming possession. Upon resumption of such possession the rights of the *patnidar* were those conferred on him by the estate and interest created by the *patni* leases, and it was these rights that were kept alive by section 51 of Act VI of 1870 of the Bengal Council. It is only necessary to examine the words which prescribe the date from which the period begins to run in Article 113 of the Second Schedule of the Limitation Act to show the difficulties in the way of any contrary contention. This date, as has already been pointed out, is either the date fixed for performance or the date when the plaintiff has notice that performance has been refused, but no date whatever has been fixed for performance in such a case as the present, either by the original grant or by the terms of the Statute; nor has there been any refusal to perform a contract, for there was no unexecuted contract which had to be performed. A suit for specific performance is essentially a suit for enforcing a stipulated obligation relating to property. The word "contract" itself primarily means a transaction which creates personal obligations, but it may, though less exactly, refer to transactions which create real rights. It is in this latter sense that the word was used in section 51, and the rights thereby reserved to the

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patnidars, comprehensively included in the word "contracts," are real rights, the enforcement of which is secured not by a suit for specific performance, but by a suit for possession, and it is this which, in their Lordships' opinion, is the character of the suits in the present case.

From this it follows the period of limitation is that fixed by Article 144; consequently the judgment appealed from is in their Lordships' opinion correct, and they will humbly advise His Majesty that this appeal should be dismissed with costs.

Appeal dismissed.

Solicitors for the Appellant: Messrs. Downer and Johnson.

Solicitor for the Respondent: Mr. G. C. Han.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 109 OF 1916.

July 18, 1918.

Present:—Mr. Lindsay, J. C., and Pandit Kanhaiya Lal, A. J. C.

Raja MOHAMMAD ABUL HASAN KHAN

—PLAINTIFF—APPELLANT

versus

ISHWAR NATH AND OTHERS—DEFENDANTS
—RESPONDENTS.

Under-proprietary right in land—Dahiyak, cash—Birtdar's right to deduct dahiyak from rental, nature of.

A cash *dahiyak* is distinguishable from a *birt* right in the land entitling the *birtdar* to hold possession of the land and to deduct the *dahiyak* from its rental. The former may in a sense be an under-proprietary right but it is not an "under-proprietary right in the land," while the latter is an under-proprietary right in the land so held in possession. [p. 267, col. 2.]

Appeal against the decree of the subordinate Judge, Gonda, dated the 17th June 1916.

Mr. M. Aditya Prasad, for the Appellant.

The Hon'ble Pandit Gokaran Nath Misra, for the Respondents.

JUDGMENT.—The dispute in this case relates to Mahal Katauli Nain, which is a hamlet of the village Katauli and forms part of the Birwa Mahnon Estate. The plaintiff is the Taluqdar or owner of that

estate. The defendants claim an under-proprietary right in the said Mahal or hamlet. The plaintiff tried to eject them through the Revenue Court, treating them as tenants-at-will, but was unsuccessful.

The present suit was, therefore, filed by him for a declaration that the defendants had neither proprietary nor under-proprietary rights in the said hamlet or Mahal. The Court below dismissed the claim. So far as the claim of the plaintiff for a declaration that the defendants had no proprietary right therein is concerned, the plaintiff has really no cause of action, because the defendants never set up any proprietary right in the land in the said Mahal. The only question is whether they hold under-proprietary rights therein by virtue of the decree obtained by their predecessor-in-interest from the Settlement Court on the 28th August 1874, and whether anything had happened subsequently, which had the effect of detracting from or nullifying those rights.

On the 14th April 1874 Hari Pande, the predecessor-in-interest of the present defendants, filed an application in the Court of the Settlement Officer, Gonda, on behalf of himself and his co-sharers, stating that the village Katauli Nain was held by him and his ancestors by right of *birt zemindari* from a long time, that it had never been under *kham tahsil* or direct management of the superior proprietor and that he had all along been getting *dasaundh* till the death of Thakurain Sarfraz Kuar, when the Court of Wards took charge of the Birwa Mahnon Estate on behalf of her minor daughter, Thakurain Brijraj Kuar, and refused to allow him to have the same. He further stated that he was "in possession of all other rights" and prayed that a decree might be passed in his favour for *birt* rights in respect of that village (Exhibit A-1). The property claimed was described as the entire village Katauli Nain with the right of *siwai*, *dasaundh*, *sir*, *parjout* (services of *ryots*), etc., and other rights. The decree passed by the Settlement Officer on the 28th August 1874 gave further particulars as to the nature of the rights set up by the then claimant (Exhibit 1). It stated that the plaintiffs asked for a decree, declara-

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tory of their right to hold the whole village Katauli Nain as their *birt* on *haq dahiyak* terms, alleging that Duniapat, the ancestor of the then Taluqdar, had sold the village in *birt* to their ancestor, Nain Singh; that the *birt patra* had been lost in 1209 Fasli, corresponding with 1802 A. D., and asserting that they had held the village *pucca* continuously on *dahiyak* terms up to 1264 Fasli. It was then admitted that Hari Pande and his co-sharers were in possession of the village but had not enjoyed any *haq dasaundh* since the annexation. In the year 1274 Fasli or 1856-1857 A. D. following the annexation, the then Taluqdar apparently refused to allow Hari Pande and his co-sharers to deduct the *dasaundh* and gave them or their representatives certain leases, fixing the rent. In regard to those leases, the Settlement Officer observed: "As, however, they have held leases of the village since 1264 Fasli, their meaning may be that the *haq dasaundh* has been deducted from the fixed payment; it may be stated at once, that they produce no *wasilbakis* of a later date than 1264 Fasli and that therefore the receipt of *haq dasaundh*, unless it was given in the mode already described, cannot be satisfactorily established. As, however, they are in possession of the whole village *pucca*, there can be no possible objection to giving the plaintiffs a declaratory decree under section 15, if they can prove enjoyment of their alleged *birt* rights within limitation." He then proceeded to dispose of the objection that Duniapat had no right to grant a *birt*, holding that the said objection was not worth consideration and went on to say:—"The defendant further pleaded that the plaintiffs were not *birtias* at all, but were village residents who had long held the village as *thekadars*. The plaintiffs produced a great many *patras* and *wasilbakis*, some of these seemed newly written, but the defendant would not plead that they were forged; he said he would call the old *karindas* and abide by their evidence. If these papers are correct, the plaintiffs are shown to have been holding the village on *haq dahiyak* terms since 1214 Fasli; these witnesses corroborate the documentary evidence, and the plaintiffs are clearly entitled to a decree unless the defendant can bring any proof sufficient

to convince the Court that the documents filed are forged." He next discussed the oral evidence produced by the then Taluqdar which went to support the *wasilbakis* or list of collections and arrears filed by the claimants, and wound up by saying:—"The Court (therefore) in the complete absence of any proof that the papers filed by the plaintiffs are not genuine must conclude that they are so, and as they represent the plaintiffs to have regularly held the village on *haq dahiyak* terms, a decree must be given in their favour. In this Tahsil or at least in the Gonda Pargana it has therefore (*sic*) been held that by custom the *birtias* are not of right entitled to a lease, but they can only claim one-tenth of the *nikasi*. The defendant, however, has not set up this plea and, therefore, the Court will not disregard the long *pucca* holding of the plaintiffs." In the end he passed a decree "declaring that the plaintiffs are in possession of the village and that they are entitled to hold it as their *birt* on *haq dahiyak* terms," adding that they were of course then bound by "their present lease."

On the same date an order was sent to the Sadar Munsarim in the following terms:—"This case was taken up to day. Plaintiff and the general agent of the Court of Wards appeared. On the grounds recorded in the judgment in English it is ordered that a decree for possession of Katauli on the basis of *birt* rights be passed in favour of the plaintiff against the defendant. The plaintiff will take one-tenth of the gross rental on account of his rights and will pay the balance to the Taluqdar defendant" (Exhibit A 2).

Hari Pande and his co-sharers were not, however, recorded as under-proprietors during the old settlement. In the *wajib-ul arz* of the village Katauli it was stated that there were no under-proprietors in it (Exhibit 43). In the *khewat* register No. 5 prepared in 1304 Fasli in accordance with section 57 of the old Land Revenue Act (XVII of 1876) the present defendants, who had succeeded Hari Pande and his co-sharers, were recorded as holding the Mahal in lieu of 10 per cent. (Exhibit 44).

In the recent Settlement they were recorded as under-proprietors (Exhibit A-6)

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and on an application made by the father of the present Taluqdar for the assessment of rent under section 79 of the U. P. Land Revenue Act (III of 1931) rent was assessed on them as such, the parties having, it is said, agreed to the Court assessing the same (Exhibit A 12). The defendants have been paying the rent so assessed to the plaintiff, the superior proprietor, since; and the conduct of the plaintiff in treating them as tenants at-will liable to ejectment by notice and not even as lessees, holding under a decree or judicial decision, is to say the least disingenuous.

He sought in the present case to prove that during the first three or four years after the first Regular Settlement the hamlet in question was held *kham* by the Taluqdar and was thereafter given in *theka* to Thakur Ram and Krishna Prasad, who remained in possession for about 8 years. It is added that on the termination of their *theka* the hamlet was restored to the defendants or their ancestors, but the evidence produced by him in support of that statement was rightly disbelieved by the learned Subordinate Judge and the learned Counsel who appears for the plaintiff-appellant has made no attempt to contest his finding. The further evidence produced by him in support of his allegation that he collected the *sayer* income from the sale of mango harvest is equally unreliable, for the plaintiff's own witness, Nand Kishore, who was in the service of the Taluqdar, deposes that, so far as the hamlet of Katauli Nain was concerned, the *theka* of that hamlet included every *sayer* income such as fish, mango crop, jack fruit produce, *sidha* and the like and that the *thekadars* realized and enjoyed the entire *sayer* income and paid the Taluqdar only the fixed rent (O. P. 26). The *khataunis* on which reliance is placed on behalf of the plaintiff do not show that the *sayer* income was realized by the plaintiff on account of the land appertaining to the particular hamlet or Mahal now in question.

Nain Pande was the ancestor of the defendants and the fact that the hamlet or Mahal is connected with or goes by his income is not without its significance. The *birt* right, which the Settlement Officer conceded, was presumably the *birt* right which Hari Pande and his co-

sharers then claimed, namely, a *bai birt* or *birt* by right of purchase, for no other kind of *birt* right was asserted or set up. In fact the Settlement Officer pointed out that in the Tahsil in which the village in question was situated or at least in the Gonda Pargana it had been held that by custom the *birtias* were not as of right entitled to a lease but could claim only one tenth of the *nikasi*, and that no such custom had been set up by the then Taluqdar and the Court could not, therefore, disregard the long *pucca* holding of the claimants. In passing the decree the Settlement Officer had obviously in view the Record of Rights Circular No. 2 of 1861, paragraph 24 of which declared:—

"But the Chief Commissioner is clearly of opinion that *birtias* who were found in direct engagement with the State at annexation or who have uninterruptedly held whole village on the terms of their *pattas* under the Taluqdars, must be maintained in the full enjoyment of their rights in subordination to the Taluqdars. It is no argument that the Taluqdar may not realize more than ten per cent. above the Government demand. Such *birt* tenures must be considered an intermediate interest between the Taluqdar and the *ryot*; and, as such, entitled to be maintained."

The suggestion that the Settlement Officer only intended to grant a cash *dahiyak* or a *dahiyak* payable by deduction so long as the claimants remained in possession cannot, therefore, be sustained. A cash *dahiyak* is distinguishable from a *birt* right in the lard, entitling the *birtidar* to hold possession of the land and to deduct the *dahiyak* from its rental. The former, as pointed out in *Deputy Commissioner, Gonda v. Bhagwan* (1) and *Parmeshar, Dat v. Mohammad Abul Hasan Khan* (2), may be in a sense an under proprietary right, but it is not under proprietary right in the land, while the latter is an under proprietary right in the land so held in possession. In *Raja Muhammad Mumtaz Ali Khan v. Murad Bakhsh* (3) their Lordships of the Privy Council

(1) 2 Ind. Cas. 297; 12 O. C. 124.

(2) 13 Ind. Cas. 809; 14 O. C. 335.

(3) 34 I. A. 142; 10 O. C. 319; 11 C. W. N. 913; 6 C. L. J. 603; 17 M. L. J. 400; 4 A. L. J. 737; 2 M. L. T. 402; 29 A. 708 (P. C.).

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discussed the various kinds of *birt* tenures prevalent in Oudh, and pointed out that in Gonda the *bai birt* was spoken of as a *birt zemindari* and was an under-proprietary tenure. The lease referred to in the settlement decree is not forthcoming. The decree places no restriction of time on the right of the defendants to hold the village as *their birt*. The periodical revision of the rent is only an incident of an under-proprietary tenure or "intermediate interest between the Taluqdar and the *ryot*," spoken of in paragraph 24 of the Record of Rights Circular. The rent is under the present law liable to be revised at every Settlement, but before section 40 of the Oudh Land Revenue Act (XVII of 1876), which corresponds with section 79 of the present U. P. Land Revenue Act (III of 1901), was enacted, superior proprietors used to revise the under-proprietary rents more often. In stating that the then plaintiffs, while holding the village as *their birt* on *haq dahiya* terms, would be bound by their "present lease," all that the Settlement Officer appears to have meant was that the rent payable by the *birt*dars was settled by their "present lease" and did not require determination. That was the rent which the present defendants and their ancestors had been paying till the last Settlement, when it was revised.

The defendants are, in our opinion, clearly entitled to *birt* or under-proprietary rights in the village on *haq dahiya* terms by virtue of the above decree and to hold possession of the same by virtue of that right. Nothing has happened since to show that they or their ancestors had surrendered those rights. The construction placed by the Court below on the settlement decree is correct and is confirmed by the subsequent conduct of the predecessor-in-title of the plaintiff at the last Settlement.

The appeal fails and is dismissed with costs.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 45-B. OF 1917.

January 26, 1918.

Present :—Mr. Kotwal, Offg. A. J. C.

MADHORAO—PLAINTIFF—APPLICANT

versus

AMRIT RAO—DEFENDANT—

NON-APPLICANT.

Civil Procedure Code (Act V of 1908), s. 11—Res judicata—Decision of Subordinate Judge, whether res judicata in subsequent suit of Small Cause nature.

The decision of a Subordinate Judge in a previous suit is *res judicata* in a subsequent Small Cause suit between the same parties inasmuch as the inability of the Subordinate Judge to entertain a claim of a Small Cause nature arises not from incompetence but from the existence of another Court with a preferential jurisdiction. [p. 269, col. 1.]

Revision of the judgment passed by the Small Cause Court, Akola, in Suit No. 1884 of 1915, on the 4th November 1916.

Mr. G. L. Subhedar, for the Applicant.

The Hon'ble Sir Bipin Krishna Bose, for the Non-Applicant.

ORDER.—The defendant Amrit Rao had money dealings with the plaintiff Madhorao, and for the debts due on account of the money dealings he had executed three *rujus* in favour of the latter. These *rujus* were

	Rs.	a.	p.	Dated
1 for	3,397	8	0	26-2-1912.
2 "	262	0	0	21-8-1912.
3 "	300	0	0	28-10-1912.

The plaintiff had filed Suit No. 32 of 1915 in the Court of the Junior Sub-Judge, Akola, for Rs. 3,824 14 6 on the *ruju* for Rs. 3,397-8 0, having admitted a payment of Rs. 1,000. The defendant in that suit had pleaded three more payments of Rs. 1,000, Rs. 1,262 and Rs. 1,000, and had said that these four re-payments had been made on account of not only the *ruju* then sued upon but also of the two other *rujus* for Rs. 262 and Rs. 300. The first issue framed in that suit referred to the three additional payments pleaded by the defendant which had been denied by the plaintiff. The Sub-Judge found that all these three re-payments had been made in addition to the one admitted by the plaintiff. The plaintiff has now filed the present suit in the Small Cause Court, Akola, for Rs. 855-1-6 on the two *rujus* for Rs. 262 and Rs. 300. The defendant's plea in the present suit is substantially the same as in the suit before the Subordinate

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Judge. He claims that he has re-paid altogether Rs. 4,262 towards all the three *rujus*, and he admits that Rs. 107.12 0 are due to the plaintiff after receiving credit for the balance of Rs. 4,262 after deducting the amount due to the plaintiff on the *ruju* for Rs. 3,397-8-0. In both cases the point substantially raised is: what was the total amount paid to the plaintiff on account of the dealings in respect of which the three *rujus* were executed. This point was decided in defendant's favour by the Subordinate Judge, and the defendant pleads that it is now *res judicata*, and I think his contention is correct, provided the Sub-Judge was competent to decide the present claim. It is, however, urged for the plaintiff that the Sub-Judge was not competent to decide the present suit as he was not exercising the jurisdiction of a Small Cause Court. The reply to this is furnished by the judgment of Jenkins, C. J., in *Ghulappa v. Raghvendra* (1). It was there held, in a like case, that the inability of the Subordinate Judge to entertain a claim of a Small Cause Court nature arose not from incompetence but from the existence of another Court with preferential jurisdiction and the Subordinate Judge's decision was held to be *res judicata* with regard to the claim in the Small Cause Court. This application for revision is dismissed with costs.

Application dismissed.

(1) 28 B. 338 at p. 340; 6 Bom. L. R. 77.

OUDH JUDICIAL COMMISSIONER'S
COURT.

MISCELLANEOUS CIVIL APPEAL No. 22 OF 1918

AND

CIVIL REVISION No. 115 OF 1918.

August 23, 1918.

Present:—Mr. Stuart, A. J. C., and

Pandit Kanhaiya Lal, A. J. C.

SADESHWAR NARAIN *alias* NURUL-
ISLAM—DEFENDANT—APPELLANT

versus

QADIR BAKHSH AND OTHERS—

PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. X, r. 4 -

Personal attendance of parties, when to be ordered.

Before a legal order can be passed against a party directing him to appear in Court under the provisions of Order X, rule 4 of the Civil Procedure Code, it is necessary that the Court should find, in the first place, that there are material questions relating to the suit which must be answered either by such party or by his Pleader, and when such party has a Pleader, it is only when the Pleader is unable or refuses to answer those questions that the Court may direct the party to appear in person. [p. 269, col. 2.]

Appeal against the order of the Subordinate Judge, Lucknow, dated the 2nd May 1918.

The Hon'ble Mirza Sami-ul-lah Beg, Mr. Aditya Prasad and Babu Raja Prasad, for the Appellant.

Mr. Mohammad Fasih, for the Respondents.

JUDGMENT.—On an application filed by the plaintiffs-respondents to have an award filed and a decree passed in accordance therewith, the learned Subordinate Judge directed the defendant-appellant under the provisions of Order X, rule 4, of the Code of Civil Procedure to appear in person and answer certain questions. On his failure to appear in person and answer those questions, he pronounced judgment against him and directed the award to be filed and a decree passed in accordance therewith. Before a legal order can be passed against a party directing him to appear in Court under the provisions of Order X, rule 4, it is necessary that the Court should find, in the first place, that there are material questions relating to the suit which must be answered either by such party or by his Pleader, and when such party has a Pleader, it is only when the Pleader is unable or refuses to answer those questions that the Court, under the provisions of Order X, rule 4, may direct the party to appear in person. It does not appear what in the opinion of the learned Subordinate Judge were the material questions in this matter. But, even assuming that there were material questions, it is clear that the learned Subordinate Judge did not call upon the appellant's Pleader to answer them. Such being the case, there could be no failure on the part of the Pleader to answer the questions as he was never asked to answer them; and the order of the Subordinate Judge directing the appellant to attend the Court was, therefore, erroneous.

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We accept the appeal and the application for revision and send back the case to the learned Subordinate Judge to be restored to its original number and decided according to law. The cross-objections filed by the plaintiffs-respondents as to their costs are disallowed. The parties will pay their own costs in these proceedings in this Court.

Appeal accepted.

**MADRAS HIGH COURT.
FULL BENCH.**

SECOND CIVIL APPEAL No. 672 OF 1917.

July 23, 1918.

Present:—Sir John Wallis, Kt., Chief Justice,
Mr. Justice Oldfield and Mr. Justice
Seshagiri Aiyar.

MACHI RAJU VENKATARATNAM—
DEFENDANT No. 3—APPELLANT

versus

Sri Rajah VADREVU RANGANAYAK-
AMMA ZAMINDARINI GARU AND OTHERS
—PLAINTIFF AND DEFENDANTS NOS. 1 AND 2—
RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, rr. 58, 63—Limitation Act (IX of 1908), Sch. I, Art. 11—Refusal to investigate claim, whether order under r. 63—Order that claim be notified to bidders—Suit by claimant to establish title—Limitation applicable.

Where a Court purports to make an order under the proviso to Order XXI, rule 68, Civil Procedure Code, i.e., an order refusing to investigate, the order comes within the mischief of Order XXI, rule 63, Civil Procedure Code, and Article 11 of Schedule I of the Limitation Act. [p. 275, cols. 1 & 2; p. 276, col. 1.]

Narasimha Chetti v. Vijiapala Nainar, 27 Ind. Cas. 944; 2 L.W. 206 and *Ponnusami Pillai v. Samu Ammal*, 38 Ind. Cas. 937; 31 M.L.J. 247, followed.

An order on a claim petition which expresses no final judgment upon the right put forward but simply directs the sale after notifying the claim, is an order against the claimant and his suit to establish his title is governed by Article 11 of Schedule I of the Limitation Act. [p. 276, col. 1.]

Per *Seshagiri Aiyar, J.*—The practice of notifying claims to intending bidders is not warranted by anything contained in the Code of Civil Procedure. It often leads to the depreciation in value of the property to be sold and is not calculated to advance the right of the claimant in any way. [p. 276, col. 1.]

Second appeal against the decree of the District Court, Godavari, at Rajahmundry, in Appeal Suit No. 32 of 1916, preferred against the decree of the Court of the Temporary Subordinate Judge, Rajah-

mundry, at Cocanada, in Original Suit No. 23 of 1914.

This second appeal coming on for hearing on the 12th and 13th March 1918, the Court (Sadasiva Aiyar and Napier, JJ.) made the following

ORDER OF REFERENCE TO THE FULL BENCH.

NAPIER, J.—One of the points taken in this appeal was whether the suit is barred by limitation by reason of the provisions of Order XXI, rules 58 to 63, and Article 11 of the Limitation Act. The claim was put in before the District Munsif under rule 58 and the District Munsif dealt with it, as appears in Exhibit V. He first passed an order as follows:—"As this petition was filed late, this claim is ordered to be notified to the intending bidders." A fresh petition was put in before him and he passed another order as follows:—"The allegations of the Zamindarini will be notified to the bidders with the remark that the Zamindarini did not take steps for her claim being enquired into during the last ten months." On the face of it, this order appears to me to be one passed under the proviso to rule 58 of Order XXI—"Provided that no such investigation shall be made where the Court considers that the claim or objection was designedly or unnecessarily delayed." It is argued before us that even if it is a case covered by the proviso, still rule 63 applies and that rule, together with the operation of Article 11 of the Limitation Act, bars any suit on the same subject matter after one year from the date of the order. The question as to the construction of rule 63 had been before this Court and it was decided in a case reported as *Narasimha Chetti v. Vijiapala Nainar* (1) that "Order XXI, rule 63 of the new Code, is much wider in its scope than the corresponding section 283 of the Code of 1882 and unlike the latter section covers cases in which there has been no investigation." This case was followed by a Bench of this Court in a case reported as *Ponnusami Pillai v. Samu Ammal* (2). There the order was passed by the District Munsif in the following terms: "Application comes late and is rejected." It was held by the Bench that "the language of Article 11 in

(1) 27 Ind. Cas. 944; 2 L. W. 206.

(2) 38 Ind. Cas. 937; 31 M. L. J. 247.

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the new Act is more comprehensive than that of the previous Act and that has been construed in this Court as covering orders after full investigation as well as orders passed on default" and with that view, the learned Judges in this case were in entire agreement. The matter again came before another Bench of this Court in Second Appeal No. 1926 of 1916, a case to which my learned brother was a party. In that case an objection had been filed and the order passed by the Munsif was as follows:—"The petitioner's objection will be noted in the proclamation." The learned Judges say: "Here there was nothing except an order passed, so far as we can see, after no investigation in any ordinary sense of the term, since it is not shown that anything was considered which could justify a decision as to the validity of the claim, and eventually no decision regarding it was reached. In fact the case resembles *Baboo Jodoonauth Chowdry v. Radhamonee Dossee* (3) and agreeing with the judgment in that case, we set aside the lower Appellate Court's decision." These decisions are, in my opinion, irreconcilable and I think that it is necessary to refer the matter to a Full Bench for decision, as the question is not one of procedure only. The result of holding that Article 11 applies is to reduce the period of limitation from twelve years to one year without any decision of a Court on the merits and without allowing the claimant or objector to prove his right. It appears that the history of this provision is as follows:—In the Code of 1859, there was a provision for a refusal to investigate in certain circumstances, and there are decisions of the High Court of Calcutta on the language of the Code of 1859, namely, *Baboo Jodoonauth Chowdry v. Radhamonee Dossee* (3), *Roghoonath Doss Mohapattra v. Bydonath Doss Maharatha* (4) and *Jugobundhoo Bose v. Sachya Bibee* (5), to the effect that a refusal to investigate was not an order which gave rise to the shortened period of limitation mentioned in the section of the Code. This view receives some support from the language of the Privy

Council in a case reported as *Sah Mukhun Lall Panday v. Sah Koondum Lall* (6).

Then coming to the Code of 1877, we have sections 278 to 283. All these sections with the exception of section 283 are practically in the same words as in the present Code, but the language of section 283 is "that the party against whom an order under sections 280, 281, or 282 is passed, may institute a suit to establish the right which he claims to the property in dispute, but subject to the result of such suit, if any, the order shall be conclusive". It was held by this Court in *Sarala Subba Rau v. Kamsala Timmayya* (7) that where a Court had, under the proviso to section 278, not made an investigation, it was clear on the face of it that section 283 did not apply because section 278 was not one of those sections mentioned in section 283. That is clear, but it is important to bear in mind that this omission is intentional, the object being to preserve the law as it existed under the Act of 1859, the principle being that in a case where there has been a refusal to investigate, (the Court having full discretion whether to investigate or not) it would not be proper to attribute to such an order a degree of finality as would justify the Legislature in depriving a party of the longer period of limitation given to him in the Code and limit it to the one year provided for by Article 11. That seems to have been the policy of both the Codes.

We now come to the present Code and it is of course to be noted, as has been pointed out in the cases, that the words "in sections 280, 281 and 282" have disappeared. They must disappear because the scheme of the Code is different, in that these sections re-appear in the form of rules in Order XXI, and it is certainly open to argument that the reason for the omission of the definite rule or order was not for the purpose of extending the operation of rule 63, but because of the altered scheme of the Code. Bearing in mind the reason why the order under section 278 was not incorporated in section 283, it is a little difficult to see why the Code of 1908 should introduce a provision of this very

(3) 7 W. R. 256; B. L. R. Sup. Vol. C43.

(4) 14 W. R. 364.

(5) 16 W. R. 22; 8 B. L. R. Ap. 39.

(6) 2 I. A. 210 at p. 218; 15 B. L. R. 228; 24 W. R. 75; 3 Sar. P. C. J. 509 (P. C.).

(7) 31 M. 5; 17 M. L. J. 554; 3 M. L. T. 103.

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drastic nature which had not been in the Codes of 1859 and 1882. Of course, if the language is such that it leads to no other interpretation, then that meaning must be ascribed to the words. Reliance is placed on the general nature of the language in rule 63 "Where a claim or an objection is preferred, the party against whom an order is made may institute a suit to establish the right which he claims to the property in dispute, but, subject to the result of such suit, if any, the order shall be conclusive." Certainly, the language is more comprehensive. First of all, we get the general words "where a claim or an objection is preferred" which were not in section 283, and then we get the simple use of the words "the party against whom the order is made." Now it is of some importance to look at the latter words of the section because if a party is to institute a suit to establish the right which he claims within a year and in default of that, the order is conclusive, one would expect that the order referred to would be one which definitely disposes of the claim or the petition. But it is clear that the order which is passed under section 278 is a simple refusal of the Court to take any proceedings which are provided for under those clauses, for it neither accepts nor rejects nor does it decide anything. The clauses are headed "investigation of claims and objections" and the proviso in rule 58 is one under which a Court has an option, whether to take the matter on its file or not. On principle, it would seem that where a Court has refused to take the procedure laid down by the section and which it has an option to refuse, an order which is passed refusing to entertain the petition or claim and investigate it, is not one which can be said to be *conclusive with regard to the right to the property in dispute*.

Suppose an order framed as follows, "I refrain from expressing any opinion on the claim and decline to investigate it as the claim is made at the last moment before sale. What will be sold is the right, title and interest of the debtor, whatever that is; petition for investigation is dismissed." Could it be said that such an order is an order "against a party on a claim preferred" within the meaning of

Article 11 or an order "against a party" within the meaning of rule 63? It seems to me that the proper interpretation of rule 63 is that it only applies to investigations and not to refusals and that being so, it would be an unnecessary extension to give Article 11 any wider scope. In this view and on conflict of the authorities, I think it is advisable to refer to the Full Bench the following

QUESTIONS: -

(1) Where a Court purports to make an order under the proviso to rule 58, Order XXI, that is to say, an order refusing to investigate, does such an order come within the mischief of Order XXI, rule 63, and Article 11 of the Limitation Act?

(2) Is Exhibit V an order covered by Article 11 of the Limitation Act?

SADASIVA ARYAR, J.—I agree that the question mentioned in the judgment just now pronounced by my learned brother should be referred to a Full Bench. There was a claim petition filed by the present plaintiff, when the plaint properties were attached in execution of a decree passed against the present 2nd defendant in favour of the present 1st defendant. That petition, so far as it relates to the plaint lands, alleged that the judgment-debtor, the present 2nd defendant, had no saleable interest whatever in the land and that it was the petitioner's private land which had been granted on service tenure to the 2nd defendant's father. She (the petitioner) prayed for the release of the property from attachment. That claim petition was E. A. No. 3307 of 1910 and was filed on the 23rd December 1910. The property had been proclaimed for sale and so the Munsif seems to have at once passed an order that as the petition was filed late it should be notified to the intending bidders. The sale seems to have been afterwards adjourned from time to time and the sale itself seems to have finally taken place only in January 1912. Meanwhile, the claimant, the present plaintiff, put in a fresh petition (evidently as supplementary to the claim petition No. 3307 of 1910) requesting the Court to make an enquiry into the claim petition in respect of the alleged non-saleability of the plaint land. Then the District Munsif, holding his first order of December 1910 as not a final order, passed a final order on

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the 16th October 1911 on that same claim petition No. 3307 of 1910 as follows:—"The allegations of the Zamindarini" (that is, petitioner) "will be notified to the bidders with the remark that the Zamindarini did not take steps for her claim being enquired into during the last 10 months". Neither in his first incomplete order nor in his final order did he use the word "rejected" or "dismissed" as regards the disposal of the petition. Now the question is whether the failure of the petitioner to file a suit within one year of October 1911 under Order XXI, rule 63, to establish the right which she claims to the property in dispute precludes her by the bar of limitation from establishing the same right in this suit filed in January 1913. Under section 247 of the Civil Procedure Code of 1859, it was enacted, "no such investigation" (that is, into claim or objection) "shall be made if it appear that the making of the claim or objection was designedly or unnecessarily delayed, with a view to obstruct the ends of justice. The order *disallowing the investigation* shall not be subject to appeal, and the claimant shall be left to prosecute his claim by a regular suit." In the previous section 246, investigation was directed as a general rule on claim petitions, and the last sentence of that section is, "The order which may be passed by the Court under this section shall not be subject to appeal, but the party *against whom the order may be given* shall be at liberty to bring a suit to establish his right at any time within one year from the date of the order." Thus a clear distinction was made between an order passed after investigation (*in favour of one party and against another party*) and an order passed *disallowing investigation*. (I shall not use the expression "without investigation," because that phrase may include cases where the Court was ready and prepared to investigate but through the default of the petitioner to pay Batta or to put in appearance or to adduce evidence, the claim petition was decided against him.) Even in cases of dismissal for default, *Kallu Mal v. Brown* (8) and *Sarala Subb, Rau v. Kamsala Timmayya* (7) held that the plaintiff was not precluded under the old

(8) 3 A. 504; A. W. N. (1891) 14; 2 Ind. Dec (N. S.) 257.

Code by the limitation bar of one year. Then the Code of 1877 by the proviso to section 278 gave the Court the same power to *decline investigation* when it considered the claim unnecessarily delayed and then under sections 280, 281 and 282, provided for orders being passed on investigation, that is, in cases in which it did not refuse to embark on investigation under the powers given to it by the proviso to section 278. Then section 283 enacted that "the party against whom an order under sections 280, 281 or 282" (that is, *where it has not refused to investigate*) "is passed, may institute a suit to establish the right which he claims to the property in dispute, but subject to the result of such suit, if any, the order shall be conclusive." Article 11 of the Limitation Act provides one year's limitation for the suit. The present Code of 1908 under Order XXI, rule 63, omits reference to rules 60, 61 and 62 of Order XXI, which correspond to old sections 280 to 282 and uses the expression 'the party against whom an order is made' (on the claim preferred). The question is whether, where a Court has refused investigation under the proviso to rule 58, it can be said that an order has been made against that party on the claim petition preferred by him. I think no order has been made on the claim preferred under those circumstances, but only an order *refusing to make any order on that claim petition either for or against the petitioner*: In *Subba Aiyar v. Subba Aiyar* (9) decided by my learned brother and myself, we thought it unnecessary to consider whether the provisions of the new Civil Procedure Code and the new Limitation Act were intended to and could take away the right of suit under the general law which the plaintiff had till 31st December 1908, where the Court refused to investigate the claim petition which he had preferred on an attachment. In *Narasimha Chetti v. Vijiapala Nainar* (1) the order which was held to have become conclusive after one year was as follows:—"The claim is based on a sale-deed dated a fortnight before the attachment. I find that the claim has been unnecessarily delayed and dismiss

(9) 31 Ind. Cas. 250.

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it without investigation. Order XXI, rule 58 (1) proviso." In *Ponnusami Pillai v. Samu Ammal* (2) the order was, "application comes late and is rejected." The learned Judges, Seshagiri Aiyar and Bakewell, JJ., refused to accept Mr. Devadoss's contention that as there was no investigation, the one year rule did not apply. The learned Judges remarked that "the contention came too late in the day" and they quoted *Narasimha Chetti v. Vijapala Nainar* (1) and *Subba Aiyar v. Subba Aiyar* (9) in support. But, as I have said already, *Subba Aiyar v. Subba Aiyar* (9) did not decide the question as it was considered unnecessary to decide it for the purpose of that case. In Second Appeal No. 1986 of 1916, the order on the claim petition was that the claim would be referred to in the sale proclamation. The claim was neither rejected, nor dismissed expressly in that case. Oldfield, J., and myself held that there was no order passed against the claimant under those circumstances as "no decision regarding the claim was reached." I think the presence or absence of the words "rejected or dismissed" is immaterial, provided that it is clear that what the Court substantially intended to do was to refuse to investigate the claim under the powers given to it by the proviso to rule 58, Order XXI. I am inclined to hold that in this case there was no order on the claim against the claimant but only an order refusing to pass any order on his petition either for or against the claimant and that, therefore, Order XXI, rule 63, does not apply to such an order. But seeing that the decisions in *Narasimha Chetti v. Vijapala Nainar* (1) and *Ponnusami Pillai v. Samu Ammal* (2) seem to be against that view and that there are numerous decisions of the Calcutta High Court all of which (if I may be permitted to say with respect) cannot be reconciled with one another, I think that the question whether the order Exhibit V in this case was an order passed on his claim petition against the plaintiff so as to preclude him from bringing a suit after one year to establish the rights which he sought to have investigated by the Court in the claim petition, should be considered by a Full Bench and I agree to the reference

proposed by my learned brother. I do not think that the mention in the order of a direction to the ministerial department of the Court to proclaim the fact of the making of the claim to intending bidders is relevant in the consideration of this question.

In pursuance of the above Order of Reference to the Full Bench the appeal came on for hearing on 15th and 16th of July 1918.

Mr. P. Narayanamurti, for the Appellant.—There is a difference between section 223 of the old Civil Procedure Code and Order XXI, rule 63 of the new Code. As soon as a claim is put in, the provisions of Order XXI, rule 63, attach. An order refusing to investigate a claim on the ground that it was put in too late is an order against the claimant. A man who is guilty of laches cannot be put in a better position than the man who prefers his claim promptly. See *Narasimha Chetti v. Vijapala Nainar* (1), *Nogendra Lal Chowdhury v. Fani Bhusan Das* (10), *Ponnusami Pillai v. Samu Ammal* (2) and *Kishore Marwari v. Bejoy Krishna Mukherjee* (11). A contrary view was taken in Second Appeal No. 1986 of 1916, but the change in the new Code was not brought to the Judge's notice.

Messrs. A. Krishnaswami Aiyar and Gopaldasikachariar, for the Respondents.—A refusal to investigate is not an order against a person. There is no conclusive order, the point being left undetermined. The order is tantamount to a refusal by Court to exercise its discretion. Rule 63 of Order XXI contemplates a suit to establish a right. A refusal to investigate a claim is no adjudication of a right. *Syed Mahomed Afzul v. Kanhya Lal* (12). An order refusing to investigate on the ground of laches is not a summary decision which should be set aside within a year. *Syed Mahomed Afzul v. Kanhya Lal* (12).

The change in the new Code was due to the fact that it was sought to bring in cases of dismissal for default under Order XXI, rule 63, *Kunj Behari Lal v. Kandh Prashad Narain Singh* (13), *Kishore Marwari v. Bejoy Krishna Mukherjee* (11),

(10) 44 Ind. Cas. 265; 45 C. 785.

(11) 15 Ind. Cas. 633; 16 C. W. N. 882.

(12) 2 W. R. 263.

(13) 6 C. L. J. 362.

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Alwar Tyengar v. Zelleveger (14) and *Sarala Subba Rau v. Kamsala Timmayya* (7).

OPINION.

WALLIS, C. J.—The general policy of these provisions of the Code, as explained by the Judicial Committee in *Sardhari Lal v. Ambika Pershad* (15), is to secure the speedy settlement of questions of title raised at execution sales. Section 283 of the Codes of 1877 and 1882 only gave a right of suit to the party against whom an order had been passed under sections 280, 281 or 282, and did not provide for the case where the Court under section 278 refused to investigate the claim on the ground that it had been designedly or unnecessarily delayed. In such cases, section 283 failed to provide for the speedy settlement of the questions of title raised by the claim. The Legislature would appear to have intended to supply this omission when in rule 63 of Order XXI of the present Code it conferred the right of suit in general terms "where a claim or an objection is preferred" upon "the party against whom an order is made", instead of limiting it, as in section 283, to cases in which an order had been passed under rules 60, 61 and 62 (sections 280, 281 and 282 of the old Code). Where a claim or objection is preferred under rule 58 (formerly section 278), and the Court rejects it under the proviso to that rule on the ground that it was designedly or unnecessarily delayed, the unsuccessful claimant or objector, in my opinion, clearly comes within the words "the party against whom the order is made." Rule 63 does not speak of *any* party but of *the* party against whom an order has been made, and assumes that, where a claim or objection is preferred under rule 58 (section 278), there must always be a party against whom an order is made within the meaning of the rule. I cannot agree with the suggestion in Napier, J.'s Order of Reference that the change in the language of rule 63 was due merely to the altered scheme of the Code. If no change had been intended, rules 60, 61 and 62 would simply have been substituted in rule 63 for sections

280, 281 and 282 in the corresponding section 283 of the former Code. We are bound, I think, to give effect to the clear intention of the Legislature to widen the scope of the rule in accordance with the general policy of this legislation as explained by the highest Tribunal. A claimant, who comes forward too late in the day to entitle him to have his claim investigated having regard to the proviso in rule 58, nonetheless raises a question of title with regard to the attached property; and there is nothing unfair in depriving him owing to his laches of the chance of getting a provision decision in his favour on his claim petition and requiring him to proceed to assert his title by suit within the shorter period of limitation prescribed when questions of title are raised with regard to attached property. I accordingly agree with *Narasimha Chetti v. Vijayapala Nainar* (1) and *Ponnusami Pillai v. Samu Ammal* (2). As regards Second Appeal No. 1985 of 1916 the attention of the Court was not called in that case to the alteration in the language of rule 63, on which my opinion is based. Our answer to the first question is that the case comes within the terms of Order XXI, rule 63. As regards the second question, assuming, as Sadasiva Aiyar, J., appears to hold in his Order of Reference, that the Zamindarini's claim in Execution Appeal No. 3307 of 1910 was not finally rejected by the order passed on it on 23rd December 1910, we think that the subsequent order Exhibit V was an order made against the Zamindarini within the meaning of rule 63, and was consequently an order covered by Article 11 (1) of the Limitation Act of 1908. Though the order only was that the allegations of the Zamindarini would be notified to bidders, we think it amounted, and was understood to amount, to a rejection of the claim on the ground that it was filed too late.

OLDFIELD, J.—I agree.

SESHAGIRI AIYAR, J.—I entirely agree. The language of Order XXI, rule 63, leaves little room for doubt that all orders which negative the right set up by the claimant or the decree-holder are within the rule. *Prima facie* the decree-holder attaches or gets attached the property in dispute as that of the judgment-debtor,

(14) 9 M. L. J. 175.

(15) 15 I. A. 123 at p. 127; 15 C. 521; 5 S. P. C. J. 172; 12 Ind. Jur. 210; 7 Ind. Dec. (N. S.) 931 (P. I.).

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The law compels him to give certain information to the Court before the proceedings in attachment are taken. When this requirement is satisfied, unless a third party intervenes, the sale would be effected as if the property belonged to the judgment-debtor. When a claim is preferred, the usual prayer is that the attachment should be raised as the property does not belong to the judgment-debtor but belongs to the claimant. On the presentation of such a petition, if the order is not that the property be released from attachment, it must be taken to be an order against the claimant. The practice of notifying claims to intending bidders is not warranted by anything contained in the Code of Civil Procedure. It often leads to the depreciation in value of the property to be sold and is not calculated to advance the right of the claimant in any way. Consequently it seems to me that the procedure adopted by some of the Subordinate Courts of notifying objection by claimants at the time of the sale without expressing any decision upon those objections should be discouraged. Although the practice is not a salutary one, I fail to see how this procedure can be construed as not having the force of giving a decision against the claimant. His right to raise the attachment must be deemed to have been negatived when the property was ordered to be sold without releasing it from attachment. Therefore, in my opinion, an order on a claim petition which expresses no final judgment upon the right put forward but simply directs the sale after notifying the claim, is an order against the claimant and he is bound to institute a suit under Article 11 of the Limitation Act. The history of the legislation has been reviewed in the judgment of the learned Chief Justice and I do not propose to deal with that question. I agree with the answers proposed.

M. C. P.

Answered in the affirmative.

OUDEH JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS APPLICATION No. 144 OF 1918.
August 16, 1918.

Present:—Mr. Stuart, A. J. C.

Raja PARTAB BAHADUR SINGH

—PLAINTIFF—APPLICANT

versus

BADLU AND ANOTHER—DEFENDANTS—

OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O XLVII, r. 1—Oudh Rent Act (XXII of 1886), ss. 120 A, 135—Review—Rent appeal—Judicial Commissioner, whether can review decision.

The Court of the Judicial Commissioner of Oudh has power under the Code of Civil Procedure to review its own decision given in a rent appeal. This power is not affected by the provisions of section 120A of Act XXII of 1886 which gives authority to the Board of Revenue to review its decisions. [p. 276, col. 2.]

Miscellaneous application for review of decree of the 1st Additional Judicial Commissioner, Oudh, dated the 17th December 1917.

Mr. Zahur Ahmad, for the Applicant.

Babu Har Govind Das, for the Opposite Party.

JUDGMENT.—This is an application for review of my decision of the 17th December 1917. The learned Counsel on the other side has taken a preliminary objection that I cannot review this decision under the provisions of sections 120A and 135 of Act XXII of 1886. This objection cannot be supported. Section 120A gives power to the Board of Revenue to review its orders. No Revenue Court could have a power of review under the Act except what was given by the Act. But the principle could not possibly apply to this Court. It has a power of review under the Code of Civil Procedure, which is not inconsistent with any of the provisions of Act XXII of 1886. I, therefore, proceed to hear the application.

When this second appeal first came before me, I was under the impression that Part 3 of Local Act V of 1894 had come into operation in the Partabgarh Tahsil on the 22nd January 1895. If such had been the case, the order of the Settlement Commissioner of the 24th December 1896 would have undoubtedly covered the point before me, and I should not have permitted any re-arguing of the question. But it has since been brought to my notice that Part 3 of Local Act No. V of 1894 did

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not come into operation in the Partabgarh Tahsil till 1899. I was not in a position to know that fact at the time, and was misled by the circumstance that it had come into operation in a portion of the Partabgarh District and not in other portions. As it is now settled that Part 3 did not come into operation till 1899, I agree with the learned Counsel for the applicant that Mr. Hooper's order can have no bearing on the question of rural Police rate, and in so far as a rural Police rate is concerned, the matter must be decided irrespective of anything that Mr. Hooper decided in his order. It is an admitted fact that the predecessor-in-interest of the respondents in the appeal did, as under-proprietor of the village, undertake to pay the whole charges of supporting the village Chaukidar in 1874, and that from that year onwards he allowed the Chaukidar rent free land for his support until 1899, when Part 3 of Local Act V of 1894 came into operation. Local Act V of 1894 laid down no clear provision as to the person from whom such Police rates should be recoverable, but that omission is cured by the repealing Act, Local Act II of 1906, which laid down in section 14 that the rural Police rate should be recoverable, in whole or in part, by the landlord from an under-proprietor or permanent lessee, who was bound by law, decree or contract to provide wholly or in part for the maintenance of rural Police. That Act has also been repealed. It has been replaced by Local Act I of 1914, and in that Act the same provision has been enacted in section 8. We thus have it that the predecessor-in-interest of the respondents was liable to support the Chaukidar in full and that, when the Government took over the support of the Chaukidar recovering the expenses by a local cess, the liability was transferred by Statute to the respondents and that no portion of that liability remains to the superior proprietor. In these circumstances I rescind my former order and decree the appeal. The respondents will pay their own costs and those of the appellant in all Courts.

Application allowed.

PRIVY COUNCIL.

APPEAL FROM THE CALCUTTA HIGH COURT.

July 16, 1918.

Present:—Lord Atkinson, Sir John Edge,
Mr. Ameer Ali and Sir Walter
Phillimore, Bart.

HARIHAR BANERJI AND OTHERS—

APPELLANTS

versus

RAMSASHI ROY AND OTHERS—

RESPONDENTS.

*Transfer of Property Act (IV of 1882), s. 106—
Landlord and tenant—Notice to quit—Requisites of
valid notice—Service on one of several joint tenants—
Presumption—Delivery by post, effect of.*

The principles governing the sufficiency of notices to quit served by landlords upon their tenants are the same in India as in England. Such notices may be good and effective in law, even though not strictly accurate or consistent: the test of their sufficiency is not what they would mean to a stranger ignorant of all the facts and circumstances touching the holding to which they purport to refer, but what they would mean to tenants presumably conversant with such facts and circumstances. Such notices are to be construed so as to effectuate the intention of the parties, "*ut res magis valeat, quam pereat*." [p. 233, col. 2.]

Section 106 of the Transfer of Property Act. only requires that a notice to quit should be tendered or delivered to the party intended to be bound by it, either personally or to one of his family or servants at his residence, or if such tender or delivery be not practicable, affixed to a conspicuous part of the property. The personal tender or delivery may take place anywhere: the vicarious tender or delivery must be made at the residence of the person intended to be bound. [p. 287, col. 2.]

In the case of joint tenants service of a notice to quit upon one is *prima facie* evidence that it has reached the others. [p. 287, col. 2.]

There is a presumption that a notice to quit posted in a letter properly addressed to the person intended to be bound reaches that person. Such presumption applies with still greater force to letters which are registered, and is not rebutted but strengthened by the fact that a receipt for the letter is produced signed on behalf of the addressee by somebody else. [p. 288, col. 2; p. 289, col. 2.]

Appeal from a decree of the Calcutta High Court, dated the 16th April 1915, confirming that of the Subordinate Judge, Hooghly, dated the 19th May 1914, reversing a decree of the First Munsif, Howrah.

FACTS of the case are sufficiently stated in their Lordships' judgment and in that of the Calcutta High Court, and the only questions for decision in this appeal were (1) whether the plaintiff's notice to quit was sufficient; (2) whether it was duly served. The Munsif decided both these questions against plaintiff.

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iff. He held that the notice was vague and ambiguous and that it required the defendants to vacate a portion only (6 *cottahs*) of their lands, also that some of the defendants were not served with the notice. He dismissed the suit. The Subordinate Judge, on appeal, remanded the case for trial on the merits. He held that the notice was served on all the defendants and that it was sufficient and was not vitiated by the fact that the area and boundaries of the land were misdescribed. The remand order was upheld on appeal by the Calcutta High Court (Fletcher and Teannon, JJ.), who delivered the following judgment:—

FLETCHER, J.—This is an appeal from a decision of the learned Officiating Subordinate Judge of Hooghly, dated the 19th May 1914, reversing the decision of the Munsif of the First Court at Howrah. The suit was brought for ejectment. The property was held on an annual tenancy and the tenancy is said to have been determined by a notice to quit properly served upon the tenants. The Munsif dismissed the suit on the grounds, first of all, that the notice was insufficient and, secondly, that the notice had not been served on all the defendants. The notice called upon the tenants to deliver up possession of a certain holding which was held in the name of one Ramnidhi Manjhi at a rental of Rs. 25 per annum. Those are the words expressed in the notice itself and that is the description of the holding which the defendants were required to give up possession of. It is true that there was to the notice a schedule annexed in which the area of the land was inaccurately stated and apparently also one of the boundaries in that schedule was not given correctly. But the fact remains that the notice required the tenants to deliver up this property originally held by Ramnidhi Manjhi and for which he was paying a rental of Rs. 25 per year. Nobody could doubt when he received a notice like that that what he was required to give up was not a portion of the holding but the whole holding for which Rs. 25 was payable. The errors in the schedule are, as the learned Subordinate Judge observes, mere inaccuracies which do not affect the validity of the notice. That seems to me to dispose

of the first point.

The second point is about the service of the notice. The appellants, who are the principal defendants in the case, say that the notice was not duly served on them. As regards the defendants Nos. 1, 4 and 5, they were admittedly served with the notice. The others were served, it is said, by registered letters. The posting of the registered letters is proved. The return through the Post Office and the receipts of the registered letters given to the postman when he delivered the letters and received these receipts in the ordinary course of his business have been given in proof. It is said, however, that as strict proof has not been given in the case of the registered letters, that is, as the signatures of the addressees or their agents have not been strictly proved, the ordinary presumption that when a letter is posted in the ordinary course it reaches the addressee does not take effect. That seems to me a matter that does not require a careful consideration. There is no reason to think that the registered letters were taken less care of than unregistered letters. The defendants did not dare to go into the witness-box to contradict the fact that they did receive these notices through the Post Office. I should have thought that, on that ground alone, the learned Judge was entitled to come to the conclusion that these notices had been duly served upon the defendants. Further, the defendants Nos. 6 and 7 have been found as a fact to form members of the same joint family as the defendant No. 5. It is admitted that the defendant No. 5 was duly served, and one of the necessary incidents of a joint Hindu family is that the family should be living together in commensality and it, therefore, follows that the defendant No. 5, when he received that notice on his own behalf and on behalf of his brothers, was either a member of the family or an authorised agent living at the same residence as the defendants Nos. 6 and 7. There seems to be no doubt that these defendants had been duly served.

The other point is about the receipt given by the Gomashta. The Post Office delivered this registered letter to a person who, it is said, was the Gomashta of the

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defendants Nos. 2 and 3. It is said that the plaintiffs have not proved that the Gomashtha was a duly authorised agent. The defendants Nos. 2 and 3 could have come forward and given evidence before the learned Judge that this letter, although duly addressed and delivered at their residence, had been purloined by some unscrupulous servant and had never, in fact, reached their hands. They did not, in fact, do so. There cannot be the slightest doubt that the person who took in the registered letter was a person authorised to do so, and that that letter duly found its way into the hands of the defendants Nos. 2 and 3. I agree in the decision of the learned Subordinate Judge. The present appeal, therefore, fails and must be dismissed with costs, two gold mohurs.

TEUNON, J.—I agree.

Defendants preferred this further appeal to the Privy Council.

Mr. DeGruyther, K. O. (with him Mr. Kenworthy Brown), for the Appellants.—The notice to quit was not a proper notice under section 106 of the Transfer of Property Act. Appellants held $2\frac{1}{2}$ bighas; the notice related only to 6 cottahs. It was not an inadvertent misdescription or mistake; it was a deliberate manoeuvring for position. There were several plots, and the notice related to one single plot in the possession of Ghose: this is clear from the boundaries given: the whole question is, what is Ramnidhi's holding. They do not want to admit that the whole $2\frac{1}{2}$ bighas is that holding so they claim the part hoping by that means to get possession of the whole. Further, the notice was not duly served. The posting of registered letters is not a sufficient compliance with section 106: the notice must be delivered personally or to a member of the family or servant at the party's residence.

Jogendra Chunder Ghose v. Dwarka Nath Karmohar (1) and *Subadin v. Durga Charan Law* (2) which lay down the contrary are incorrect.

Mr. Branson (with him Mr. Dube), for the Respondents.—The High Court's decision is correct. The notice clearly referred to the whole of Ramnidhi Manjhi's holding. As

to service the expression in section 106 is "delivered"; posting of registered letters is a sufficient delivery within the meaning of the section. We rely on *Papillon v. Brunton* (3).

Mr. DeGruyther, K. O., replied.

JUDGMENT.

LORD ATKINSON.—This is an appeal against a decree of the High Court of Judicature at Fort William, Bengal, dated the 16th April 1915, which dismissed an appeal from the Subordinate Court of Hooghly, dated the 19th May 1914.

The action out of which the appeal has arisen is one of ejectment brought, not by owners or occupiers of land against persons trespassing upon it, but by landlords of a particular piece of land against their former tenants of the same to recover possession thereof, on the ground that the tenancy of those tenants has been determined by an effective notice to quit duly served.

Two sets of defendants have been named in the plaint, the first containing the names of seven persons named Banerji, some of whom were, and still are, members of a joint Hindu family; others were once such members and have ceased to be so. For convenience these are styled the principal defendants, and are alleged by the plaintiffs to have been their tenants from year to year of the piece of land mentioned up to the service of the aforesaid notice to quit. The second set of defendants consists of three limited companies—two milling companies, numbered 8 and 9 respectively; Andrew Yale (Limited), timber merchants, the managing agents of the two first-named companies, and numbered 10, and a firm named Amrita Lal Ghose and Sons, numbered 11. These latter defendants Nos. 8, 9, 10, and 11 are stated to be the subtenants of the principal defendants, and being in the possession of the above-mentioned piece of land are made *pro forma* defendants. In the third paragraph of the appellants' case it is in effect stated that the only questions in the case which have up to the present been decided are—first, the question whether, assuming that the principal defendants were the

(1) 15 C. 681; 7 Ind. Dec. (N. S.) 1038.

(2) 28 C. 118; 4 C. W. N. 790.

(3) (1863) 5 H. & N. 518; 29 L. J. Ex. 265; 120 R. R. 704; 157 E. R. 1285.

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tenants of the plaintiffs of the aforesaid piece of land from year to year, the notice to quit alleged to have been served upon them was sufficient and proper in form; and, second, the question whether it had been duly served. The Munsif in whose Court the suit was filed decided both these questions in favour of the defendants, and on this ground dismissed the suit. His decision was reversed upon appeal by the Subordinate Judge, and it was by him ordered that the case be sent back to the lower, i.e., the Munsif's Court, with a direction to remit the suit to its original number, and to proceed to try the issues raised in the suit other than issue No. 2, and determine the suit after giving the parties due opportunity for adducing evidence.

The principal defendants appealed from this order to the High Court of Judicature at Fort William in Bengal. The appeal was dismissed with costs, this latter Court being, like the Subordinate Judge, of opinion that the notice to quit dated the 9 Assin, 1317, B. S., given by the plaintiffs had been duly served and was effective to determine the alleged tenancy from year to year of the principal defendants.

On the 11th July, in the year 1906, the present plaintiff No. 1 addressed the present defendant No. 10 a letter in the words and figures following:—

"Messrs. Andrew Yule and Co., Calcutta.

"Dear Sirs.

"I am informed that since the 1st day of March last you are filling up and occupying our *khas* (Patit) vacant land and *khal* in Char Ramkrishtopur, Howrah, described below. You have taken no permission from us, nor have you made any arrangement with us for it. Please take notice that the land is the absolute property of myself and my co-sharers, and therefore any improvements you may make to it will belong to us absolutely. Further, you are liable to pay for your use and occupation of the land and for all damages that we may suffer thereby from the 1st March last, that is, from the date from which you have been using and occupying it.

"Therefore, on behalf of myself and my co-sharers I demand from you that you do

within ten days of receipt hereof make a settlement with us for the land, failing which we shall take such steps as the law provides.

"Description of Land.

"All that piece of (or) parcel of *khas* Patit land consisting of low land, *khal*, etc., measuring about 10 *cottaks* and butted and bounded as follows."

The boundaries are then given, but nothing turns upon them.

This statement that Yule's land is 10 *cottaks* in extent is of importance. On the 23rd July in the same year plaintiff No. 1 in the present suit, as executor of his father Rammoya Roy and *Srimati* Adhar Roy, widow and executrix of the same Rammoya Roy deceased, brought an action against the seven principal defendants in the present suit to recover a sum of Rs. 3 14-10, arrears of rent due to the deceased Rammoya Roy.

In the second paragraph of the plaint in the former suit it is stated that the plaintiffs have been in possession of about 6 *cottaks* of *bastu* land, mentioned in the schedule, situate in the said village of Char Ramkrishtopur, on payment of the prescribed annual rent of Rs. 25 thereof as Sarbararkars of an annual Gar Mourashi, Thika tenant under the plaintiffs, Rs. 12-8-0 being annually paid by them separately by four instalments to the plaintiff. The statement that the rent of Rs. 25 a year issued out of 6 *cottaks* of land is undoubtedly inconsistent with their claim in the present suit, in which they allege that it issues out of a holding about 2 *bighas* 2½ *cottaks* in extent. It is not, however, more inconsistent with their present claim, than is the defence put in by the defendants inconsistent with the admission they made before the Subordinate Judge, to the effect that they were in possession of a holding belonging to the plaintiffs formerly occupied as tenant by one Ramnidhi Manjhi, and that this rent of Rs. 25 issued out of the holding, whereas the defence is that the lands out of which this rent of Rs. 25 issued is 2 *bighas* 2½ *cottaks* in extent purchased *benami* by their predecessors and belonging to them as longstanding *mourashi mokurari* land.

Again, on the 18th February 1908 the present appellant No. 1, executor

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of his late father, and the latter's widow, as his executrix, addressed to the same Andrew Yule and Co:—

"Messrs. Andrew Yule and Co.,

"Managing Agents, Fort William Flour Mills Company (Limited).

"Dear Sirs.

"We are informed that you have filled up a *khal* situate in the land specified below, and occupied the said land also, which is our *khas* land, without our permission and without entering into any settlement with us. This land adjoins on the west a piece of land measuring 6 *cottahs*, for which the name of Nidhiram Manjhi is recorded in our *Serishta* as a tenant-at-will, having no permanent rights. We also beg to draw your attention to the letter written by one of us on the 11th July 1906, protesting against your filling up the said *khal* and occupying the said land.

"Under the circumstances, unless you deliver up possession of the said piece of land more particularly described below within one month [torn] date or take a settlement from us on reasonable terms, we shall be under [torn] painful necessity of taking such steps as we may be advised for the recovery [torn] of possession against you and such other person or persons who may claim any right to interfere with our rights and *khas* possession.

"We further demand from you a sum of Rs. 920 (23 *into* 4 *into* 10) on account of the use and occupation of the said land and filled up *khal* from the 1st March 1906 to the 31st January 1908 and require you to pay the same to us within a month of date.

"Description of the Land.

"All that piece or parcel of *khas* vacant land consisting of low land, *khal*, etc., measuring about 10 *cottahs* or more, situate in our *Zemindari* of Char Ramkrishnampur, sub-district of Howrah and Thana Shibpur, and butted and bounded as follows."

The boundaries are then set out.

This letter, treating Yule and Co., as trespassers instead of sub tenants of the principal defendants, as they are treated in the present suit, may have, with the other inconsistencies already mentioned, induced, and their Lordships think most probably did induce, the principal defend-

ants to refuse to be content with the decision of the Subordinate Judge and High Court, and to prefer the present appeal to this Board on two points, one of which, the proper service of the notice, is technical and unmeritorious. It is not pretended that the plaintiffs are estopped by these proceedings and documents. But the strangest argument that could well be addressed to any legal tribunal has been founded upon them and pressed on behalf of the principal defendants. It is this, that the plaintiffs deliberately and for some indirect object narrowed their notice to quit to what they knew was a small portion of the holding for which their tenants paid them rent, in order that, having got possession of this portion, they might treat the companies occupying the remainder of the holding as trespassers. If they knew the law, as they must be assumed to do, they must have been well aware that a notice to quit calling upon the tenants of a holding to quit a portion of it is absolutely bad, and they must have known also that this design could not be accomplished unless the ejectment founded on the notice was so framed as to obtain secure possession of the portion mentioned in the notice and no more, and that the action could be at once defeated by the tenants by proof that the contents of their holding were more than the part named.

It is desirable, therefore, to refer to the pleadings to see how the respective parties framed their claims and defences, in order to discover whether the former were fashioned so as to carry out the alleged knavish design. In paragraph 5 of the plaintiffs' plaint the nature of the holding of which they claim to recover possession is described. It is a *Jumma* of land bearing an annual rental of Rs. 25 in the name of Nidhiram *alias* Ramnidhi Manjhi, recorded in the *Serishta* of the plaintiffs, for which the principal defendants paid the annual rent of Rs. 25 and of which they were in possession. So far the description of the holding is reasonably plain and clear, and if it stopped there it is difficult to suppose that any person of ordinary intelligence reading it would not at once see it was the possession of that *Jumma* in its entirety—nothing more and nothing less—which

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was claimed. Any difficulty which exists arises from the statement of the contents of this Jumma. The plaintiffs mention 6 *cottahs*, but it is not quite clear whether by mention of that area the plaintiffs mean to assert that this was in fact its area at the date of the filing of the plaint or merely that it is its area as recorded in the plaintiffs' *Serishtah*. If the holding be one of *char* lands, it may well be that its area would be considerably augmented by accretion in the long course of sixty years during which it is alleged to have been in the tenancy of the defendants and their predecessors.

The description, however, does not stop there. In the same paragraph it is further stated that in the suit already mentioned brought by plaintiffs Nos. 1 and 2 to recover arrears of rent, the principal defendants had stated that the whole quantity of 2 *bighas* 2½ *cottahs* was comprised in the Jumma in respect of which the annual rent of Rs. 25 was paid. In the schedule these different estimates or descriptions of the contents of the Jumma are repeated, but whatever its actual contents it is stated to be the land recorded in the plaintiffs' *Serishtah* in the name of Ramnidhi Manjhi, subject to an annual payment of Rs. 25. In the sixth paragraph of the plaint it is averred that the formal defendants are in the possession of the said lands, that is, the lands comprised in the Jumma, in the immediately preceding paragraph mentioned as monthly tenants under the principal defendants. This paragraph refutes absolutely the suggestion that all the plaintiffs seek to recover is the 6 *cottahs* of the Jumma in the occupation of Amrita Ghose and Sons. What is sought to be recovered is all the lands occupied by all the *pro forma* defendants, and not merely the portion occupied by any one of them. The contents of the succeeding paragraph lead to the same conclusion. It appears to their Lordships that in the face of this pleading it is perfectly plain that what the plaintiffs in this suit seek to recover is possession not of a Jumma 6 *cottahs* in extent, nor yet a portion, 6 *cottahs* in extent, of a larger Jumma, but the whole Jumma described as formerly held by Ramnidhi Manjhi, for which he and the principal defendants after him paid an annual rent of Rs. 25 and which

is in actual occupation of the formal defendants.

The written statements filed by the principal and *pro forma* defendants suggest the same conclusion. From paragraph 12 of the latter it appears that in the month of May 1900 the principal defendants entered into an agreement with the *pro forma* defendants to grant to the latter a lease of 13½ *cottahs* of low land forming part of the "land in suit." The part cannot be equal to or greater than the whole; 13½ *cottahs* cannot be a portion of 6 *cottahs*; and thus the lands in suit, in the opinion of the formal defendants, cannot be a mere part of the Jumma 6 acres in area. In this statement it is also averred that the defendant No. 8, the Monarch Flour Mills Company, on the faith of this promise of the lease immediately began to raise the level of the land demised to them and to raise buildings upon it.

It is further averred in the statement that the defendant No. 8 filled up at an expense of about Rs. 3,000 a *khal* immediately north of the premises of defendant No. 9, and that in May 1905, the principal defendants claiming the lands so made by this filling up, the defendant No. 9 agreed with them to rent a piece of land 17 acres in extent situate east of the plot 13½ acres in extent already mentioned; that the said defendant No. 9, relying on these promises to grant a lease to them, erected buildings upon the said lands and paid rent to the principal defendants in respect of them; that the principal defendants evaded executing these leases though tendered to them for execution, and ultimately refused to execute them; and that defendants Nos. 8 and 9 were about to institute a suit against the principal defendants for specific performance of their agreement to grant the leases when the news of the institution of the present suit reached them.

This written statement was filed on the 22nd December 1911, three days after the filing of the written statement of the principal defendants. Of course, these latter people are not bound by the averments contained in the written statement of their sub-tenants.

The written statement of the formal defendants is that in their view, at all

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events, the present suit is not brought to recover merely possession of the 6 *cottahs* in the occupation of defendant No. 11, Ghose and Sons; but is brought for the recovery of the possession of lands which they themselves have promised to lease. In paragraph 9 of their statement it is averred that the land in suit is not the 6 *cottahs* held by Ghose and Sons, but 2 *bighas* 2½ *cottahs* held by them in one plot, not two plots. And they repeat *ad nauseam* in various forms the statement that the lands in suit are not confined to a Jumma of 6 *cottahs* bearing an annual rent of Rs. 25; that they never had possession of a *jote* of 6 *cottahs*, nor ever paid rent in respect of such a *jote*; that the lands in suit are not confined in a *jote* Jumma of 6 *cottahs* at an annual rent of Rs. 25, alleged by the plaintiffs in their plaint to be recorded in the name of Ramnidhi Manjhi; and further that if there be any such *jote* of 6 *cottahs* recorded in the plaintiffs' *Serishtas*, the principal defendants never had any connection with it or interest in it.

In paragraph 12 of the written statement they repeated the assertion already mentioned that the 2 *bighas* 2½ *cottahs* for which they pay Rs. 25 is ancestral property acquired in the way already described, but not a particle of evidence was given by the defendants at the hearing to sustain any one of the averments contained in this paragraph. Nor was any evidence whatever then given to sustain the accusation that the plaintiffs harboured the stupid and fraudulent design attributed to them in framing their notice to quit in its actual form. The form of their pleading repels the idea. This is a vital matter, because of the principles upon which, according to the authorities, notices to quit containing errors honestly but mistakenly or inadvertently made are to be construed. These principles would be entirely inapplicable to inaccuracies deliberately inserted for fraudulent purposes. The principles that the notice to quit should be construed *ut res magis valeat, quam pereat* applicable in the first class of cases could not be applied to the second. There is no reason why, if the plaintiffs before they served this notice to quit had obtained more full and accurate information as to the precise

facts touching this holding for which the principal defendants paid them this annual rent of Rs. 25, they should not have availed themselves of it and embodied it in their notice to quit.

In their Lordships' view there is nothing whatever to show that the plaintiffs were actuated by a desire to play any trick, or effect any fraudulent purpose in connection with this notice to quit or the ejectment suit consequent upon it, or to show they did not serve the notice and institute the suit in the honest desire to exercise legitimately the rights which the law conferred upon them in reference to the possession and enjoyment of their own property.

If this were a case arising in England the English authorities would, therefore, be applicable. It has not been suggested, and could not, their Lordships think, be successfully contended, that the principles they lay down are not equally applicable to cases arising in India. They establish that notices to quit, though not strictly accurate or consistent in the statements embodied in them, may still be good and effective in law; that the test of their sufficiency is not what they would mean to a stranger ignorant of all the facts and circumstances touching the holding to which they purport to refer, but what they would mean to tenants presumably conversant with all those facts and circumstances; and further, that they are to be construed, not with a desire to find faults in them which would render them defective but to be construed *ut res magis valeat quam pereat*. To take a few of these authorities out of many to illustrate these principles.

In *Doe d. Huntingtower v. Culliford* (4) the defendant went into possession of a house and an acre of land in the parish of Ilchester on the 4th August 1821 as tenant to the plaintiff. On the 28th September 1822 the plaintiff served upon the defendant a notice, dated the 27th September 1822, to quit this house and this land at Lady-Day next or at the end of your current year. Lady-Day next would be the 25th March 1823 and the current year of the tenancy would be the 4th August 1823, but acting on the above-

(4) (1824) 4 Dowl. & Ry. (K. B.) 248,

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mentioned principles it was held to be a good notice to quit on Lady-Day, 1823, i.e., the 25th March 1823. Abbott, C. J., in delivering judgment said:—

"There is one rule of construction in cases of this nature which is no less sound than ancient, namely, to give such a sense to ambiguous words as will effectuate the intention of the parties. Applying that rule to this case, it appears to me the words 'at the end of your current year' may be understood to mean the end of the current year ending at the ensuing Lady-Day. The words, I think, are plainly applicable to the current year Lady-Day, 1823."

Bayley, J., said:—

"We are to look at the intention of the landlord. When general language is used which is open to doubt, the rule is to make it sensible, not insensible. The state of the defendant's holding shows it to be clear that the landlord did not mean the year ending Michaelmas Day. He could not intend to give notice to quit in two days, because that would be no notice whatever. By mentioning Lady-Day next it is clear he meant to give a six months' notice, or such notice as the law requires. He intended to give an effective notice, and it is quite sufficient if the tenant understands what is meant."

In *Doe d. Williams v. Smith* (5) the tenant, who held lands under a demise originally from May 1832 to the 2nd February 1833 and held certain buildings from May 1832 to May 1833, retained possession after February and May 1833 without any express contract. On the 22nd October 1833 the landlord served a notice to quit and deliver up possession of all the buildings and the land at the expiration of half a year from the delivery of the notice "or such other time or times as your present year's holding of or in the said premises or any part thereof respectively shall expire after the expiration of half a year from the delivery of this notice." Lord Denman, C. J., in delivering judgment said:—

"I think the notice was well enough. It is admitted that it would be good

from May 1834. The half year would expire in April 1834. It would, therefore, not be a good notice for the 2nd February 1834 but I think that, although the word 'present' is used, the notice may be referred to 2nd February 1835, which was after the expiration of the half year, and that there was no danger of the tenant being misled."

Littledale, J., concurred for the same reasons, saying:—

"This is certainly a lame and inaccurate notice; but, such as it is, we must endeavour to give it a rational interpretation."

Patteson, J., said:—

"It is not required that a notice should be worded with the accuracy of a plea. This is not drawn with strict precision, but I think it is sufficiently clear."

That case was followed and approved of in *Wride v. Dyer* (6).

The case of *Doe v. Archer* (7) is very applicable to the present case. There a farm was leased for twenty-one years at a rent of £180 per annum, consisting, as described in the lease, of Town Barton and its several parcels described by name at a rent of £33, other closes named at rents of £5 5s. and £11, and the Shippon Barton and several parcels described by name at £86, reserving to either party power to determine the lease at the end of fourteen years on giving two years' previous notice. It was held that a notice by the landlord to the tenant to "quit Town Barton, etc., agreeably to terms of the covenant between us on the expiration of the fourteen years of your term" was sufficient.

Lord Ellenborough in delivering judgment said:—

"The landlord must have intended to give such a notice to quit as the lease reserved to him the liberty of giving, and not a void notice to quit a part only, and so the notice in question must have been understood by the tenant."

"The notice to quit Town Barton, where the mansion was, meant the Town Barton cum sociis, especially with reference to the lease, which only gave him power to determine the tenancy as to the whole of what was let together."

(5) (1836) 5 Ad. & E. 350; 6 N. & M. 829; 2 H. & W. 176; 5 L. J. K. B. 216; 111 E. R. 1198; 44 R. R. 442.

(6) (1900) 1 Q. B. 2; 69 L. J. Q. B. 17; 81 L. T. 453; 48 W. R. 73; 64 J. P. 118; 15 T. L. R. 21.

(7) (1811) 14 East 245; 104 E. R. 595; 12 R. R. 509.

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Le Blanc, J., said:—

"There being no power under the lease to determine the tenancy as to part only, the notice to quit could have no operation at all unless taken, as it must have been intended, to apply to the whole."

Bayley, J., said:—

"We are to construe a notice to quit in such a way *ut res magis valeat, quam pereat*."

In order to judge of what the notice to quit in this case conveyed to those of the principal defendants upon whom it was served, it is necessary by examination of the evidence given at the trial before the Munsif to ascertain what were the material facts in reference to the connection of those defendants with the lands in suit. Three witnesses were examined on behalf of the plaintiffs, namely, Ramsashi Roy, Suresh Chandra Chatterji and Hira Lal Kar. The second of these gave no material evidence upon the point now under consideration. One witness, and only one, namely, Jyotish Chandra Banerji, was examined on behalf of the defendants. Ramsashi Roy proved amongst other things that the plaintiffs in the suit are the Maliks of two Towzi Nos. 3994 and 3994A acquired by purchase, of which the latter belonged to the witness and his mother, and the former belonged to Guru Das and his cousins; that the Banerjis were the tenants of the lands in suit; that he accepted rent from them; that Nidhiram was the tenant; that somehow or other the Banerjis got the lands from Nidhiram; that they paid rent to the plaintiffs for it, and their rents were accepted; that the Banerjis were not trespassers; that Nidhiram was treated in his witness's Serishtas as dead; that the land in the possession of the principal defendants was included within the boundaries given in the notice to quit; that the actual occupiers of the lands were Messrs. Andrew Yule and Co. and Amritsa Lal Ghose; and that he, the witness, only came to know in May or June 1900 that the Banerjis had under-tenants who paid them rent.

In reply to the Court he said the Banerjis (defendants) are not trespassers; they are tenants in the sense that they pay him rent; that he accepts rent from them as Sarbararkars, meaning thereby that they

were occupying the place of tenants; that he has been accepting rent from them since 1900; he believed his uncle (the owner of Towzi No. 3994) also receives rent from them; that he did not know when they acquired their interest in the lands in suit; that he treated them as tenants to the extent of receiving rent from them as Sarbararkars. On being further cross-examined by Counsel he said that the quantity of land in the possession of defendant No. 11 was 6 *cottahs*; that there are no *pucca* structures upon it; the quantity of land in the possession of defendants Nos. 8 to 10, he said, was 30 *cottahs*, the total quantity 2 *bighas*; that before 1900 the lands were *khal* (a closed channel) and Patit; that to the east of the 2 *bighas* odd there is no public pathway, but a private pathway, 6 to 10 feet wide, used by Andrew Yule and Co. solely; that to the east of that pathway lie the lands of the Port Commissioners; that these latter lands formerly belonged to his, witness's, predecessors, and were acquired by the Commissioners; that he did not include in the plaint this eastern pathway within the disputed land.

The witness Hira Lal Kar stated that he was Gomashta for all the plaintiffs. He proved that he received rent from the Banerjis for the plaintiffs and gave receipts for it, eight of which were apparently produced, proved, and marked Exhibit A and Exhibits B (1) to B (7). They have not been printed in the Appendix, as they ought to have been since they may describe the holding in respect of which the rent was paid and throw light upon the point in controversy.

Well, in the face of this evidence, it is not surprising that when the case came before the Subordinate Judge it is stated in his judgment that it was admitted on both sides that the defendants', *i. e.*, the Banerjis', tenancy consisted of the holding of Ramnidhi Manjhi. It is not suggested that the knowledge of this fact was recently acquired by the principal defendants and the sufficiency or insufficiency of the notice to quit must, therefore, be determined having regard to the fact that admittedly the principal defendants were, to their own knowledge, tenants of Ramnidhi Manjhi. The fact that in their written statement they don't deny this fact, but studiously evade admitting it, while they have given

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no evidence whatever to disprove it, all suggest that they were well aware who their predecessor in occupation was. And it is almost impossible to believe that the Counsel for the principal defendants would have omitted to confine his clients' admission to their state of knowledge subsequent to the service of the notice to quit if he could have honestly and truthfully done so.

Turning to the contents of the notice to quit, the material part of it is:—

"You are informed by this notice that Char Ramkrishtopur, Pergunnah Boro, recorded in Towzi Nos. 3994 and 3994A in the Collectorate of district Hooghly, within station Sibpur, is our Zemindari. The Bastu land, bounded as below, within the said Char, is land, bearing a yearly Jumma of Rs. 25 standing in the name of the late Nidhi Ram *alias* Ram Nidhi Manjhi. You have been in possession of the said land on payment of rent at the said rate and taking *dakhilas* in the name of the said Nidhi Ram Manjhi as Thika tenants-at-will of the said one Jumma only under us. Now it being necessary for us to take *khas* possession of all the lands comprised in the said Jumma, you are informed by this notice that you should vacate that land, by removing the huts, etc., that exist on the said land on or before the last day of the month of Chaitra of the current year 1317 B.S. We shall take *khas* possession of all the lands comprised in the said Jumma on the expiry of the said fixed time. In case we do not get *khas* possession of the said land on the expiry of the said time fixed, we shall take *khas* possession of that land by instituting a suit in proper Court against you, and you shall be liable for all damages.

"The 9th Assin, 1317 B. S.

"SCHEDULE.

"1 (one) plot of *bastu* land, about 6 *cottahs* in area, situate in village Char Ramkrishtopur, within station Sibpur, Pergunnah Boro (6 *cottahs*).

"Boundaries.

"North : Ramkrishtopur Ghat Road.

"West: Jamai land of the late Thakur-das Banerji.

"South : Jamai land of the late Bhuban Mohan Banerji.

"East : Land included in the said Towzi."

The question is what must that notice have conveyed to an ordinary reader, much less to tenants who were aware, as the principal defendants have admitted, that they held Ramnidhi Manjhi's holding.

The notice begins by stating that the *bastu* lands, bounded as below within the Char of Ramkrishtopur, are lands bearing yearly Jumma of Rs. 25 standing in the name of Nidhi Ram *alias* Ram Nidhi Manjhi. It is then averred that the principal defendants have been in possession of these lands on payment of rent at the aforesaid rate, taking *dakhilas* in the name of the said Nidhi Ram Manjhi, as Thika tenants-at-will, of "the said one Jumma only under the plaintiffs." It is then averred that it is necessary for the plaintiffs to take *khas* possession of all the lands comprised in the Jumma already mentioned. The principal defendants are then required to vacate that land, that is, all the land comprised in the aforesaid Jumma, before a day named, and they are informed that on the expiry of that time the plaintiffs will take possession of all the lands comprised in the aforesaid Jumma. If the boundaries alone were added it could not, their Lordships think, be successfully contended that the meaning of this notice to any ordinary reader was not that possession of the entire Jumma in the tenancy of the principal defendants, which has stood in the name of Ram Nidhi Manjhi, and for which he and they paid a rent of Rs. 25 per annum, should be delivered up to the plaintiffs. To tenants who, like the principal defendants, were admittedly in possession of the entire Jumma and paid this rent, that must have been clear to demonstration, but it is contended that all this clearness is obscured, and this certainly rendered doubtful by the statement in the schedule that the lands the possessions of which are to be delivered up are one plot of *bastu* lands 6 *cottahs* in extent.

The principal defendants knew perfectly well that a plot of 6 *cottahs* in extent is only a small fraction, one sixth or one-seventh of the lands in the entire Jumma. They must presumably have known the law that a notice requiring a tenant to quit only a small portion of the holding of which he was tenant was bad and ineffective; but the presence of these words 6 *cottahs* in the schedule, it was, in effect, contended,

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reverses all the presumptions such as would apply in English cases and necessitates that the landlord should be presumed to have intended to serve a notice bad and ineffectual to his own knowledge rather than a valid and effectual one, and that the notice itself should be construed *ut res magis pereat quam valiat* instead of the contrary. No argument has been addressed to their Lordships and no authority produced to show that the principles of the above recited English cases are inapplicable to Indian cases. From the very nature of a notice to quit, which is merely the formal expression of the landlord's will that the tenancy of his tenant shall terminate, it would *prima facie* appear that they are applicable. In addition, it may well be that the description of the lands of the Jumma as *bastu* lands may refer to their condition as originally held by Ramnidhi Manjhi, and not to their condition after the defendants Nos. 8 and 9 had, during the years subsequent to the year 1905, built *pucca* buildings upon them, and defendant No. 11 had erected huts upon his 6 *cottaks*.

In their Lordships' view the erroneous statement of the contents of the Jumma does not predominate over the description given of it in the earlier portion of the notice to quit. They have not the slightest doubt that the principal defendants were perfectly well aware that the notice required the defendants, as the plaintiffs desired and intended that it should, to quit and deliver up possession of the entire Jumma for which they for years paid the rent of Rs. 25. If anything additional were needed to convince one that this was so, it would be the evidence of the only witness examined for the defendants. He says not a word about the principal defendants and their predecessor having from time immemorial had ancestral *mokurari* rights in the property containing 2 *bighas* and 2½ *cottaks* bearing an annual rental of Rs. 25, not a word to the effect that although he got, as he admits, the notice to quit he did not understand that it referred to the whole Jumma for which Nidhiram formerly and the principal defendants in succession to him paid this rent of Rs. 25 per annum. Their Lordships are, therefore, clearly of opinion that the notice was a good notice to quit this last named Jumma in its entirety, whatever its area may be. What its actual area is

can be determined at the trial, and the possession of that area can be recovered in these proceedings.

Next and lastly as to the service of the notice to quit. The 106th section of the Transfer of Property Act, 1882, only requires that such a notice should be tendered or delivered to the party intended to be bound by it either personally or to one of his family or servants at his residence, or if such tender or delivery be not practicable, affixed to a conspicuous part of the property. The personal tender or delivery may take place anywhere; the vicarious tender or delivery must take place at the residence of the person intended to be bound by the notice. Well, in the case of joint tenants, each is intended to be bound, and it has long ago been decided that service of a notice to quit upon one joint tenant is *prima facie* evidence that it has reached the other joint tenants. [*Doe d. Macartney v. Orick* (8), *Doe d. Bradford v. Watkins* (9), *Pollock v. Kelly* (10).]

It was proved and found that defendants Nos. 5, 6 and 7 are members of a joint Hindu family, and that of these No. 5 was duly served with a duplicate of the notice to quit. The mode of service adopted was this: Hira Lal Kar, the Gomashta of all the plaintiffs, who knew all the defendants and their addresses, sent to each by registered letter addressed to them at these addresses duplicates of the notice to quit signed by all the plaintiffs. For these notices he received receipts on the registration of them. And the peon of the Post Office, who, the defendants' only witness admitted, knew all their houses, got from all of them receipts for the letters when delivered. These receipts were produced, one purporting to be signed on behalf of Srimati Panchkawri Dabi, the guardian *ad litem* of the minor defendant No. 7, by a person signing on behalf of the addressee with the initials F. C. B.; another addressed to Babu Nula Kumar Banerji, the minor, purporting to be signed in something the same way; a third addressed to Babu Narinda Nath Banerji, defendant No. 6, purporting to be signed

(8) (1805) 5 Esp. 196; 8 R. R. 843.

(9) (1806) 7 East. 551; 103 E. R. 213; 3 Smith 517; 8 R. R. 670.

(10) 6 L. O. L. B. 367.

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for the addressee in the same way; a fourth addressed to Fakir Chandra Banerji, defendant No. 5, signed by the addressee; a fifth addressed to Babu Haribar Banerji, defendant No. 1, signed by the addressee; a sixth addressed to Babu Jyotish Chandra Banerji, defendant No. 4, examined as a witness on behalf of his co-defendants, signed by himself; a seventh addressed to Babu Narayan Chandra Banerji, defendant No. 2, purporting to be signed on his behalf by Jogendra Nath Dey; and an eighth addressed to Babu Para Chandra Banerji, defendant No. 3, purporting to be signed on the addressee's behalf by the same person, Jogendra Nath Dey. The defendant No. 4 in his cross-examination stated he did not know a person named Jogendra Nath Dey, but, strange to say, after the signatures of five of the principal defendants, including Narayan Chandra Banerji, Para Chandra Banerji and Jyotish Chandra Banerji, to their written statement filed in the suit of the plaintiffs to recover rent instituted in July 1906, already referred to, appears the statement: "Satisfied from the statement of Jogendra Nath Dey." That was followed by something which is now illegible. It probably was the signature of some official before whom the defendants or their signatures to the written statement were identified or verified.

Hira Lal Kar stated that he left all the notices with Babu Prabodh, a man 30 years of age, son of defendant No. 2, who lives in his father's house. There would seem to be some error in the print of this witness's evidence on this point, as the witness is represented as having said he gave all the notices, not one notice, to Babu Prabodh. The Subordinate Judge found that this was good service on Narayan, the defendant No. 2. The Munsif held there was no proof of the service of the notice to quit on any of the defendants other than those numbered 1, 4 and 5. He seemed to be of opinion that the registered letters must be presumed to have been delivered to the person who signed on behalf of the addressee the receipt of it, but not to the addressee himself in the first instance or at all, and that as there was no proof that the persons other than the addressees who so signed were the duly au-

thorised agents of the addressees to receive these notices the proof of service was defective. Service of a notice upon or delivery to such an agent would be good service or delivery to the principal, though in fact the notice was destroyed by the agent and never was seen or heard of by the principal [*Tanham v. Nicholson* (11)]; but it is an entire mistake to suppose that the addressee must sign the receipt for a registered letter himself, or that he cannot do so by the hand of another person, or that if another person does sign it on the addressee's behalf the presumption is that it never was delivered to the addressee himself mediately or immediately. For instance, if a servant in the addressee's house saw a notice handed in by the postman carried to the addressee and handed to him, that servant could certify that it was delivered to his master and could, if requested by the master, sign the receipt on the latter's behalf, though he was not the agent of the master authorised to take delivery on his, the master's, behalf.

The latest, clearest, and most conclusive authority upon the question of the sufficiency of the service or delivery of a notice to quit by post is probably the case of the *Gresham House Estate Company v. Rossa Grande Gold Mining Company* (12). There, the defendants, who were sued for rent, contended that they had, before the rent accrued due, terminated their tenancy by a notice to quit enclosed in a letter which they had put into the post correctly addressed to the plaintiffs, and which, if delivered in due course, would have been received in time to determine the tenancy. The plaintiffs called evidence to show the letter had never been received. The learned Judge presiding at the trial directed the Jury that a notice to quit enclosed in a letter sent through the post was *prima facie* evidence that it had been received, and left to the Jury the question whether it had, in fact, been received or not. The Jury found it had been received. On a motion for a new trial on the ground of misdirection, the Court, consisting of Cockburn, C. J., Blackburn, Mellor, and Hanan, JJ., held that if a letter properly directed, containing a notice to quit, is proved to have been put into the post office, it is presumed that the letter reached

(11) (1872) 5 H. L. 561; Ir. R. 6 O. L. 188.

(12) (1870) W. N. 119.

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its destination at the proper time according to the regular course of business of the post office, and was received by the person to whom it was addressed. That presumption would appear to their Lordships to apply with still greater force to letters which the sender has taken the precaution to register, and is not rebutted but strengthened by the fact that a receipt for the letter is produced signed on behalf of the addressee by some person other than the addressee himself.

The only one of the defendants who appeared as a witness admitted he had received through the post office the notice addressed to him. None of the other defendants appeared as witnesses to deny that they had received the notices properly addressed to them and properly posted. In their Lordships' view the evidence of delivery of the notices to quit to all the principal defendants was, under these circumstances, adequately and sufficiently proved, and constituted good service of them within the meaning of section 106 of "The Transfer of Property Act, 1832." They are, therefore, of opinion that the appeal fails upon both the points raised for decision, and should be dismissed, and will humbly advise His Majesty accordingly. As they think that the erroneous mode in which the plaintiffs shaped their claims in the years 1906, 1907 and 1908, in the letters and litigation already referred to, may have misled the defendants and brought about this appeal, they think the parties should be left to abide their own costs incurred in it.

Appeal dismissed.

Solicitors for the Appellant.—Messrs. *Rebder and Higgs.*

Solicitors for the Respondents.—Messrs. *Watkins and Hunter.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 845 OF 1916.

April 22, 1918.

Present:—Mr. Justice Spencer and Mr. Justice Krishnan.

BADAGALA JOGI NAIDU—PLAINTIFF

—APPELLANT

versus

BENDALAM PAPIAH NAIDU AND OTHERS

—DEFENDANTS NOS. 2 TO 4—RESPONDENTS.

Hindu Law—Joint family—Antecedent debt—Mortgage of joint property by father—Subsequent mortgage in renewal of prior one—Sons, liability of.

A prior mortgage over joint family property created by a Hindu father cannot be treated as an antecedent debt for the purpose of binding his sons' interest in co-parcenary property under a subsequent mortgage between the same parties. [p. 292, col. 1; p. 293, col. 2.]

A debt contracted by the father on the security of the joint family estate cannot be treated as a debt of the father within the meaning of the doctrine as to antecedent debts. The doctrine must be restricted to cases of antecedent debts borrowed on the father's sole responsibility with no obligation on the joint family or its properties. [p. 293, col. 2.]

Sahu Ram Chandra v. Bhup Singh, 39 Ind. Cas. 280; 33 M. L. J. 14; 39 A. 437; 21 C. W. N. 693; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 493; 26 C. L. J. 1; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213; 44 L. A. 126 (P. C.), followed.

Vinjanampati Peda Venkanna v. Vadlamannati Sreenivasa Deekshatulu, 43 Ind. Cas. 225; 33 M. L. J. 519; 22 M. L. T. 334; 6 L. W. 649; (1918) M. W. N. 55; 41 M. 136, considered.

Second appeal against the decree of the District Court, Ganjam at Berhampore, in Appeal Suit No. 157 of 1915, preferred against the decree of the Court of the Temporary Subordinate Judge, Ganjam at Berhampore, in Original Suit No. 99 of 1911.

Messrs. *P. Somasundaram and V. Subramanya Pantulu*, for the Appellant.

Mr. *V. Ramesam*, for the Respondents.

This second appeal coming on for hearing on the 26th of September 1917, the Court delivered the following

JUDGMENT.—It is not improbable that the plaintiff's omission to ask questions of his witnesses to prove that the signatures of the persons executing Exhibit B were in the handwriting of those persons and his omission to prove the handwriting of the executants and attestors of Exhibit C were due to oversight. The District Judge appears to have granted the plaintiff's application to examine further witnesses, when it was made, and his judgment does

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not contain anything to show that it was subsequently refused at the time of hearing the appeal.

We must call for findings on the questions:—

(1) Whether the mortgage deeds, Exhibits B and C, are genuine? and

(2) Whether Exhibit A is wholly or partially binding on 2nd defendant?

It would be binding on him if the money was borrowed by the father for the necessary purposes of the family or if the mortgages were executed by the father to discharge an antecedent debt [*Sahu Ram Chandra v. Bhup Singh* (1)]. The onus of proving the whole of this issue will lie on the plaintiff, as the 2nd defendant was not a party to these documents.

Fresh evidence may be admitted. The finding will be submitted in two months, and ten days will be allowed for filing objections.

In compliance with the order contained in the above judgment the District Judge of Ganjam at Berhampore submitted the following

FINDINGS.

The suit has been remanded for findings on the following issues:—

(1) Whether the mortgage deeds, Exhibits B and C, are genuine?

(2) Whether Exhibit A is wholly or partially binding on 2nd defendant.

2. Both parties have examined witnesses at the remand hearing. Plaintiff now says that he saw the mortgagors sign Exhibit B and that he can identify their signatures on Exhibit C. P. W. No. 3 is the son of the man who wrote Exhibits A, B, C and he identifies his father's writing and signature. P. W. No. 5 is the son of Enni Appanna, whose name appears among the witnesses who attested Exhibit B, and he identifies his father's signature and says that he was present himself and saw Exhibit B executed though he did not attest it. P. W. No. 2 is a retired postman who attested Exhibit C and says that he saw the mortgagors sign, and P. W. No. 4 who is related to all the defendants says that the signatures of the mortgagors on Ex-

hibits B and C are genuine. The only evidence on the other side is that of 2nd defendant, who says that the signatures of the mortgagors on Exhibits B and C are not genuine.

The evidence now on record is certainly sufficient to prove Exhibits B and C, if it be true and the question is whether it should be believed. There is little or nothing to be said against plaintiff's witnesses, but it has been argued—

(1) that the circumstances show that the deeds were forged to create a title for defendants Nos 3 and 4 to the mortgaged properties;

(2) that the endorsement of discharge on Exhibit C was found by my predecessor to be a forgery;

(3) that the mortgagees under Exhibit C were not examined; and

(4) that 3rd defendant was not examined to prove that he had executed Exhibits B and C. The first argument is based partly on the evidence of D. Ws. Nos. 2 to 4, who were examined to prove that the mortgaged property belonged to defendants Nos. 1 and 2 and that plaintiff managed their property for a number of years because 1st defendant was incompetent, and partly on recitals in Exhibits A, B and C about the property. The defence witnesses are clearly interested, and I cannot see that the recitals in the mortgage-deeds afford any foundation for defendants' case that there has been a long series of forgeries. In Exhibits B and C the recital is that the property had been in the possession of an aunt of the fathers of defendants Nos. 1 and 3 and that she had given it to 1st defendant's father, or (as in Exhibit C) that it had devolved on him by means of adoption, and the recitals would surely have been very different if these deeds had been forged with the object of creating a title for the father of 3rd defendant. Besides this there is the all-important fact that 1st defendant, who was alive at the time of the original trial, was not put into the witness box to deny his signatures on Exhibits A and B. Second defendant stated at one time before the Subordinate Judge that 1st defendant did manage their property. The plea of his incompetency was not supported by any independent evidence, and even the witnesses who

(1) 39 Ind. Cas. 280; 33 M. L. J. 14; 39 A. 437; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 498; 26 C. L. J. 1; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213; 44 L. A. 126 (P. C.).

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were examined did not speak of him as an idiot.

No proof has been offered of the endorsement on Exhibit C, but the omission of this endorsement in the public copy given on 25th May 1915 is not conclusive proof that this endorsement is a forgery. It is insignificant in appearance and position, and it has been omitted in the translation appearing in the printed book. In any case I think there is clear proof that Exhibit B is genuine and Exhibit C recites a debt due to the mortgagee of Exhibit C. I am inclined to think that Exhibit C is genuine too. Two circumstances on which my predecessor laid some stress, *viz.*, that plaintiff did not retain the *paddus* and that no record was made of payments said to have been made under Exhibit A, may be explained by the close relationship between the parties, and I have taken these circumstances into consideration in forming an opinion about Exhibits B and C. My finding on issue No. 1 is that Exhibits B and C are genuine.

2. The second issue is "whether Exhibit A is wholly or partially binding on 2nd defendant?" and it is stated in the referring order that "it would be binding on him if the money was borrowed by the father for necessary purposes of the family or if the mortgages were executed by the father to discharge an antecedent debt [*Sahu Ram Chandra v. Bhup Singh* (1)]." In the case quoted, the words "antecedent debt" have been defined as meaning "an obligation, not only antecedently incurred, but incurred wholly apart from the ownership of the joint estate or the security afforded, or supposed to be available by such estate", and in another passage their Lordships speak of the father's power to bind his son as being confined to cases "where the father's debts have been incurred irrespective of the credit obtainable from immovable assets which do not personally belong to him, but are joint family property." The consideration for Exhibit A was made up of Rs. 2,000 required to discharge Exhibit B, and of Rs. 1,000 said to have been borrowed from time to time. Money was borrowed under Exhibit B to discharge Exhibit C, a mortgage deed held by a third party, and Exhibit C is said to have been executed in discharge of yet another mortgage deed—Exhibit E. In all

these cases money was borrowed on the security of the family property, and if this is one of the tests to be applied in deciding whether a debt is an antecedent debt or not, the Rs. 2,000 secured by Exhibit A must be held not to be an antecedent debt. It has been argued that a different interpretation has been put on this case by the Madras High Court, or rather that the Madras High Court has held in *Vinjanampati Peda Venkanna v. Vadlamannati Sreenivasa Deekshatulu* (2) that this ruling cannot be held to apply in Madras, but the question decided in *Vinjanampati Peda Venkanna v. Vadlamannati Sreenivasa Deekshatulu* (2) was rather different and did not depend on the meaning of the words "antecedent debt." I think I am bound to follow the Privy Council case, and as there is no proof of necessity apart from the fact that there was a prior debt due to plaintiff himself, and as plaintiff, being a near relation, should be in a position to prove necessity, if any existed, I find that Exhibit A is not binding on 2nd defendant to the extent of Rs. 2,000 of the original consideration. The balance, according to the terms of Exhibit A, was borrowed at various times for household expenses and to pay Government assessment, but there is no evidence that money was really required for these purposes, and according to defendants' evidence, which has not been contradicted in this respect, the family lands yielded an ample income. P. W. No. 2 said that he saw money paid on two occasions, and there is no other evidence to show when this Rs. 1,000 were advanced, but even if it be assumed that the money was advanced before the mortgage deed was executed, I doubt whether the debt can be treated as an antecedent debt coming within the terms of the very restricted definition given by the Privy Council. If money is borrowed ostensibly for household expenses and to pay Government assessment, the debt can hardly be said to have been incurred wholly apart from the ownership of the joint estate.

My finding on issue No. 2 is that Exhibit A is not binding on 2nd defendant.

(2) 43 Ind. Cas. 225; 33 M. L. J. 519; 22 M. L. T. 334; 6 L. W. 649; (1918) M. W. N. 55; 41 M. 136.

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This second appeal coming on for final hearing on the 17th April 1918, after the return of the findings of the lower Appellate Court upon the issue referred by this Court for trial and having stood over for consideration till this day, the Court delivered the following

JUDGMENT.

SPENCER, J.—We must accept the learned District Judge's findings of facts, (1) that Exhibits B and C are genuine; (2) that family necessity has not been proved for the debts secured by Exhibit A, apart from the fact that there was a prior debt due to the plaintiff secured by the previous instruments (Exhibits B and C) executed by the 1st defendant and 3rd defendant and their fathers which mortgaged the family property.

On the question of law, which is whether a prior mortgage over joint family property created by a father can be treated as an antecedent debt for the purpose of binding his sons' interest in co-parcenary property in a subsequent mortgage between the same parties, I think we are bound to give the fullest effect to the words of Lord Shaw in *Sahu Ram Chandra v. Bhup Singh* (1). If the arguments advanced before their Lordships are read with what preceded and followed this expression of the Judicial Committee's opinion, there cannot be any doubt as to what was meant by the words "an obligation not only antecedently incurred but incurred wholly apart from the ownership of the joint estate or the security afforded or supposed to be available by such joint estate."

If the law were different from what it is here pronounced to be, it would be open to a father to create a mortgage over the joint estate of himself and his sons one day and the next day to execute a second mortgage over the same property citing the first mortgage as an antecedent debt to make the transaction binding on the sons' interest. The effect would be to give the sanction of law to the very evil which the Privy Council seek to avoid when they speak of the undue and improper extension of this exception in respect of antecedent debts to the manager's power of mortgage.

The effect of the decision in *Sahu Ram Chandra v. Bhup Singh* (1) has been con-

sidered in a recent decision of this High Court in *Vinjanampati Peda Venkanna v. Vadlamani Sreenivasa Deekshatulu* (2).

The question that arose in that case was whether a creditor could proceed against the son's share during his father's lifetime to recover a debt upon a promissory note executed by the father after partition in renewal of a note executed before partition. It was held that the Privy Council decision was not intended to overrule the whole current of authorities on this topic. The learned Chief Justice observed that the latest Privy Council decision did not question a creditor's right to bring the son's interest to sale for an antecedent debt. The new definition of what is an antecedent debt was not discussed in his judgment or in that of Kumarasami Sastri, J., who sat with him. There was nothing said, nor could there be, to diminish the authority of this pronouncement by the Privy Council, and even if anything in earlier judgments of that tribunal can be cited as being difficult to reconcile with this we should have to follow the more recent.

I consider that the appeal must be allowed to the extent of giving the plaintiff a decree in the usual mortgage form, including costs of this suit throughout, against the share of the deceased 1st defendant in the hands of his son the 2nd defendant, allowing 6 months for payment and that as regards the 2nd defendant's share the appeal must be dismissed with costs and a decree will be made accordingly.

KRISHNAN, J.—The learned District Judge has now found on the 1st issue that the prior mortgage deeds—Exhibits B and C—are genuine and on the 2nd issue that Exhibit A is not binding at all on the 2nd defendant. The finding on the 1st issue is not objected to and must be accepted. The appellant has, however, contested the finding on the 2nd issue before us and we must consider it.

The 2nd defendant is not a party to Exhibit A; his share in the joint property mortgaged is sought to be made liable on the ground that his father executed Exhibit A, and that the consideration for it is binding on him. The consideration for Exhibit A as recited in it consists of two parts, viz., Rs. 1,000 said to have been borrowed by the father at various times to pay household expenses and the

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Government assessment on the joint estate and Rs. 2,000 to pay off the prior mortgage on the same property under Exhibit B. It is now found that there was no necessity to borrow either of the sums. Exhibit B was executed for paying off the mortgage under Exhibit C and that again to pay off the mortgage under Exhibit F. No evidence was given to show that there was any necessity to borrow under Exhibit F; and, therefore, Exhibit A also is not shown to be justified by necessity. This finding that Exhibit A was not proved to have been executed for any necessary purposes of the joint family was not seriously contested before us. The appellant has based his claim to make Exhibit A binding on the 2nd defendant on the ground that it was executed by his father for 'antecedent debts'. That a mortgage interest can be created on joint property by the father alone, so as to bind the son, to pay off his antecedent debts is not disputed. But the question is, whether the consideration for which Exhibit A was executed can be held to be 'antecedent debts'. As regards the Rs. 1,000 it is not clear whether there was a debt at all before Exhibit A, and whether the moneys were not paid as consideration for the mortgage itself; the alleged *paddus* were not produced at all. We must take it that plaintiff has not established the existence of any debts for Rs. 1,000 antecedent in time to and dissociated in fact from the mortgage sued on, and, therefore, as laid down by the Privy Council in *Sahu Ram Chandra v. Bhup Singh* (1) his claim to enforce Exhibit A on that ground against the son to the extent of Rs. 1,000 fails. The question, whether the previous mortgages should not be treated as antecedent debts is a more difficult one. As stated already, Exhibit A was partly to pay off Exhibit B, and that again to pay off Exhibit C which was to pay off Exhibit F. They are all mortgages on the same joint family property; Exhibits A and B were in favour of plaintiff; but Exhibits C and F were in favour of third parties. If any of these deeds created a valid charge on the son's share as having been executed for an antecedent debt itself, the subsequent ones no doubt will also be binding to the

extent that they were executed for paying off such a valid charge. It is not shown that there was any antecedent debt to pay off which Exhibit F was executed; but the argument has been that each prior mortgage was an antecedent debt for the one next in time. This argument must fail under the recent ruling of the Privy Council in *Sahu Ram Chandra v. Bhup Singh* (1). Their Lordships make it clear that a debt borrowed by the father on the security of the joint family estate cannot be treated as a debt of the father within the meaning of the doctrine in question. They say: "In their Lordships' opinion these expressions, which have been the subject of so much difference of legal opinion, do not give any countenance to the idea that the joint family estate can be effectively sold, or charged in such a manner as to bind the issue of the father, except where the sale or charge has been made... to discharge an obligation not only antecedently incurred, but incurred wholly apart from the ownership of the joint estate or the security afforded or supposed to be available by such joint estate. The exception being allowed as in the state of authorities it must be, it appears to their Lordships to apply, and to apply only, to the case where the father's debts have been incurred irrespective of the credit obtainable from immoveable assets which do not personally belong to him, but are joint family property." Their Lordships observed in an earlier part of their judgment, "this (that is, the doctrine of the validity of mortgages or sales by the father for antecedent debts against his sons) being an exception from a general and sound principle, their Lordships are of opinion that the exception should not be extended and should be very carefully guarded." There cannot be any doubt on their language that they meant to restrict the doctrine to cases of antecedent debts borrowed on the father's sole responsibility with no obligation on the joint family or on its properties. We are bound to follow this expression of opinion which is quite clear, as pointed out by Mr. Ramesam, and we cannot consider any arguments about its correctness.

The lower Court's finding that Exhibit A is not binding on the 2nd defendant's share of the property must, therefore, be accepted.

AGENT, G. I. P. RAILWAY V. KARAYA LAL.

The 1st defendant, the father, being himself the executant of Exhibit A, the liability of his half-share in the plaint property is not disputed. His death after the decree in the District Court cannot in any way affect the liability. Recitals in Exhibit A are good evidence against its executant and as there is no proof that such recitals are false, the claim must be taken to be proved against the father. There must be a mortgage decree as prayed for, with the variation that only half the plaint property will be made liable.

I agree to the order proposed by my learned brother.

Appeal allowed.

M. C. P.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 69 OF 1916.

September 28, 1916.

Present.—Mr. Mittra, Offg. A. J. C.
THE AGENT, G. I. P. RAILWAY,
BOMBAY, AND THE AGENT, E. I.
RAILWAY, CALCUTTA—

DEFENDANTS—APPLICANTS

versus

KARAYLAL AND ANOTHER—PLAINTIFFS

—NON-APPLICANTS.

Railways Act (IX of 1890), ss. 76, 80—Suit against Railway Company for compensation for loss of goods—Burden of proof—Goods carried over two Railways—Decree against both, legality of.

Under section 76 of the Railways Act a plaintiff suing a Railway Company for compensation for loss of goods has ordinarily only to prove the loss. Thereupon it is for the Railway Company to show that the loss occurred under circumstances which exempt a bailee from responsibility for the loss, or it may rely upon a special contract exempting it from liability. [p. 295, col. 1.]

Where, however, a risk-note exempts the Railway Company from all liability except in certain specified circumstances, the plaintiff can only succeed if he establishes that his case comes within those exceptions. [p. 295, col. 1.]

Under section 80 of the Railways Act a decree can be passed against a Railway Company to whom the goods were not entrusted for carriage, only if it is proved that the loss occurred while the goods were in the custody of that Company. In no case can a decree be passed against both the Companies under that section. [p. 295, col. 2.]

Application for revision of the decree of the Judge, Small Cause Court, Saugor, dated the 15th December 1915.

Mr. P. Lobo, for the Applicants.

Mr. G. L. Subhedar, for the Non-Applicants.

ORDER.—This is an application for revision under section 25 of the Provincial Small Causes Courts Act. The plaintiffs who are partners sued the two defendant Railway Companies for compensation for the loss of 9 tins of Ghee consigned from Saugor for delivery at Calcutta. The defendants rely upon a risk-note in Form H approved by the Governor-General in Council under section 72 (2) (b) of the Indian Railways Act, and signed by one of the plaintiffs on behalf of the firm. No evidence has been given as to how the loss occurred. The lower Court has decreed the plaintiffs' claim against both the Companies.

The risk-note recites that in consideration of special reduced rates, the plaintiffs agree and undertake to hold the G. I. P. Railway Administration and all other Railway Administrations, working in connection therewith, harmless and free from all the responsibility for any loss, destruction, or deterioration of or damage to all or any of such consignments from any cause whatever, except for the loss of a complete consignment or of one or more complete packages forming part of a consignment due either to the wilful neglect of the Railway Administration or to theft by or to the wilful neglect of its servants: provided the term wilful neglect be not held to include fire, robbery from a running train or any unforeseen event or accident. The lower Court has found that the loss was due to pilfering on the part of the Railway servants. There is not an iota of evidence, direct or indirect, to justify such a finding. This is a pure conjecture on the part of the Small Cause Court, and must be ignored. The case must be decided upon a consideration of the burden of proof upon the pleadings. The plaintiffs rely on section 76 of the Railway Act, which runs as follows:—

"In any suit against a Railway Administration for compensation for loss, destruction or deterioration of animals or goods delivered to a Railway Administration for carriage by Railway, it shall not be necessary for the plaintiffs to prove how the loss, destruction or deterioration was caused." The section is very

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general in terms. But I think that ordinarily the plaintiffs have only to prove the loss. Thereupon it is for the Railway Company to show that the loss occurred under circumstances which exempt a bailee from responsibility for the loss, or the Railway Company may rely upon a special contract exempting them from liability. In the present case, the defendants have not attempted to explain how the loss occurred. But they have relied upon the risk note, the terms of which have been already given above. Now the risk-note exempts the defendants from all liability except in certain specified circumstances. The plaintiffs can, in my opinion, only succeed, if they establish that their case comes within those exceptions. This view is in accordance with the judgment of the Calcutta High Court in *Sheo Barat Ram v. Bengal and North-Western Railway Company* (1). Fletcher, J., in *East Indian Railway Company v. Nilkanta Roy* (2) expresses a similar opinion, though the case was actually decided on a different ground. Under section 7 of the Railway and Canal Traffic Act, 1854, every Railway and Canal Company shall be liable for the loss of or injury to animals or to goods occasioned by the neglect or default of such Company, or its servants, notwithstanding any notice, condition or declaration made and given by such Company contrary thereto. Erle, C. J., in *Harrison v. London, Brighton and South Coast Railway Company* (3) speaking of this section, says: "It creates a liability for loss of, or injury to, a thing, not howsoever caused, but occasioned by the neglect or default of the Company, the contest being whether a Company could exempt themselves from liability for misconduct. Under this construction the Statute would only come into operation where, in an action for the loss of or injury to a thing carried, the defence should be a condition exempting from liability. Then if the plaintiff showed that the loss of or injury to the thing was occasioned by the neglect or default of the defendant, the condition would be void."

That is no doubt an interpretation of an English Statute, and here we are concerned

(1) 15 Ind. Cas. 56; 16 C. W. N. 766.

(2) 22 Ind. Cas. 679; 41 C. 576; 19 C. W. N. 95; 19 C. L. J. 142.

(3) (1862) 127 R. R. 322 at 324; 2 B. & S. 153; 31 L. J. Q. B. 113; 8 Jur. (N. s.) 740; 6 L. T. (N. s.) 463; 121 E. R. 1029.

with the form of contract sanctioned by the Governor-General in Council in pursuance of a Statute. It seems to me that it was for the plaintiffs to prove that the loss occurred under circumstances which would make the defendants liable under the special contract.

The lower Court in passing a joint decree against both the Railway Companies has misunderstood the provisions of section 80 of the Indian Railways Act. That section authorises the plaintiffs to sue the G. I. P. Railway Company as the Company to whom the goods were delivered, but as there is no proof that the loss occurred whilst the goods were in the custody of the East Indian Railway Company, no decree could be passed against that Company. In no case can a decree be passed against both the Companies. The decree of the lower Court is set aside and the suit is dismissed with costs.

Application allowed.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 225
OF 1916.

July 12, 1918.

Present:—Mr. Justice N. R. Chatterjea
and Mr. Justice Smither.

SANKAR NATH MUKHERJI—PETITIONER

—APPELLANT

versus

BIDDUTLATA DEBI—DEFENDANT—

RESPONDENT.

Administration of estate—Executor, duty of.

B. by her Will appointed G., H., L. and T. her executors. It was also provided that S. would be able to act as executor when he attained majority. G., H. and L. obtained Probate in 1882 and went on administering the estate until 1888, when T. was appointed executor. T. died in 1908. There was a legacy in favour of S. who presented an application for Probate long after the death of the testatrix:

Held, that it was not necessary or proper to grant Probate 35 years after the death of the testatrix in order that S. might get the property bequeathed to him, when the genuineness of the Will and the right of the parties under the Will had been established by the previous grant of Probate. [p. 297, col 1.]

The duty of an executor is to administer the estate of the deceased only so far and so long as

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to enable him to carry out the terms of the Will of which he is executor. After the property has ceased to be the estate of the deceased and has become the property of the residuary legatees under the Will, the executor as such has no authority to manage the estate on his behalf. [p 297, col. 2.]

Taran Singh Hazari v. Ramratan Tewari, 31 C. 89, followed.

Appeal against the decision of the District Judge, Nadia, dated the 10th August 1916.

Babus Ram Chunder Mozumdar, Romesh Chunder Sen and Atindra Nath Mukherjee, for the Appellants.

Babus Baidyanath Dutt and Bhupendra Kumar Bose, for the Respondent.

JUDGMENT.

N. R. CHATTERJEA, J.—This appeal arises out of an application for Probate of the Will of one Bhayaharini Debi, dated the 2nd Agrahan 1288.

By her Will she appointed her husband's brother's sons Girindra and Harendra, her daughter Lambodari and her husband Tara Nath, her executors. It was also provided in the Will that Sankar Nath (the appellant), who was the son of another brother of Tara Nath, when he attained majority, would be able to act as executor: and that in case Tara Nath, was willing and able to act as sole executor, he would be entitled to do so. Bhayaharini died two days after the execution of the Will: and as Tara Nath was not willing to apply for Probate, Girindra, Harendra and Lambodari applied for, and obtained, Probate in January 1882 and went on administering the estate until April 1888 when Tara Nath having applied for Probate, he was appointed executor.

In the year 1893, Girindra, Harendra and Narendra as also Sankar Nath and his two minor brothers represented by their mother were called upon to state whether they would accept the bequest in their favour, which consisted of certain immovable property subject to an annuity of Rs. 2,400 a year in favour of Lambodari. Girindra, Harendra and Narendra filed a petition in Court giving up the legacies. In 1894, there was an agreement between Tara Nath and her daughter Lambodari and daughter's son Mohini Mohan under which Lambodari and her son gave up their right to certain properties and also the annuity given to her under the Will, and Tara Nath gave certain properties to her absolutely. Tara Nath died in

1908, and in 1910 Girindra and Harendra applied for Probate. Notice was served upon Sankar and he stated that he could not apply for Probate owing to ill health but that he would do so later on.

It appears that after the death of Bhayaharini, Tara Nath married a second wife and had a son Baroda Bhusan, who died sometime before 1910 leaving a widow Biddutlata, who is the respondent before us. In August 1910 Biddutlata, who was a minor, filed an application through her father for revocation of the Probate granted to Girindra and Harendra and the grant was accordingly revoked.

Then the present application was made by Sankar on the 9th March 1894 for the Probate of the Will of Bhayaharini. The application has been refused by the Court below and Sankar Nath has appealed to this Court.

The testatrix died more than 35 years ago, and presumably the estate has been fully administered. But it was contended on behalf of the applicant in the Court below as well as in this Court that there were certain debts and legacies unpaid, and that it was necessary to grant administration to manage the properties dedicated for *deba sheba* provided for in the Will of Bhayaharini.

As regards the debts, it appears that there was a mortgage bond executed by Bhayaharini on the 25th Falgun 1283. The mortgagee obtained a decree against Tara Nath apparently as executor. On the 1st Ashar 1311 Tara Nath mortgaged certain properties in lieu of the debt due under the mortgage decree obtained by the creditor, asserting his own right to the properties, presumably based upon the *ekrar* with Lambodari. The properties mortgaged appear to have formed part of the estate left by Bhayaharini, but Tara Nath took over the liability of the debt upon himself and the creditors chose to take the properties to which Tara Nath asserted his own right, as security. In these circumstances, we do not think that a fresh Probate should be granted on the fresh ground.

Then as to the legacies under the Will, we have seen that Harendra, Girindra and Narendra refused to accept the bequest burdened with the annuity in favour of Lambodari. It is contended on behalf of the appellant that there is no evidence that notice was

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served upon Sankar. On the other hand, we were referred on behalf of the respondent to a finding of the District Judge in a previous revocation case as showing that Sankar had been served with notice; and it is also contended on her behalf that Sankar having in 1897 stated in his deposition that Tara Nath was in possession and had got his own name registered as proprietor, any claim for the bequest was barred by limitation. But these questions cannot be gone into by the Probate Court and we do not think that we should consider them. It appears that specific property or rather a share in a certain specific property was bequeathed to Sankar and his brothers, and they can enforce the right against the persons in possession if they have any subsisting right. We do not think it necessary or proper to grant Probate 35 years after the death of the testatrix in order that Sankar may get the property bequeathed to him, when the genuineness of the Will and the right of the parties under the Will have been established by the grant of Probate previously made.

The last point relates to *deba sheba* and the contention is that the *sheba* is to be carried on by the executors. This contention was raised in another appeal to this Court arising out of the application made by Biddutlata for revocation of the Probate granted to Girindra and Harendra Nath Mookerji. Mr. Justice Coxe in disposing of that contention observed as follows:—"As regards the idol it is argued that the *sheba* has to be performed for ever and that consequently the estate cannot have been completely administered. It appears to us that this argument amounts to *reductio ad absurdum*. The Will provides that: 'If any of the aforesaid executors died, his successive male descendants will be able to act as executors.' But it is impossible to hold that the estate can never be completely administered and that the heirs of the executors will be entitled to apply for Probate of this Will till the end of time. The appellants held the Probate of the Will for seven years. They had full opportunities for making all necessary arrangements for the *sheba* of the idol. In *Ranjit Singh v. Jagannath Prosad Gupta* (1),

(1) 12 C. 375; 6 Ind. Dec. (N. S.) 255.

the executor had been empowered to appoint a Shebait and had failed to exercise that power. But in the present case all that was done was to leave certain property to certain idols, and there is nothing to show that the idols are not in the full enjoyment of the property." *Vide* Respondent's Book, page 51.

We agree with those observations and also with the observations made by Brett, J., as to the position and duties of an executor in *Taran Singh Hazari v. Ramratan Tewari* (2). "The position and duties of an executor in this country are not very well understood, and considerable confusion exists as to duties of the executor, in administering the estate. The duties of the executor are to administer the estate of the deceased only so far and so long as to enable him to carry out the terms of the Will of which he is executor. After the property has ceased to be the estate of the deceased and has become the property of the residuary legatee under the Will, the executor as such has no authority to manage the estate on his behalf. Under the Will, the beneficial interest in the property vested in the minor as soon as the testator died, and Gouri Debi was appointed as executrix to manage the property till the minor attained majority. In describing her as executrix for this purpose, there has, in our opinion, been a confusion or misinterpretation of the term 'executrix.' What was intended appears to us to be that she should as executrix administer the estate and see that the terms of the Will were carried out, and, this being done, that she should manage the property covered by the Will, not as executrix under the Will and administratrix of the deceased's estate, but as manager for the minor till he attained majority. The intention clearly was to appoint her to be manager of the minor's estate. We think that in interpreting the Will, we must have regard not merely to the words used but to the evident intention of the testator."

We think under the circumstances that it is not necessary to grant Probate, for the administration of the estate as the estate really

(2) 31 C. 89 at pp. 92, 93.

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does not require what is technically meant by 'administration.' If there is any controversy between the parties as to the Shebaitship of the disputed property, they must seek for a decision in a title suit framed for the purpose. In this view of the case, it is unnecessary to consider whether the appellant had any *locus standi* to make the application for Probate.

The appeal accordingly fails and is dismissed with costs, five gold mohurs.

SMITHER, J.—I agree.

Appeal dismissed.

MADRAS HIGH COURT.

MISCELLANEOUS SECOND CIVIL APPEAL NO. 123 OF 1917.

August 6, 1918.

Present:—Mr. Justice Spencer and

Mr. Justice Krishnan.

SUBBALAKSHIMI AMMAL—DEFENDANT

No. 1—APPELLANT

versus

RAMALINGA CHETTY AND OTHERS—

PLAINTIFFS NOS. 2 AND 3 AND DEFENDANTS

NOS. 2 TO 4—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 2, 47, 96, O. XXXIV, r. 6 (2)—Limitation Act (IX of 1908), s. 19, Sch. I, Art. 181—Mortgage decree—Application for final decree for sale, rejection of—Appeal—Petition by judgment-debtor, acknowledgment of liability in—Limitation, fresh starting point of.

An order of Court dismissing an application for a final decree for sale in a mortgage suit is a "decree" within the meaning of section 2, Civil Procedure Code [p. 298, col. 2.]

Such an order cannot be treated as one under section 47, Civil Procedure Code, in execution of the preliminary decree, but is an order in the suit itself and is appealable as a decree under section 96 of the Civil Procedure Code [p. 298, col. 2.]

Suppu Nayakan v. Perumal Chetty, 34 Ind. Cas. 372; 30 M. L. J. 486; (1916) 1 M. W. N. 301; 19 M. L. T. 364, applied.

Madho Ram v. Nihal Singh, 30 Ind. Cas. 494; 38 A. 21; 13 A. L. J. 985, followed.

Article 181 of the Limitation Act applies to an application under Order XXXIV, rule 6 (2), Civil Procedure Code. [p. 299, col. 1.]

An acknowledgment by a judgment-debtor of the amount due by him under a mortgage decree is sufficient, under section 19 of the Limitation Act, to save limitation for the purpose of making an application for a final decree for sale. [p. 299, col. 2.]

The right to take legal steps for enforcing a right need not be expressly acknowledged if the right itself is acknowledged. [p. 299, col. 2.]

Appeal against the order of the Court of the Temporary Subordinate Judge, Vellore, in Appeal Suit No. 22 of 1917, preferred against the order of the Court of the

District Munsif, Tirupatur, in I. A. No. 903 of 1914, in Original Suit No. 1240 of 1910.

Mr. M. Patanjali Sastri, for the Appellant.

Mr. C. V. Ananthakrishna Aiyar, for the Respondents.

JUDGMENT.—The two questions raised for our decision in this case are: (1) Whether an appeal lay to the lower Appellate Court and (2) whether Miscellaneous Petition No. 178 of 1912 contains a sufficient acknowledgment under section 19 of the Limitation Act to give a fresh starting point for 1st respondent's application.

The 1st plaintiff sued to recover the amount due to him under a simple mortgage bond by sale of the property mortgaged. On 27th October 1910 a preliminary mortgage decree was passed in his favour giving defendants time till 27th April 1911 to pay the amount found due. Money was not so paid, and the present application out of which the civil miscellaneous second appeal before us arises was filed by the 1st respondent on 16th September 1914 under Order XXXIV, rule 5, clause (2), for a final decree for sale. The 1st Court dismissed the application as barred by limitation under Article 181 of the Limitation Act. On appeal the lower Appellate Court reversed that order and has passed a final decree. The 1st defendant has appealed to us against that decision.

On the first question raised, the appellant is right in his contention that the order cannot be treated as one under section 47, Civil Procedure Code, in execution of the preliminary decree. It is an order in the suit itself. The effect of the order is to dismiss the plaintiffs' suit so far as it prayed for the realisation of the mortgage money by sale of the mortgaged property. It is a final adjudication on that part of the plaintiffs' case so far as the Munsif's Court is concerned, and, therefore, falls within the definition of decree under section 2, Civil Procedure Code. A formal decree was drawn up by the Munsif dismissing the petition, but it did not expressly dismiss the suit for sale. This, however, seems immaterial as the effect of the order was to so dismiss. In *Suppu Nayakan v. Peru-*

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mal Chetty (1) this Court held that an order declaring that a suit had abated because the legal representative of the deceased defendant had not been brought on record in time was a decree and appealable as such, though no formal decree dismissing the suit had been drawn up. The principle of that decision applied to the present case. If the plaintiffs' application had been allowed by the Munsif and a final decree passed, there can be no doubt that an appeal would have lain against it. It would be an anomalous position if we were to hold that an appeal does not lie where the application is refused. The ruling of the Full Bench in *Mudho Ram v. Nihal Singh* (2) shows that appeals are allowed in that Province from such orders as appeals from decrees in suits. We think that is the right view and that the appeal to the lower Appellate Court was a competent one under section 96 of the Civil Procedure Code.

On the question of limitation it is now settled that Article 181 applies to an application under Order XXXIV, rule 6, clause (2); see *Nimmala Mahankali v. Kallakuri Subba Rao* (3), and it is clear that section 19 of the Limitation Act also applies. The question then to be decided is whether there is a sufficient acknowledgment in the present case. Miscellaneous Petition No. 178 of 1912, relied on by the plaintiffs as containing the necessary acknowledgment, was put in by the mortgagor for obtaining an adjournment of the sale of the mortgaged properties in Court auction. It should be explained that, at one stage of the proceedings in this suit, the Court had treated the first decree as an executable decree and had ordered sale of the properties. It was during the time that this view was in force that Miscellaneous Petition No. 178 of 1912 was filed. Subsequently the Court ruled that a final decree should be obtained before execution and that order has now become final between the parties, so that no question about the executability of the 1st decree itself having become *res judicata* arises. In Miscellaneous Petition No. 178 of 1912 the 1st defendant says: "The date of sale in auction has been fixed for the 17th

of this month. I have applied for extension of time till the re-opening of the Court to pay the plaintiff the decree amount. Plaintiff has also consented. I pray that the Court may be pleased to pass orders directing that the auction to be held on the 17th instant may be stopped and the sale may be adjourned till the re-opening of the Court without issuing any further sale proclamation". There can be no doubt that the mortgagor clearly acknowledges by it plaintiffs' right to the decree amount and their right to realise it by sale of the suit properties. Appellants' Vakil, however, urges that such an acknowledgment is not sufficient to save the present application and that the acknowledgment must expressly be of the right to apply for a final decree, and he relies on *Andiappa Chetty v. Devarajulu Naidoo* (4). Under section 19 the acknowledgment of liability must be "in respect of the right" in respect to which the application is made. What then is that right in the present case? Is it the right to apply for a final decree as appellant contends, or the right to realise the decree amount by sale of the mortgaged properties through Court as the respondent argues? The substantial right the plaintiff has is the latter; his application to Court is only for obtaining a final decree to enable him to enforce that right. The Privy Council has laid down in *Sukhamoni Chowdhurani v. Ishan Chunder Roy* (5) that it is not required that an acknowledgment within the Statute shall specify every legal consequence of the thing acknowledged. Similarly the right to take legal steps for enforcing the right itself need not be expressly acknowledged, if the right itself is acknowledged. The language of section 19 is clear on the point that the right itself should be acknowledged, and not the right to apply. In *Venkatrav Bapu v. Bijesing Vithalsing* (6) an application for the postponement of the sale under a mortgage decree, which said the mortgagor would pay the amount of the decree, was held to contain a sufficient acknowledgment to give a fresh starting point

(1) 34 Ind. Cas. 372; 30 M. L. J. 486; (1916) 1 M. W. N. 301; 19 M. L. T. 364.

(2) 30 Ind. Cas. 494; 38 A. 21; 13 A. L. J. 985.

(3) 41 Ind. Cas. 263; 32 M. L. J. 455.

(4) 12 Ind. Cas. 378; 21 M. L. J. 1024; 36 M. 68; 10 M. L. T. 251; (1911) 2 M. W. N. 225.

(5) 25 O. 844 at p. 851; 25 I. A. 95; 2 O. W. N. 402; 7 Sar. P. O. J. 294; 3 Ind. Dec. (N. S.) 550 (P. C.).

(6) 10 B. 108; 5 Ind. Dec. (N. S.) 458.

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for the plaintiff's subsequent application to execute the decree. The only difference between that case and the present one is that here the application is to get a final decree before applying for execution; this does not seem to be a material difference in this connection. The acknowledgment of plaintiffs' right to sell the properties in Court auction involves an acknowledgment of their right to get the final decree for the purpose.

We think the Subordinate Judge is right in holding that there was a sufficient acknowledgment in this case. The respondents' Vakil has not attempted to support the Subordinate Judge's view on the question of waiver and on the question of previous execution applications giving fresh starting points for limitation under Article 181, which are obviously wrong. His decree is, however, right and this appeal must be dismissed with costs.

M. C. P.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 2262
OF 1916.

June 17, 1918.

Present :—Justice Sir Charles Chitty, Kt., and
Mr. Justice Walmsley.FAZARALI MAHALDAR AND OTHERS—
PLAINTIFFS—APPELLANTS*versus*POROO MIAN AND ANOTHER—DEFENDANTS—
RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 161 (a)—Incumbrance, meaning of—Interest of purchaser of portion of tenancy, whether incumbrance.

The interest of the purchaser of a portion of a tenancy is not an incumbrance within the meaning of section 161 (a) of the Bengal Tenancy Act, which the purchaser of the tenancy in execution of a rent decree would have to annul under section 167 of the Bengal Tenancy Act. An incumbrance implies a limitation of the rights of the tenant, and not a total extinction of them.

Appeal against the decision of the Subordinate Judge, Murshidabad, dated the 14th July 1916, modifying that of the Munsif, Additional Court at Jangipur, dated the 15th July 1915.

Babu Anilendra Nath Roy Chowdhury, for the Appellants.

Babu Shyama Churn Mitra, for the Respondents.

JUDGMENT.—This is an appeal by the plaintiffs arising out of a suit brought to recover a plot of land measuring 1 *bigha* 14 *cottahs*. Plaintiffs were the landlords and they purchased the land in execution of a rent decree obtained by them against their tenant Bandia Bewa. It is said that Bandia Bewa had sold 5 *cottahs* of the land to defendant No. 2. The question is whether that creates an incumbrance which the purchasers would have to annul. The learned Subordinate Judge relied upon the case of *Ohundra Sakai v. Kalli Prosanno Chuckerbutty* (1) and held that it was an incumbrance. He also referred to the case of *Jogeshwar Mozumdar v. Abed Mahomed Sirkar* (2). Those cases, however, have been distinguished in more recent cases. In *Tmizuddin Khan v. Khoda Nawaz Khan* (3) the case last cited was distinguished and it was held that an incumbrance must imply a limitation of the rights of the tenant and not a total extinction of them. In the case of *Abdul Rahman Chowdhuri v. Ahmadar Rahman* (4) the same view was taken. That was a case of sale of a portion of a *putni* tenure; but otherwise it was indistinguishable from the present case. We think that these recent decisions should be followed and that the judgment of the learned Subordinate Judge cannot be supported. The most recent case of *Abdul Rahman Chowdhuri v. Ahmadar Rahman* (4) does not seem to have been brought to his notice. We accordingly allow the appeal, set aside the decree of the lower Appellate Court and restore that of the Court of first instance with costs in this Court and in the lower Appellate Court.

Appeal allowed.

(1) 23 C. 254; 12 Ind. Dec. (N.S.) 176.

(2) 3 C. W. N. 13.

(3) 5 Ind. Cas. 116; 11 C. L. J. 16; 14 C. W. N. 229.

(4) 31 Ind. Cas. 554; 22 C. L. J. 356; 19 C. W. N. 1217; 43 C. 558.

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VENKATACHARIAR v. NARASIMHA AYYANGAR.

ODDH JUDICIAL COMMISSIONER'S
COURT.

SECOND CIVIL APPEAL NO. 238 OF 1918.

August 19, 1918.

Present:—Pandit Kanhaiya Lal, A. J. C.

JAGDAMBA BAKHSH SINGH—

PLAINTIFF—APPELLANT

versus

MAHADEO SINGH AND ANOTHER—

DEFENDANTS—RESPONDENTS.

Landlord and tenant—Ejectment—Notice to quit, cancellation of—Tenant claiming under-proprietary rights—Declaration, suit for, by landlord—Limitation, commencement of—Fresh notice, whether gives fresh period of limitation—Limitation Act (IX of 1908), Sch. I, Art. 120.

Where a notice issued by a landlord to eject his tenant is cancelled by the Revenue Court on the ground that the tenant is more than an ordinary tenant, the right to file a suit to challenge that order accrues to the landlord on the date of the order and he must bring a suit for that purpose within six years of that date.

It is not open to him to defeat the law of limitation by issuing an abortive notice of the same character shortly before the institution of the suit. Such a proceeding cannot bring the suit within time if the right has already lapsed.

Appeal against the decree of the Subordinate Judge, Sultanpur, dated the 7th March 1918, modifying that of the Munsif, Musafir-khana (Sultanpur), dated the 14th September 1917.

Mr. Fakhruddin Hasan, for the Appellant.

JUDGMENT.—The plaintiff appellant sued for a declaration that the defendants had no proprietary or under-proprietary rights in the plots in dispute. The Court of first instance dismissed the claim. The lower Appellate Court upheld that decree in regard to three of the plots, on the ground that the claim with regard thereto was barred by limitation and discharged it in regard to the 4th plot, holding that the defendants had proprietary or under-proprietary rights therein.

The learned Counsel for the plaintiff-appellant contends that the right to sue accrued to the plaintiff when the notice issued by him to eject the defendants was cancelled in March 1916. But as a previous notice to the same effect had been issued by the plaintiff in 1905 and cancelled by the Revenue Court on the ground that the defendants were more than ordinary tenants, the right to file a suit to challenge that order accrued in 1905 and the present claim was, therefore, barred

by time. It was not open to the plaintiff to defeat the law of limitation by issuing an abortive notice of the same character shortly before the institution of his suit. Such a proceeding cannot bring the case within time if his right has already lapsed. The plaintiff was not in possession constructively or otherwise, and as the Court below has pointed out, his title, so far as it is inconsistent with the order cancelling his notice, ceased to exist after the expiry of six years from that date.

The appeal is, therefore, rejected.

Appeal dismissed.

MADRAS HIGH COURT.

APPEAL SUIT NO. 92 OF 1917.

August 23, 1918.

Present:—Sir John Wallis, Kt., Chief Justice, and Mr. Justice Seshagiri Aiyar.

C. VENKATACHARIAR—PLAINTIFF

—APPELLANT

versus

NARASIMHA AYYANGAR AND OTHERS—

DEFENDANTS—RESPONDENTS.

Landlord and tenant—Ejectment, suit for—Permanent tenancy, plea of—Construction of document—'Saswatham' and 'kayam,' meanings of—Presumption—Denial of landlord's title to lands not comprised in suit, effect of—Transfer of Property Act (IV of 1882), s. 111 (g).

The expressions 'kayam' and 'saswatham' occurring in lease-deeds ordinarily import a permanent tenancy. Even if literal effect is not given to these words so as to involve as a necessary inference a permanent tenancy, the surrounding circumstances may be looked at and a permanent tenancy may be inferred from the use of these words. [p. 302, col. 1.]

Where a deed of lease is a renewal of prior documents in respect of which a permanent tenancy was judicially upheld, the presumption may be made that a permanent tenure was intended to be conferred by the later document. [p. 302, col. 1.]

The denial of the landlord's title in respect of lands not comprised in an ejectment suit will not entail forfeiture of the tenancy in respect of the suit lands under section 111 of the Transfer of Property Act. [p. 303, col. 1.]

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Doe d. Davies v. Evans, (1841) 9 M. & W. 48; 11 L. J. Ex. 9; 60 R. R. 664; 152 E. R. 21, *Doe d. Calvert v. Frowd*, (1828) 4 Bing. 557; 1 Moo. & P. 480; 180 E. R. 883; 29 R. R. 624, *Doe d. Phillips v. Rollings*, (1847) 4 C. B. 188; 17 L. J. C. P. 268; 136 E. R. 476; 72 R. R. 586, distinguished.

Appeal against the decree of the Court of the Temporary Subordinate Judge, Salem, in Original Suit No. 13 of 1915.

Mr. A. Krishnaswami Aiyar, for the Appellant.

Mr. K. Srinivasa Aiyangar, for the Respondents.

JUDGMENT.—This is an appeal from the judgment of the Subordinate Judge of Salem in a suit brought by a Mittadar to eject the defendants, who claim to hold under a permanent lease.

Two questions have been argued before us: (1) whether the defendants hold on a permanent tenure; and (2) whether, if they did so hold, they have forfeited their tenure by renouncing their character as lessees by setting up a title in a third person, within the meaning of section 111 (g), of the Transfer of Property Act.

As regards the first point we have been referred to the cases reported as *Rajaram v. Narasinga* (1), *Foulkes v. Muthusami Goundan* (2), *Venkataramanna v. Venkatapathi Nayani Varu* (3) and *Rama Iyengar v. Anga Guruswami Ohetti* (4), in which the meaning of the words "Saswatham" and "kayam" occurring in leases have been construed. We do not think it necessary again to discuss the meaning of these terms or the correctness of the decision in *Rajaram v. Narasinga* (1), because it has been abundantly established in later cases that, even if literal effect is not to be given to these words so as to involve as a necessary inference a permanent tenancy, yet the surrounding circumstances may be looked at and a permanent tenancy may be inferred from the use of these words. In the present case, we find that the lease in the suit was a renewal of previous documents, and that previously to the execution of this instrument the lessees had been held to hold on a permanent tenure in the suit

of 1819. That consideration, in our opinion, is sufficient to show that it was intended to confer a permanent tenure in favour of the lessees by virtue of Exhibit J in this case. Therefore, on that ground, we agree with the learned Subordinate Judge.

The next question is a somewhat interesting one which has been very ably argued by Mr. A. Krishnaswami Aiyar for the appellant, namely, whether the denial by the present defendants of the title under which the Mittadar claims the whole Mitta in a previous suit, brought by the Mittadar not in respect of the suit land but to recover Jodi in respect of certain Inam lands in the Mitta which were also held by the defendants, is a sufficient setting up by the lessees of a title in a third person to the suit lands. Mr. Krishnaswami Aiyar has argued that directly and by necessary implication, the written statement in that suit Exhibit G should be held to contain a setting up of the title in a third person to the suit lands. We asked him to cite the strongest cases which he could in support of that proposition and he referred us to *Doe d. Davies v. Evans* (5), *Doe d. Calvert v. Frowd* (6); *Doe d. Phillips v. Rollings* (7). In every one of these cases, the denial of title, whether it was direct or whether it was inferential, was in respect of leasehold premises and there is no case in which a denial of the landlord's title to some other lands has been held to operate as a forfeiture of his title to the suit lands, merely because one thing would logically follow from the other. Mr. K. Srinivasa Aiyangar for the respondents has contended that the denial by the defendants of the Mittadar's right in the suit for the Jodi of the Inam lands is consistent with the plaintiff's having the rights of a lessor in respect of the suit lands which he might have acquired in other ways than by transfer of the Mittadar's title from the plaintiff's predecessor to the plaintiff. The doctrine of forfeiture, which is embodied in section 111 of the Transfer of Property Act, is not one to be

(1) 15 M. 199; 5 Ind. Dec. (N. S.) 400.

(2) 21 M. 503; 8 M. L. J. 207; 7 Ind. Dec. (N. S.) 712.

(3) 29 Ind. Cas. 188; 28 M. L. J. 510; 17 M. L. T. 269; (1915) M. W. N. 313.

(4) 46 Ind. Cas. 62; 8 L. W. 109; 35 M. L. J. 129.

(5) (1841) 9 M. & W. 48; 11 L. J. Ex. 9; 60 R. R. 664; 152 E. R. 21.

(6) (1828) 4 Bing. 557; 1 Moo. & P. 480; 180 E. R. 883; 29 R. R. 624.

(7) (1847) 4 C. B. 188; 17 L. J. C. P. 268; 136 E. R. 476; 72 R. R. 586.

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extended, and we think we should be extending it if we were to treat the denial in the written statement Exhibit G in this case as a setting up of a title of a third person to the lands in this suit. Mr. Srinivasa Aiyangar for the respondents desired to take other objections, but we do not think it necessary to hear them, because on the ground which we have stated, we think that the appeal fails and must be dismissed with costs.

M. C. P.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 1499,
2151 AND 2152 OF 1916.

July 8, 1918.

Present:—Mr. Justice Walsley
and Mr. Justice Panton.

Srimati ISHANI DASI AND ANOTHER

—PLAINTIFFS—APPELLANTS

versus

RAJENDRANATH JASH AND OTHERS—

DEFENDANTS—RESPONDENTS.

Hindu Law—Minor—Guardian de facto, powers of—Alienation by guardian to pay off ancestral debts, whether binding on minor.

K. and G. were two Hindu brothers who had executed a mortgage of their joint properties. K. died leaving him surviving as his heiresses two minor daughters who were married, but whose husbands did not assert any claim to the management of their properties. G. with whom the two minor girls were living, acting as the *de facto* guardian of their property, executed conveyances of portions of the joint properties for paying off the *ejmali* debts of himself and his deceased brother K.

Held, that the conveyances were binding upon the minors, inasmuch as had they not been executed, the probable result would have been that either the whole of the joint properties would have been endangered or at any rate bigger sacrifices would have been inevitable. [p. 306, col. 1.]

Appeals against the decrees of the Subordinate Judge, 2nd Court, Burdwan, dated the 6th of May 1916, affirming that of the Munsif, 3rd Court, at that place, dated the 6th April 1915.

FACTS appear from the judgment.

Babu Ram Chandra Mozumdar (with him Babu Gauranga Nath Banerjee for Babu Pro-

both Chandra Ghosh), for the Appellants.—My points are:—

(1) What was sold was the right, title and interest of Ganesh in the property and hence so far as the minors' shares in these properties are concerned, they are unaffected.

(2) The next point is that even if it is held that the minors are bound by the debt as originally contracted by their father and if Ganesh paid the whole debt, he might be entitled to have half of the debt from the minors, the debt being the debt due by their father; but that is a different thing from whether by the conveyances the minors' shares were affected or not.

(3) The third point is that if legal necessity is pleaded by Ganesh for which he mortgaged the property he must prove that necessity. Simply showing that the transaction was for the benefit of the minor won't do. Trevelyan on Hindu Law, page 131, referred to.

The original mortgage was substituted by two *kut kobalas* and one *kistibandh*. In the mortgage, only $9\frac{1}{4}$ *bighas* of property were mortgaged and in the *kut kobalas* also $9\frac{1}{4}$ *bighas* were mortgaged. If Ganesh chooses to realise half of the debt from the property of the minors he can do so by regular suit, but this suit is framed in a different way. The finding is that it is for the actual benefit of the minors that the property was sold.

The case of *Mohanund Mondul v. Nafur Mondul* (1), referred to by the Subordinate Judge, is hardly any authority where *de facto* minors are involved and not *de jure* minors. I beg to invite your Lordships' attention to *Balwant Singh v. Rev. Rockwell Clancy* (2) in support of the view that Ganesh, the defendant No. 1, could not be *de facto* guardian-in-law of the minors, as the husbands of the minors were both alive at the time the said *kobalas* were executed. That being so, what actually passed was Ganesh's entire share and not the share of the minors; *Balwant Singh v. Rev. Rockwell Clancy* (2) referred to and also *Mansaram*

(1) 26 C. 820; 3 C. W. N. 770; 13 Ind. Dec. (N. S.) 1125.

(2) 14 Ind. Cas. 629; 15 C. L. J. 475 at p. 481; 34 A. 296; 16 C. W. N. 577; 23 M. L. J. 18; 11 M. L. T. 344; (1912) M. W. N. 482; 9 A. L. J. 509; 14 Bom. L. R. 422; 39 I. A. 109 (P. C.).

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Das v. Ahmad Hosain (3). Exhibit A is the conveyance of *jamai* land. By that Ganesh conveys the right, title and interest he had to the land. There is not a single word in the deed about the minors or that Ganesh was acting on behalf of the minors. In the other two deeds (Exhibit G and Exhibit J) also nowhere is anything mentioned about the minors.

Babu Bipin Behari Ghosh, II (with him Babu Narendra Nath Chowdhury), for the Respondents.—The money was borrowed to satisfy a debt which the minors were bound to pay off, as their father was a debtor. *Krista Chandra v. Ratan Ram Pal* (4) referred to. What is necessity? If interest on the debt increases and if the manager sees that part of the mortgaged property is required to be sold in order to satisfy the debt, that is necessity; *Krista Chandra v. Ratan Ram Pal* (4) referred to. Here there was such necessity and hence the property was sold; otherwise there was no other means of paying off the debt. Then again in *Mohanund Mondul v. Nafur Mondul* (1) it is laid down that a manager can part with the property for legal necessity and for the benefit of the minors. In this case there was absolute necessity for the sale. So far as the contention of the other side is concerned, viz., that the minors' interest was not sold as nowhere the names of the minors are mentioned, I beg to refer to *Judoonath Chuckerbutty v. Mr. James Tweedie* (5). There it was held that if the vendor intended to sell the whole property that was sufficient. In the deed the recital shows that everywhere Ganesh says that as my brother and I incurred debts and as there is no other means of paying it up, etc.

Trevelyan on Minors, page 163, and *Makundi v. Sarabsukh* (6), referred to.

In *Hunoomanpersaud Panday v. Musammatt Babooee Munraj Koonweree* (7) the observation of their Lordships on this point occurs.

(3) 37 Ind. Cas. 330; 21 C. W. N. 61.

(4) 35 Ind. Cas. 673; 20 C. W. N. 615 at p. 647; 23 C. L. J. 432.

(5) 11 W. R. 20.

(6) 6 A. 417; A. W. N. (1894) 144; 4 Ind. Dec. (N. S.) 76.

(7) 6 M. I. A. 393 at pp. 412, 423; 18 W. R. 81n; Sevestre 253n; 2 Suth. P. C. J. 29; 1 Sar. P. O. J. 552; 19 E. R. 147.

The recital is very loosely framed, and where from the surrounding circumstances it may be gathered that the vendor intended to sell the whole property then the whole property would pass by such a conveyance.

As to my friend's remark that a *de facto* guardian cannot act where there is a *de jure* guardian, the word *de facto* guardian applies only when there is a *de jure* guardian but he does not act and then a *de facto* guardian can act.

Babu Ram Chandra Mozumdar, for the Appellants, in reply.—If the other side has got any remedy against my client, they can certainly enforce that; but that is a quite different matter from an absolute sale out and out. What I say is that the minors' shares were not at all actually sold. There is no doubt that Ganesh was actually dealing with his own property.

JUDGMENT.

WALMSLEY, J.—The facts of the case from which these appeals arise are as follows. Two brothers, Kartik Rakshit and Ganesh Rakshit, borrowed Rs. 500 on mortgage from the wife of one Asakrit Chandra Chowdhuri in Chaitra 1313 B. S. in order to pay off debts due to various creditors. They mortgaged all their property in this deed. In the following year Kartik died, leaving two daughters who are still minors and are the plaintiffs. In Sraban 1317 B. S. no part of the debt on the mortgage had been paid off and Ganesh entered into a fresh arrangement; he executed two *kat kobalas* in favour of the same lady, one for Rs. 100 and covering 2 *bighas* of land, and another for Rs. 400 in respect of 7 *bighas* and a quarter and a *kistibandi* bond for the sum of Rs. 256. By the *kat kobalas* the principal of the original mortgage was satisfied, and the *kistibandi* bond was for the unpaid interest that had accrued. Under the terms of the *kat kobalas* the creditor was to remain in possession until the sums mentioned were paid to her, and from the usufruct she was to pay the rent due to the landlord, and to take the balance as interest. Under the *kistibandi* bond Ganesh was to pay Rs. 64 per annum from 1318 to 1321. In 1318 and 1319 Ganesh executed three conveyances, selling 3 *bighas* for Rs. 150 to the contesting defendants in Suit No. 97

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on Jaist 13th 1318, nine *bighas* and a quarter for Rs. 600 to the contesting defendants in Suit No. 69, and one *cotta* and a quarter for Rs. 119 to the contesting defendants in Suit No. 98 on Chaitra 8th, 1319. With the purchase-money he paid off the sums due under the *kat kobalas* and the *kistibandi* bond.

His nieces were married in 1316 and 1317, and they have brought three suits through their husbands for a declaration that the conveyances executed by Ganesh did not affect their eight-annas interest, and for recovering possession of their share as successors-in-interest of the deceased Kartik.

The Courts below have agreed in dismissing the suits and the plaintiffs have appealed.

In the first Court it was urged that the transactions were fraudulent, but that contention has been given up. The points that have been put forward in this Court are as follows :—

(1) Ganesh did not purport to convey more than his own right, title and interest, and, therefore, the conveyances could not affect the plaintiffs' interests.

(2) If it be held that the plaintiffs were bound by the debt contracted by their father Kartik, and if Ganesh paid the whole, he might recover from the plaintiffs their share in the amount paid to the creditor, but that is a very different thing from selling the plaintiffs' share without authority.

(3) Even if Ganesh purported to act as guardian of his minor nieces, and in that capacity to sell their share, it must be shown that he did so under the stress of necessity, and it is not enough to show that the transactions were for the benefit of the minors.

On the first point the learned Subordinate Judge says, "if the documents are liberally construed, it would appear clear that Ganesh sold the 16-annas interest of himself and his minor nieces for paying off the *ejmali* debts of himself and their father Kartik." All the conveyances speak of the joint debt which had to be paid off if the property was to be saved, and except in one of them there is no suggestion that Ganesh was trying to discharge the debt at the expense of his own share only. The exception is Exhibit H, the conveyance to Harimani Dasi, in which the interest

sold is 'my share' in the homestead. It is conceded that this conveyance did not affect the minors, but here I refer to it only as showing that the other conveyances were framed differently. I think the view taken by the lower Appellate Court is correct.

The second point need not be discussed. Ganesh might have followed another course, but that will not matter if the Courts below are right in holding that he was acting under the force of necessity.

The third point is the one on which most stress was laid. It was found by the first Court, and it is not disputed now, that the plaintiffs were living with Ganesh when the conveyances were executed, and it is conceded that he was managing the property. The plaintiffs' husbands were their natural guardians, but there is no reason to suppose that they had ever asserted any claim to the management of the property. It seems to me clear that Ganesh was *de facto* guardian of the minors' property, and it must have been as such that he purported to convey their interest by the *kobalas*. The question then becomes, whether under the circumstances he was legally entitled to make the sales. It appears from the record that the original mortgage covered six *cottas* Lakhiraj *bastu* with the buildings, four *cottas* of rent paying *bastu*, and over twenty-four *bighas* of *jamdi* land. In four years the interest had reached the sum of Rs. 256 and not an anna had been paid. If Ganesh had allowed the mortgage to run on, in a few years the whole of the family property would have been swallowed up. His first step, the *kat kobalas* and the *kistibandi* bond, was obviously a wise one. After that there was no urgency about the land transferred under the *kat kobalas*, but no payment had been made under the *kistibandi* bond. It is urged that this bond made no provision for the whole sum becoming payable on one default: the wording is rather ambiguous, but I think that stipulation is in the bond, and in any case there was a provision for compound interest at the rate of one rupee eight annas per centum per mensem. Under the bond the ancestral property and dwelling house were given as security. Looking at these facts it

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seems to me that the position of Ganesh was little less than desperate, and that the course he took was that of a prudent administrator. It is said, however, that though the sales may have been beneficial to the minors, they were not compelled by necessity, and, therefore, the plaintiffs are not bound by them. This sharp distinction between the effect of benefit and the effect of necessity is not warranted by the authorities. In *Huncomanpersaud Panday's case* (7) their Lordships of the Privy Council say: "It (i.e., the power of a manager for an infant heir to charge an estate not his own) can only be exercised rightly in a case of need or for the benefit of the estate The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it in the particular instance, is the thing to be regarded." Mr. Mayne in his book speaks of the minor being bound "if under the circumstances the step taken was necessary, proper or prudent." Reference may also be made to Sir Ernest Trevelyan's remarks on page 154 of his book "The Law Relating to Minors" (IVth Edition) and to the decision of a Bench of this Court reported as *Krista Chandra v. Ratan Ram Pal* (4). Applying the principles laid down by these authorities, I think the question can be determined in the present instance by asking what would have been the probable result if Ganesh had not taken the steps which he did take. In my opinion the answer must be that the whole property would have been endangered, at any rate that bigger sacrifices would have become inevitable. That being so, I think the Courts below were right in holding that the sales were binding on the minors.

With regard to the sale to Harimani Dasi, the learned Munsif points out that the plaintiffs have $2\frac{3}{4}$ out of the 4 cottas, so they are not entitled to ask for any part of the $1\frac{1}{4}$ cottas. This is correct.

The appeals are dismissed with costs.

PANTON, J.—I agree.

Appeals dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 2908 OF 1914.

May 13, 1918.

Present:—Mr. Justice LeRossignol and
Mr. Justice Wilberforce.

KAPURA AND ANOTHER—DEFENDANTS
—APPELLANTS

versus

SHANKAR DAS MUL CHAND—

PLAINTIFF—RESPONDENT.

Muhammadan Law—Minor—Mother, power of, to deal with minor's estate.

Under the Muhammadan Law the Courts should uphold the acts of a mother in dealing with her minor son's estate, provided they are to the manifest advantage of the minor or for urgent or imperative necessity. [p. 307, col. 2]

Where, however, a Muhammadan died leaving a widow and a minor son with a good and profitable estate on which they could live with comfort, and the widow nevertheless constantly borrowed small sums at exorbitant rates of interest for domestic purposes:

Held, that the debts having been incurred neither for the benefit of the minor nor for urgent or imperative necessity, they could not be held to be binding on the minor's estate. [p. 308, col. 1.]

Second appeal from the decree of the District Judge, Lyallpur, dated the 13th August 1914.

Khwaja Feroze-ud-Din Ahmad, for the Appellants.

Mr. Mehr Chand, for the Respondent.

JUDGMENT.—In this case a money-lender sued two brothers, Kapura and Ghulam, the latter of whom is a minor, on a balance due on a book account which began in *Sambat* 1956. The original account was in the name of the father of the defendants and was continued in the names of his widow and his three sons. The eldest son, Nura, has executed a bond on account of his share of the debt and the present suit for Rs. 1,700 was brought against the other two sons. The first Court gave the plaintiff a decree in full against both defendants. As far as the minor defendant was concerned, it held that the debts had mostly been incurred by his mother for household necessities and that his estate was, therefore, liable. The lower Appellate Court upheld this decision, merely stating that the items appeared to have been taken for household necessities. Against this decision the defendants have put in a second appeal, Ghulam contesting the decision on the ground that his mother had

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no power to bind his estate and Kapura asking merely for instalments.

As far as the case against Ghulam is concerned, the only question before us is whether his mother, acting as his so-called *de facto* guardian, was competent to raise the debts in question so as to bind her minor son. Many authorities on the legal point involved were quoted before us and as the power of a guardian *de jure* or *de facto* under the Muhammadan Law to bind minor's estate appears to be frequently misunderstood, it is advisable to refer to some of the most important recent decisions on the question. The Calcutta High Court in *Moyna Bibi v. Banku Behari Biswas* (1) held that under Muhammadan Law a mother, not being a *de facto* guardian of her minor son, had no power to bind his estate in any way and that any acts by her to this effect were entirely void. The same Court has, however, in later decisions considerably modified this view. In *Mafazzal Hosain v. Basid Sheikh* (2) it was held that though the mother of a Muhammadan minor is not the guardian of his property, yet if she deals with his estate her acts, if for his benefit, should be upheld. Another decision on page 65 of the same volume [*Ram Charan Sanyal v. Anukul Chandra Acharjya* (3)] is to a similar effect. The same matter has been dealt with at length by a distinguished Muhammadan Judge of the Madras High Court in *Hyderman Kutti v. Syed Ali* (4). After referring to authorities it was held that the *de facto* guardian of a Muhammadan minor can alienate his estate in cases of urgent and imperative necessity or do other acts on behalf of the minor which must necessarily be beneficial. The learned Judge proceeded to lay down that there is no substantial difference between the power of a *de jure* and a *de facto* guardian, though cases existed where the powers exercisable by a lawful guardian were not within the competence of other persons. The question in that case was whether a sale by a

Muhammadan mother of her minor son's property to find money for the expenses of his sister's marriage or for the discharge of family debts or for family purposes was a justifying cause. It was held that the sale of the minor's property for such purposes was not for his benefit and was, therefore, invalid. The Allahabad High Court in *Majidan v. Ram Narain* (5) has interpreted the powers of a *de facto* Muhammadan guardian in a similar manner. The law on the subject has been summed up in Ameer Ali's Muhammadan Law, Volume II, 4th Edition, page 611, to the effect that if the acts of a mother in dealing with her minor son's estate are to the manifest advantage of the minor the Court should uphold them. To this we might add the *dictum* of Mr. Justice Abdur Rahim reported in *Hyderman Kutti v. Syed Ali* (4) that the acts of a mother, if they are for urgent or imperative necessity, must be upheld.

In view of the decisions quoted above and the exposition of the validity of a mother's acts in dealing with her minor son's estate, we have to consider whether her acts in the transactions disclosed in the present suit should bind the estate of her minor son, Ghulam. His father had commenced dealings with the plaintiff in Sambat 1956. He died apparently in the following year, and the first transaction after his death showed a debt of Rs. 112-9-0 principal and Rs. 32-5-6 interest. He left a widow and three sons and one and a half squares of canal-irrigated land on the Gugera Branch. The account was then charged against the name of his eldest son, Nura, and shortly afterwards the name of the widow was also introduced and in Sambat 1962 the name of Kapura, the second son, appeared in the account. In Sambat 1965 Nura's account was separated and his debt was settled by the execution of a separate bond, and the name of Ghulam minor was then inserted in the account. The result of the frequent borrowings and the additions of interest has been that the debt now standing against Kapura and Ghulam alone has increased to Rs. 1,700. It is admitted that the whole business with

(1) 29 C. 473; 6 C. W. N. 667.

(2) 34 C. 36; 4 C. L. J. 435; 11 C. W. N. 71.

(3) 34 C. 65; 4 C. L. J. 578; 11 C. W. N. 160.

(4) 15 Ind. Cas. 576; 37 M. 514; 23 M. L. J. 244; 12 M. L. T. 147; (1912) M. W. N. 889.

(5) 26 A. 23; A. W. N. (1903) 183.

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the plaintiff was conducted by the mother of the minor. The accounts show the frequent borrowings of small sums for apparent household necessities, and under some circumstances it might be held that these borrowings were necessary for the minor's subsistence and that he was, therefore, liable. In the present case, however, the family was left with a good and profitable estate on which it could have lived with comfort. We cannot see, therefore, how it was in any way beneficial for the minor for his mother to borrow constantly small sums at exorbitant rates for domestic purposes. There was neither any manifest benefit to the minor nor does any urgent or imperative necessity appear to have existed. We, therefore, accept his appeal and dismiss the suit against him.

The appeal of Kapura for instalments was little pressed and his claim to this effect was not raised in the lower Appellate Court. We, therefore, dismiss his appeal.

As for costs, we give Ghulam his costs calculated on half the claim in all Courts. As Kapura's appeal was only for instalments, we see no reason why he should pay costs in this Court. He will pay costs to the plaintiff on half the claim in the lower Courts.

Appeal accepted.

UDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 79 OF 1918.

August 19, 1918.

Present :—Mr. Kanhaiya Lal, A. J. C.

BALBHADDAR SINGH—DEFENDANT No. 1

—APPELLANT

versus

SRIPAL SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Evidence Act (1 of 1872), s. 32 (5)—Statement by agent of deceased member of family, admissibility of—Principal and agent—Pedigree filed by agent in suit to which principal was party—Presumption.

The statements of the deceased relatives, servants and dependents of a family are as much admissible under section 32, clause (5), of the Evidence Act as the statements of the members of the family, provided they had special means of knowledge requisite to render their statements admissible [p. 309, col. 1.]

In a suit for inheritance the plaintiffs relied upon a pedigree which purported to have been filed in a previous suit by the general agent of one of the parties to that suit. The latter was a member of the family to which the parties in the inheritance suit belonged and he and his general agent were both dead:

Eld, (1) that the presumption was that the general agent must have filed the pedigree under the instructions of his master; [p. 309, col. 1.]

(2) that the pedigree was admissible in the inheritance suit under section 32, clause (5) of the Evidence Act. [p. 309, col. 1.]

Appeal against the decree of the District Judge, Hardoi, dated the 1st December 1917, affirming that of the Munsif, Sandila, Hardoi, dated the 22nd May 1917.

Mr. Gopal Sahai, for the Appellant.

JUDGMENT.—This was a suit by certain persons who claimed to be the reversionary heirs of Ganga Bakhsh Singh deceased. They sued for a declaration of their title to the property left by him as their nearest reversioners or in the alternative for the recovery of possession of the said property. The defence was that the defendants were the nearest heirs of the deceased. Both the Courts below found in favour of the plaintiffs and decreed the claim.

In appeal it is contended that the pedigree relied on by the Courts below was inadmissible in evidence, inasmuch as it purported to have been signed and filed on behalf of Balwant Singh by his general agent Rudradat. Balwant Singh was a member of the family to which the parties belong. In 1866 he filed a suit for redemption of a mortgage against Kalyan

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Singh. The pedigree was then filed which supports the claim of the present plaintiffs. It is difficult to say under what circumstances Radradat signed the pedigree on behalf of his master. It is possible that Balwant Singh might have been illiterate or unable to sign, and it is equally possible that he might have sent his general agent to file it. In any event Balwant Singh being dead, the presumption is that the general agent must have filed it under the instructions of his master. As pointed out in *Garuradhwaja Prasad v. Superundhwaja Prasad* (1), the statements of the deceased relatives, servants and dependents of the family are as much admissible under section 32, clause (5), of the Indian Evidence Act as the statements of the members of the family, provided they had special means of knowledge requisite to render their statements admissible. The evidence adduced by the defendants was disbelieved by both the Courts below.

The appeal is, therefore, rejected.

Appeal rejected.

(1) 23 A. 37 at p. 51; 10 M. L. J. 267; 5 C. W. N. 33; 27 I. A. 238; 2 Bom. L. R. 831; 7 Sar. P. C. J. 724 (P. C.).

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 102 OF 1915.

March 22, 1918.

Present:—Mr. Justice N. R. Chatterjea and Mr. Justice Greaves.

MONMOHAN PANDAY AND OTHERS—
DEFENDANTS NOS. 9 TO 14—APPELLANTS
versus

BIDHU BHUSAN RAY CHOWDHURY
AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXII, r. 4, O. XXX, r. 4—Suit by persons described as proprietors of firm, decree in Appeal—Respondent, death of—Representative not brought on record, effect of.
Order XXX, rule 4, of the Civil Procedure Code applies only to a case where the suit is brought in the name of the firm. [p. 310, col. 1.]

In a suit where the description of the plaintiffs as given in the plaint was "the proprietors and *maliks*" of a firm and then the names of the plaintiffs were mentioned, the Court below gave a decree to the plaintiffs and in the decree one B. and

other persons were described as the plaintiffs without the addition of the words that they were *maliks* of the firm. After an appeal from the decree had been filed by the defendant one of the plaintiffs-respondents died, but his legal representatives were not brought on the record within the time allowed by law.

Held, that the decree being in favour of the plaintiffs jointly the appeal could not proceed in the absence of the legal representatives of the deceased plaintiff-respondent. [p. 310, col. 1.]

Appeal against the decree of the Subordinate Judge, 1st Court, 24 Perganahs, dated the 14th January 1915.

Babus Haraprasad Chatterjee and Mritunjoy Chatterjee, for the Appellants.

Dr. Sarat Chunder Basak, Babus Jatindra Mohan Ghose and Sib Chander Palit, for the Respondents.

JUDGMENT.

N. R. CHATTERJEA, J.—We think that the preliminary objection taken to the hearing of the appeal must prevail.

The appeal arises out of a suit to recover money on a *hatchitta* executed by two persons, named Upendra Nath Banerjee and another, as managing partners of the "Calcutta Hosiery" in favour of Ray Chowdhury and brothers. The suit was instituted, however, by Bidhu Bhusan and several other persons as plaintiffs. In the plaint the description of the plaintiffs was—"The proprietors and *maliks* of the firm styled: Ray Chowdhury brothers," and then the names of the plaintiffs were mentioned. The Court below gave a decree to the plaintiffs and in the decree the names of Bidhu Bhusan and other persons were described as the plaintiffs without the addition of the words that they were *maliks* of the firm of Ray Chowdhury Brothers. After the appeal had been filed in this Court, one of the plaintiffs, Dakhina Ranjan, died and his legal representatives were not substituted within the time allowed by law.

It appears that an application was made out of time and that a Rule was issued to show cause why the substitution should not be made though out of time. The Rule, however, was discharged, the result being that the appeal was dismissed as against one of the plaintiffs, the deceased Dakhina Ranjan.

Now, the decree being in favour of six plaintiffs jointly, the appeal cannot proceed in the absence of the legal representatives of one of them.

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The learned Pleader for the defendants-appellants refers to Order XXX; rule 4, which lays down that notwithstanding anything contained in section 45 of the Indian Contract Act, 1872, where two or more persons may sue or be sued in the name of a firm under the foregoing provisions and any of such persons dies, whether before the institution or during the pendency of any suit, it shall not be necessary to join the legal representative of the deceased as a party to the suit. It is contended that the suit was really instituted in the name of the firm of Ray Chowdhury Brothers.

We are unable, however, to take that view. The suit was brought in the names of the particular individuals who were described as plaintiffs, and not in the name of the firm, and this is made clear by the decree that was passed in the case. In the case of *Ram Narain Nursing Doss v. Ram Ohunder Jankee Loll* (1) in a suit by surviving partners for the recovery of a partnership debt which became due during the life of a deceased partner, the representatives of such deceased partner, having regard to section 45 of the Contract Act (IX of 1872), were held to be necessary parties. The title of the suit was—*Issur Dass and Jugarnath, surviving partners of Nursing Dass deceased who carry on business in 99, Cross Street, Calcutta, in the name and style of Ram Narain Nursing Dass*... That appears to be a stronger case than the present. Order XXX, rule 4, does not help the appellants, as that rule applies only to a case where the suit is brought in the name of the firm.

But even if we are to hold that the appeal can proceed in the absence of the representatives of the deceased plaintiff, we do not think that there would be any benefit to the appellants because the representatives of the deceased plaintiff can apply for execution of the entire decree against the defendants as the decree in their favour cannot be touched by us.

Under the circumstances, we think that the appeal must fail and is accordingly dismissed with costs, two gold *mohurs*, to Dr. Basak's clients. The Deputy Registrar's costs have already been deposited.

GREAVES, J.—I agree.

Appeal dismissed.

(1) 18 C. 86; 9 Ind. Dec. (N. S.) 58.

LOWER BURMA CHIEF COURT.

CIVIL REGULAR NO. 190 OF 1916.

March 23, 1917.

Present:—Mr. Justice Robinson.

J. G. BUCHANAN—PLAINTIFF

versus

S. C. MALL—DEFENDANT.

Trading with enemy Royal Proclamation of August 5, 1914—Contract to buy German goods—Goods shipped from Germany before War—Price of goods demanded after outbreak of War and prohibition of trade with enemy—Buyer, whether bound to pay.

Sometime before the outbreak of War A entered into a contract with B. at Rangoon. Under the contract A was (i) to buy certain goods in Germany, (ii) to obtain a contract of affreightment to Rangoon, (iii) to take out a policy of insurance; and (iv) to ship the goods in July 1914. B. on his part agreed to buy those goods from A for a price which was fixed *c. i. f.* Rangoon. A performed his part of the contract and on the 12th August 1914 caused to be presented to B for acceptance a bill of exchange covering the price, etc., of the goods and payable ninety days after sight. Along with the bill of exchange were tendered the bill of lading, invoice and insurance note. B refused to accept the bill of exchange as well as the documents of title, inasmuch as the War having broken out on the 4th of August, the ship containing the goods was seized by the Belgian Government and trade with Germany was prohibited by the Royal Proclamation, dated the 5th August 1914:

—*Held*, (1) that the Royal Proclamation rendered the contract abortive and illegal and so void: [p. 312, col. 1.]

(2) that the effect of the outbreak of the War was that the contract of affreightment was dissolved; [p. 311, col. 2.]

(3) that A was bound to tender and B was entitled to get valid and effective documents by which B could recover what might be lawfully recovered under such documents, but as A did not and could not tender such documents in respect of the contract of affreightment, B. was entitled to refuse to pay against them. [p. 312, col. 1.]

Mr. Olifton, for the Plaintiff.

Mr. Mehta, for the Defendant.

JUDGMENT.—Plaintiff and defendant entered into a contract whereby plaintiff bought 18 tons of German tool or faggot steel. The price was fixed per ton *c. i. f.* Rangoon, shipment to be in July 1914. Plaintiff obtained a contract of affreightment by the SS. "Schildturn," whereby the goods were to be shipped and carried from Bremen to Rangoon and the goods were so shipped. Plaintiff also arranged a contract of insurance.

In accordance with the contract plaintiff drew a bill of exchange on defendant payable ninety days after sight with interest

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added. On the 12th August 1914 plaintiff caused the bill of exchange to be duly presented to the defendant for acceptance through the Mercantile Bank of India, Ltd., and with it were tendered the bill of lading, invoice and insurance note. Defendant refused to accept the bill of exchange and plaintiff now sues him for the price of the goods, etc.

War having broken out on the 4th August 1914, the SS. "Schildturn" was seized by the Belgian Government at Antwerp.

Defendant pleads the Royal Proclamation of the 5th August 1914 and urges that as the bill of lading was a German bill to plaintiff's order the contract has become void. It is not denied that the bill of lading is a German bill of lading. The contract of affreightment was with a German line. Plaintiff urges that he has done all that he had to do under the contract, that the outbreak of War would only affect an executory contract and that the goods, though in a German ship, were to be delivered to a British subject at a British port. He says that the risk thus became the defendant's risk and that he is entitled to be paid.

I have tried the issue as a preliminary issue. I have been referred to certain recent authorities, *Duncan, Fox & Co. v. Schrempt & Bonke* (1). The decision was affirmed on appeal, *Duncan, Fox & Co. v. Schrempt & Bonke* (2).

The goods in this case were to be delivered in Germany and further performance of the contract would have involved a trading in goods destined for the German Empire in violation of the Royal Proclamation of the 5th August 1914.

This authority need not be referred to further. The next case is that of *Arnhold Karberg & Co. v. Blythe, Green, Jourdain & Co.* (3). This involved two contracts for the sale of beans to be shipped from Chinese ports to, Naples and Rotterdam. Payment was to be net cash in London on arrival of the goods at port of discharge in exchange for bills of lading and policies of insurance but not later than three months from date of bills of lading. The beans

were shipped in July 1914 on German vessels which on the outbreak of the War entered ports of refuge in the east. At the expiration of the three months the sellers tendered to the buyers the shipping documents, in one case a German bill of lading and an English policy of insurance, in the other both the bill of lading and the policy of insurance were German. The buyers refused the tender and were held entitled to do so. This decision was appealed but the decision was affirmed, *Arnhold Karberg & Co. v. Blythe, Green, Jourdain & Co.* (4).

This decision was followed by Mr. Justice Beaman in *Marshall & Co. v. Naginchand Phulchand* (5). Lastly in *Cama & Co. v. K. K. Shah* (6) of this Court Sir Charles Fox, C. J., took the same view.

Having regard to this mass of authority I need only briefly record my findings, full authority for which can be found in the cases referred to above and in the rulings referred to in them.

By the contract entered into plaintiff undertook to buy the goods, to enter into a contract of affreightment to Rangoon, which will be evidenced by a bill of lading and to take out a proper policy of insurance. The defendant undertook to pay as settled by the contract against these documents. When this has been done the plaintiffs as sellers will drop out, but they must supply defendant with a bill of lading and a policy which are still subsisting and can be enforced. Now here the contract of affreightment was made with a German subject with reference to a German ship and the effect of the outbreak of the War was that the contract of affreightment was dissolved. The result was that the shipper was no longer bound to continue the voyage and there was no force left in the bill of lading by which defendant could compel him to do so or to recompense him.

It is not sufficient to say that the policy of insurance was with an English subject, for defendants are entitled to have the contract carried out by plaintiff before they pay, and that plaintiff could not do.

(1) (1915) 1 K. B. 365; 84 L. J. K. B. 730.

(2) (1915) 3 K. B. 355; 84 L. J. K. B. 2205.

(3) (1915) 2 K. B. 379; 84 L. J. K. B. 1673.

(4) (1916) 85 L. J. K. B. 665.

(5) 37 Ind. Cas. 644; 18 Bom. L. R. 915.

(6) 33 Ind. Cas. 96; 9 Bur. L. T. 99.

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The Royal Proclamation of the 5th August 1914 forbids the obtaining from the German Empire or from any person resident therein any goods, wares or merchandise: it also forbids the trading in any goods, wares or merchandise coming from the said Empire or from any person resident, carrying on business or being therein. If the contract had remained good, the effect would only have been that to pursue it defendant might have had to enter into contractual relations with a German subject or subjects.

The Proclamation, by forbidding trading in goods coming from the German Empire as these did, rendered the contract abortive and illegal and so void. Plaintiff was bound to tender and defendant was entitled to get documents that were valid and effective, documents by which he could recover what might be lawfully recovered under such documents. Plaintiff did not and could not tender such document in respect of the contract of affreightment and this being so, defendants are entitled to refuse to pay against them.

The suit, therefore, fails and is dismissed with costs.

Suit dismissed.

PRIVY COUNCIL.

APPEAL FROM THE NAGPUR JUDICIAL COMMISSIONER'S COURT.

June 13, 1918.

Present:—Lord Shaw, Sir John Edge, Mr. Ameer Ali and Sir Walter Phillimore, Bart.

GAURISHANKAR BALMUKUND—

APPELLANT

versus

CHINNUMIYA AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act XIV of 1882), ss. 320, 325A—Execution of decrees—Transfer of decree affecting immoveable property to Collector—Restriction on power of judgment-debtor to mortgage, extent of.

The incompetence to alienate without the Collector's permission, imposed upon a judgment-debtor by section 325A of the Civil Procedure Code, 1882, is absolute and is not limited to the time during which the property is under the Collector's control. Therefore, a mortgage created by a judgment-

debtor in defiance of the prohibition is of no effect even after the property has come back into his hands. [p. 313, col. 2.]

Magniram v. Bakubai Rakhma Lohar, 16 Ind. Cas. 570; 36 B. 510; 14 Bom. L. R. 598, overruled.

Murray v. Murat Singh, 3 N. L. R. 171 at p. 172 and *Salu Bai v. Bajat Khan*, 42 Ind. Cas. 200; 13 N. L. R. 130 (F. B.), approved.

Appeal from the decision in First Appeal No. 15-B of 1912 of the Judicial Commissioner's Court (Mr. Stanyon, A. J. C. and Mr. Batten, A. J. C.) of the Central Provinces, dated the 26th April 1913, affirming that of the Additional District Judge, Amraoti.

FACTS.—The sole question in this appeal was whether a mortgage effected by the owner of immoveable property without the Collector's permission, at a time when such property was under the Collector's control in terms of section 320 of the Civil Procedure Code, 1882, was valid after the property had been released from the Collector's control. The lower Courts both held that such mortgage was absolutely void. Hence this appeal.

Messrs. *DeGruyther, K. C.*, and *Parikh*, for the Appellant, submitted that the incompetency to mortgage, imposed upon the judgment-debtor by section 325A of the Civil Procedure Code, must be construed *secundum subjectam materiam*. The result of sections 320, etc., of the Code was that after the debts, for which the Collector was put in, were discharged, the Collector had no further rights over the property: why then should the judgment-debtor be debarred from mortgaging the residue which would revert to him? A limitation should be placed on the literal words used. We submit that the mortgage is enforceable against the mortgagor himself, once the Collector's management has ceased.

Magniram v. Bakubai Rakhma Lohar (1), *Jhabulal Kalar v. Rampershad* (2).

Our submission is supported by section 43 of the Transfer of Property Act, 1882, and section 18 of the Specific Relief Act, 1877.

The decision in *Murray v. Murat Singh* (3), affirmed by a majority in *Salu Bai v. Bajat Khan* (4), is incorrect: We rely on the dissenting judgment of *Mittra, A. J. C.*, in the latter case.

The mortgagor is estopped from denying that the mortgage was good.

(1) 16 Ind. Cas 570; 36 B. 510; 14 Bom. L. R. 598.
(2) 4 C. P. L. R. 153.

(3) 3 N. L. R. 171 at p. 172.

(4) 42 Ind. Cas. 200; 13 N. L. R. 130 (F. B.).

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[LORD SHAW.—This is the case of a statutory prohibition, not one of the misrepresentation of authority contemplated by section 43 of the Transfer of Property Act.]

[SIR W. PHILLIMORE.—If the Statute is part of public policy, the mortgage should not be allowed to defeat it. There is a close analogy in England—the case of a married woman restrained from anticipation.]

The respondents did not appear.

JUDGMENT.

LORD SHAW.—By section 325A of the Code of Civil Procedure (Act XIV of 1882) it is provided that:—

"So long as the Collector can exercise or perform in respect of the judgment-debtor's immoveable property, or any part thereof, any of the powers or duties conferred or imposed on him by sections 322 to 325 (both inclusive), the judgment-debtor or his representative-in-interest shall be incompetent to mortgage, charge, lease or alienate such property or part except with the written permission of the Collector, nor shall any Civil Court issue any process against such property or part in execution of a decree for money."

In the present case the two salient facts are simply these: That in 1891 the Collector of the district came under the Act into possession of the property in question; and that, secondly, while he was still in possession of that property, a mortgage upon it was granted on the 22nd July 1892 by the judgment-debtor. It is now sought to make that mortgage operative in the appellant's favour by reason of this; that the construction, it is alleged, of section 325A is not to be read in the complete and operative sense natural to the words, that is to say, of incompetency to mortgage such property, but must be read with an implied limitation. The limitation suggested is that there still remained in the judgment-debtor a power to mortgage the property so as to become operative over any residue that might arise to the latter after the Collector's regime had ended. It is the fact that the Collector's regime has now ended, but it is also the fact that, pending his regime, namely, on the 22nd July 1892, the mortgage which is now founded upon was granted.

Their Lordships have been referred to authority upon this question. That which

is founded on by the appellant particularly is the case of *Magniram v. Bakubai Rakhma Lohar* (1). Their Lordships are of opinion that that case was erroneously decided. Upon the contrary, the case of *Murray v. Murat Singh* (3), referred to in the judgment under appeal, and the case which has been decided recently by the Full Bench of the Central Provinces in *Salu Bai v. Bajat Khan* (4) are, in the opinion of the Board, proper decisions and sound in law.

In short, the sole point in this appeal is, whether a declaration by Statute that a judgment-debtor shall be incompetent to mortgage his property is or is not to be read in the exact and plain sense which the words imply. It is not necessary to go into reasons for the Statute, but if reasons were to be implied, it is manifest that a confusion of title of a somewhat extraordinary kind would arise if it was held that there was a competency on the one hand to mortgage the residuary interest, so to speak, of the judgment-debtor by him, leaving, on the other, uncontrolled and unimpaired during the same time, all those acts of administration by a Collector, which it is admitted in argument would be perfectly competent. The confusion emerging from such a situation is not hard to figure. Their Lordships content themselves with holding that the judgments of the Courts below on this point are right, and they will humbly advise His Majesty that the appeal should be disallowed. No other point was taken upon the appeal. The respondents not having appeared, there will be no order as to costs.

Appeal disallowed.

Solicitor for the Appellant.—Mr. E. Dalgado.

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CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL CASE No. 20 OF 1918.

March 18, 1918.

Present.—Sir Lancelot Sanderson, Kt.,
Chief Justice, and Justice Sir John
Woodroffe, Kt.

NARENDRA NATH MITTER—

PETITIONER—APPELLANT

versus

Rai RADHA CHARAN PAL BAHADUR

—RESPONDENT.

Calcutta Municipal Act (III B. C. of 1839), Sch. V, r. 2—Nomination paper, form of—Description of candidate, omission of, effect of—Proposer, whether can sign as approver—Alternative nomination papers, validity of.

What is contemplated by rule 2 of Schedule V of the Calcutta Municipal Act is that a nomination paper should be self-contained and complete and that the nomination paper which is presented by the candidate must contain all the matters which are specified in the rule, one of them being the description of the candidate. [p. 317, col. 1.]

It is clear from the wording of clause (d) of the rule that if a person signs the nomination paper of a candidate, either as proposer or seconder, he cannot also sign it as an approver. [p. 317, col. 1; p. 319, col. 1.]

The name of a firm which is not the signature of an individual voter is not a good signature of an approver under clause (d) of the rule. [p. 317, col. 2.]

The intention of the rule is that a nomination paper in order to be valid should, among other matters, contain the name of the candidate, and the names of the proposer and seconder, and then the names of the approvers. [p. 317, col. 2.]

per Woodroffe, J.—Under rule 2 of Schedule V of the Calcutta Municipal Act alternative nomination papers may be sent to the Chairman, so that if one is held, either in whole or in part, to be invalid, the other may be used. In such case, however, each nomination paper should be complete in itself. [p. 318, col. 2.]

A candidate may send in a nomination paper with names of more than 18 voters as mentioned in the rule, in order to meet the case of possible objections to any of the voters whose names appear upon the paper. In such case, more than one nomination paper may be used but the papers must be connected by placing on each paper the name, description and address of the candidate as appearing in the first paper. [p. 318, col. 2; p. 319, col. 1.]

Appeal against the decision of Mr. Justice Chaudhuri, dated the 15th March 1918, sitting on the original side.

FACTS appear from the following judgment of

CHAUDHURI, J.—This is an application under section 45 of the Specific Relief Act, relating to the acceptance of the nomination paper of Babu Narendra Nath Mitter for the forthcoming Municipal election. The Chairman of the Corporation has held the nomination of that gentleman as valid. His decision is

questioned on several grounds. The nomination paper, he holds, contains the necessary particulars required by rule 2 of the election rules. He has treated as part of the nomination paper a letter written by the candidate signed by himself containing this description, "Honorary Presidency Magistrate, Landlord and Banker, Hindu, Bengali." As an annexure to that letter there are three printed forms containing signatures. In the printed forms which have been signed by the proposer, seconder and approvers there is no description of Narendra Nath Mitter. The Chairman has held that the covering letter of Narendra Nath Mitter can be treated as part of the nomination paper. I am unable to take the same view. The letter itself speaks of the nomination paper as a separate document. It seems clear to me under the rules that the nomination paper should contain the description of the candidate. The very same question came up in England, and it was held that an omission of the candidate's description was fatal and could not be regarded as a misnomer. In *Reg. v. Tugwell* (1) Chief Justice Lord Cockburn has held that a total omission of description was not an inaccurate description and was not cured by section 142 of the English Act, and it was, therefore, fatal to the validity of the voting paper. We have no section corresponding to section 142. Justice Hannen also said in that case that he could not think it would be right to hold that the nomination paper was valid notwithstanding a total omission of the description of the candidate. It was argued that the description was for the purpose of enabling the Chairman to identify the candidate. But I think it has been rightly argued on the other side that it is for the purpose of enabling the persons who are approvers to identify the person whom they are approving.

The second point relates to sub-rule 2 (d) of the election rules, namely, that the signatures of 18 voters as approvers ought to appear. As I have said, the nomination paper in this case consists of 3 sheets. The first sheet contains, amongst other things, the signatures of the proposer and the seconder and of 18 persons as approvers. The second sheet contains the names of 14 persons, it being pasted on to the first

(1) (1868) 3 Q. B. 704; 9 B. & S. 367; 37 L. J. Q. B. 276; 16 W. R. 1039.

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sheet. On the third sheet, also pasted, there are three signatures. Objection has been taken by the applicant before me that the signature of Tandulal on the first sheet (he being No. 6 on that page) ought not to have been accepted and similar objection has been taken to Nos. 3, 8, 12, 14, 10 and 15. Nos. 10 and 15 have been rejected by the Chairman, and, therefore, it is not necessary for me to consider them. With regard to Tandulal it is said that there is no such voter. The Chairman says, "the full name of Tandulal is said to be Tandulal Kanori, voter No. 1821." Now on the electoral roll there is no such name as Tandulal. The name of Tandulal Kanori appears. There is also another name on the electoral roll, that of Tandulal Agarwalla, who is put down as voter No. 615 in that list. How it could be decided without an enquiry by the Chairman as to whether Tandulal was Tandulal Kanori or some other person, I cannot make out. Tandulal was not present, and the Chairman seems to have relied entirely on an allegation made on behalf of the candidate Narendra Nath Mitter. I do not think that he was competent to do so. What he has got to do is to compare the name of the signatory with the name appearing in the election roll. It is to avoid elaborate enquiries as regards the identity of voters that that rule ought to be strictly observed. As authority for this proposition, reference has been made to *Moorhouse v. Linney* (2). There ought not to be a laborious enquiry into these matters, but the question ought to be determined by mere comparison of the nomination paper and the electoral roll. An objection was also taken to No. 3, Jagabandhu Mookerji, who apparently wrote a letter saying that he had not approved of the candidate. No enquiry was made into that matter, and yet the signature was accepted. With regard to No. 8, Benoy Krishna Chakravarty, his signature appears on page 1 as well as on page 2. So far as page 2 is concerned, I shall have to say later as to why it has been rejected, and, therefore, I do not want to deal with that man's case at present. With regard to No. 12, the name of Ananda Mohan Shaw

(2) (1885) 15 Q. B. D. 273; 53 L. T. 343; 33 W. R. 704; 49 J. P. 471.

appears as voter No. 1509. In the list the number put down against No. 12 is 1509. It is said to be a mistake for voter No. 1484. Here again the name on the electoral roll and the signature do not agree and I do not, therefore, think that the Chairman should have accepted that signature as the signature of a voter. With regard to No. 14, the signature appears as Srigopal Bilas Roy. The Court Munshi has read it as such, it has also been supported by an affidavit, relied upon by the applicant before me; and it is not said that it could be read in any other way. The name appears on the election roll as Srigopal Bilas Ram, and, therefore, the Chairman was not competent to treat the signature on the nomination paper as that of a voter.

With regard to page 2, a very serious allegation has been made. Some of the persons whose names appear on that list, have said that they never intended to approve of the candidate Narendra Nath Mitter. Certain others have come forward and said that they were prepared to approve of that candidate. It appears, however, from the petitioner's affidavit that some of the signatures, at any rate, on that page were signatures which were put down in connection with the proposed election of one Pramatha Nath Pramanic. It is curious how a document of that character should have come to be pasted on to the nomination paper upon which the candidate Narendra Nath Mitter has relied, and I think that the Chairman was quite right in not taking into consideration the signatures on that page.

With regard to the third sheet, it contains three signatures but not the name of the candidate proposed. There is nothing to show that those persons approved of the proposal made by the proposer and the seconder, and relying upon the case of *Harmon v. Park* (3). I hold that those signatures ought not to have been accepted.

The result of my decision, therefore, is that there are not 18 approvers approving of the candidate Narendra Nath Mitter, and on that ground also the nomination paper ought not to have been accepted. The Rule, is, therefore, made absolute with costs.

(3) (1881) 7 Q. B. D. 369 at p. 373; 50 L. Q. B. 775; 45 L. T. 174; 45 J. P. 714.

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Messrs. T. C. P. Gibbons, K. C., Advocate-General, and S. K. Chakravarty, for the Appellant.

Messrs. N. Sarkar and S. C. Basu, for the Respondent.

JUDGMENT.

SANDERSON, C. J.—This is an appeal by Mr. Narendra Nath Mitter against the judgment of my learned brother Mr. Justice Chaudhuri. The matter arose in connection with the candidature of Mr. Narendra Nath Mitter for the forthcoming Municipal Election in Calcutta. This gentleman was a candidate for the Corporation, and he sent in certain documents to the Chairman of the Corporation in connection with his nomination. An objection was taken to these documents as not constituting a valid nomination.

The Chairman decided in favour of Mr. Narendra Nath Mitter. A Rule was obtained under section 45 of the Specific Relief Act; and, upon the hearing of that Rule the learned Judge made it absolute, with the result that he overruled the decision at which the Chairman of the Corporation had arrived.

Now, the Rule which relates to this matter is one of the rules relating to the conduct of elections which were made in pursuance of the Calcutta Municipal Act of 1899. This is rule 2, and it runs as follows:—

"Every person who is a candidate for election shall send to the Chairman, not less than fourteen days before the day fixed for the election, a nomination paper containing:—

"(a) his name and description and a statement of his place of abode,

"(b) the name of the ward or wards for which he proposes to stand,

"(c) the signature of two voters other than the candidate in each such ward who respectively propose and second his candidature, and

"(d) the signature of eighteen voters other than the candidate in each such ward who approve his nomination."

The candidate in this case Mr. Narendra Nath Mitter sent in four documents. The first was a letter signed by himself and addressed to the Chairman of the Corporation of Calcutta in these words:—

"Dear Sir,

"I beg to send you herewith my nomination paper for election as Municipal Commissioner for Ward No. 6 at the ensuing General Election. The nomination paper is duly proposed, seconded and approved.

"Yours truly,

"(Sd.) Narendra Nath Mitter,
Hony. Presidency Magistrate,
Landlord and Banker, Hindu,
Bengalee."

Attached to that letter, by means of a clip as we were informed, were three forms of a nomination paper. These three forms, it appears, were gummed together. The first one is as follows:—

"I hereby propose Babu Narendra Nath Mitter, wrongly put down as Nagendra Nath Mitter in the election roll, of Premises No. 84, Muktaram Babu's Street, who is recorded as Voter No. 1553 of Ward No. 6 as a candidate for election as Commissioner of Ward No. 6."

Then the name of the proposer is written and his number as voter and that of his ward and, then the name of the seconder is written, Atal Coomar Sen, with his number as voter and the number of the ward. Underneath there are the names of the 18 approvers with their numbers as voters, and the number of the ward opposite to their names. The name of Atal Coomar Sen appears as approver as well as seconder, and the Chairman of the Corporation has found that No. 15, the name of which is Sew Kissen Srikissen, is that of a firm, and the signature is not the signature of an individual.

The second nomination paper is in the same form as that which I have read, but it does not contain the names of the proposer, and the seconder, nor does it contain the name of the candidate. That form is signed by 14 people, the name of Atal Coomar Sen again appearing as an approver.

The third document is another similar nomination form, and that again does not contain the names of the proposer and the seconder, nor does it contain the name of the candidate.

Now, the first objection which was taken to these documents being a valid nomination was that the nomination paper did

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not contain the description of the candidate.

The answer which was given to that objection was, that it was true that the actual form of the nomination paper did not contain the description of the candidate, but the description of the candidate appeared fully from the letter which had been attached to the nomination paper and that the letter and the three nomination forms ought to be taken together as one nomination paper, and that consequently the nomination paper did contain the description of the candidate.

In my judgment that contention is not sound, and I think that the first objection which is raised to these documents being a valid nomination paper, *viz.*, that the nomination paper does not contain the description of the candidate, is a good objection. I think it is clear that what is contemplated by the rules is that a nomination paper should be self-contained and complete and that the nomination paper which is presented by the candidate must contain all the matters which are specified in rule 2, one of them being the description of the candidate. We were informed that the forms which were used were supplied by the Corporation: if this be so, I think it is somewhat unfortunate that the forms do not contain a space which is allocated to the description of the candidate. There is a space allocated to his name and there is also a space allocated to his place of residence, but there is no space allocated to his description, as is the case in the forms which are prescribed under the Municipal Corporation Act in England: in those forms there is a separate column provided for the description of the candidate.

On the facts of this case, in my judgment, the nomination paper which has been sent to the Chairman of the Corporation does not contain the description of the candidate.

The second point which is urged against the validity of this nomination was that the name of the seconder had been included as one of the approvers. I think it is clear from the wording of the rule that if a person signs the nomination paper of a candidate, either as proposer or seconder, he cannot also sign it as an approver.

Therefore, I agree with the decision of the Chairman of the Corporation when he decided that the signature of Atal Coomar Sen as an approver was not in order.

The Chairman of the Corporation has also decided that No. 15 is the name of a firm and not of an individual: and, the learned Advocate-General has quite correctly, if I may say so, admitted that he could not support that as a good signature of an approver on the ground that it is the name of a firm and not the signature of an individual voter. Consequently, if the nomination is to be confined to the first of these three forms, in my judgment it is not a good nomination, for the following reasons:—

First, that it does not contain the description of the candidate, and, *secondly*, that it does not contain the names of 18 approvers in addition to the names of the proposer and seconder.

The result is that there is really an end of this matter, unless this Court thinks it right that either the second or the third form ought to be taken into consideration and ought to be treated as part of the nomination paper. In my judgment neither the second nor the third form ought to be taken as part of the nomination paper, and the ground of my decision is, that neither the second nor the third form contains the name of the candidate and the names of the proposer or seconder. The intention of the rule is, that a nomination paper, in order to be valid, should, among other matters, contain the name of the candidate, and the names of the proposer and seconder, and then the names of the approvers. And, to my mind it would not be right for us to say that the second form and the third form should be taken as part of the nomination paper, merely because the three forms are gummed together and sent in to the Chairman at the same time. If we were so to hold, we should be laying the procedure in respect of these elections open to the possibility of considerable abuse, because unless the names of the candidate, his proposer and seconder appear on the paper which the approvers are asked to sign, it might be that signatures of approvers might be obtained by representing that they were giving their approval to a particular candidate, when,

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as a matter of fact, their signatures were intended to be used for another candidate. I do not say that this was done in this case. I only use that as an illustration for pointing out that it would be impossible for us to hold that the second and third forms ought to be looked upon as part of the nomination paper simply because they are attached to the first nomination paper and sent to the Chairman at one and the same time. I do not express any opinion as to whether the second and third forms might have been looked at for the purpose of seeing whether the nomination is valid, if they had contained the names of the candidate and of his proposer and the seconder. I confine my judgment to the facts of this case and hold that we cannot look at the second and third forms for the reason that neither of them contained the names of the candidate, the proposer and the seconder.

There is one other matter to which I wish to refer before I conclude my judgment. It is said that it was alleged before the Chairman of the Corporation and also before Mr. Justice Chaudhuri that some of the signatures of the approvers, in what I call the second form (which contains the names of the 14 approvers), were intended to be in support of the candidature of some person other than Mr. Narendra Nath Mitter, and the learned Advocate-General applied to the Court that we should admit certain affidavits with regard to that matter, inasmuch as he said that reflection had been cast upon the reputation of his client. It appears that those affidavits had not been used before Mr. Justice Chaudhuri, but that the learned Counsel who was then acting for the appellant, (which learned Counsel is not before us to-day) decided not to use those affidavits before the learned Judge.

Under those circumstances, the respondent objected to their admission on the hearing of the appeal and we declined to admit them.

Having regard to the conclusions which I have already expressed in the first part of my judgment, it is not necessary for me to come to any decision about this matter; I express no opinion as to whether there is any ground for the suggestion that some of these names were obtained for

another candidate or another proposed candidate.

In this connection I may draw attention to the fact that, as I read the judgment of Mr. Justice Chaudhuri, the learned Judge gave no definite finding on this point. Therefore, that matter, in my judgment, remains undecided: at any rate, so far as my judgment goes, I express no opinion one way or the other, as, for the reasons I have stated, it is unnecessary for my judgment.

For these reasons I think that the appeal should be dismissed with costs and the Rule discharged with costs.

At the request of the learned Advocate-General to deal with a further point that he urged, I will add this to my judgment. The learned Advocate-General contended that the nomination paper did contain a description of the candidate because after the address of the candidate appear these words:—

"Who is recorded as Voter No. 1553 of Ward No. 6"

In my judgment that by itself is not a "description" within the meaning of rule 2 (a). When one refers to the election roll, one finds there the name of Narendranath Mitter, which ought to be Narendra Nath Mitter, opposite the number 1553, and his address No. 84, Mukhtaram Babu's Street. This carries the matter no further than the nomination paper itself. I cannot think that such a reference by itself can be held to be a description of the candidate within the meaning of the rule.

WOODROFFE, J.—Rule 2 of the election rules says that a nomination is to be sent to the Chairman. In my opinion, if there be one such paper, it must be complete in itself, which is not the case here, for the description given on an appended letter from the candidate is not sufficient. I see, no reason, however, why alternative nomination papers should not be sent to the Chairman, so that if one is held, either in whole or in part, to be invalid, the other may be used. In such case, however, each nomination paper should be complete in itself. I see also no reason why the candidate should not send in a nomination paper with names of more than 18 voters as mentioned in the rule, in order to meet the case of possible objections to any of the voters

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whose names appear upon the paper. In such case, more than one nomination paper may be used, but the papers must be connected (otherwise than as here by mere pinning together). That connection is effected by placing on each paper the name, description and address of the candidate as appearing in the first paper. If we were to hold otherwise, we should open the door to fraud:

Here the first paper does not contain a description of the candidate such as is given in the letter appended to the nomination paper. I agree with the Chairman that a seconder cannot also sign as an approver. The 18 voters in clause (d) of the rule are clearly 18 voters other than those mentioned in clause (c). This excludes Voter No. 10 on the first mentioned paper. The number of approvers in the first paper is (excluding also, as is admitted, Voter No. 15 which is the name of a firm) 16 only. This is insufficient, unless we include voters on the other two papers said to be attached to the first paper. The second paper must be excluded. It is said to include the names of voters who say that they intended to support Babu Promotha Nath Pramanick. But apart from this, that appears not complete. I think the third sheet ought to be excluded on the same ground, namely, that it is not in itself complete and is not thus connected on its face with the first paper, so as to make it capable of being read with it.

It is suggested that some impropriety was committed in putting forward the second paper as to which Mr. Justice Chaudhuri, according to the report read to us, does not seem to have come to any definite finding. It is impossible to accede to the application of the appellant to put in further affidavits, for his learned Counsel said at the hearing before Mr. Justice Chaudhuri that he would not give evidence on this point. It is not necessary, however, to go into this matter further, for the appeal fails on the technical ground stated and should be dismissed with costs. I agree that reference to the number of the candidate in the election roll is not by itself a sufficient description within the meaning of the rule: though if it were, the appeal fails on other grounds stated.

Appeal dismissed.

PRIVY COUNCIL.

APPEAL FROM THE SIND JUDICIAL COMMISSIONER'S COURT.

March 11, 1918.

Present:—Earl Loreburn, Lord Dunedin,
Lord Sumner and Lord Paramoor.
THE KARACHI PORT TRUST—

APPELLANTS

versus

J. MACKENZIE DAVIDSON AND OTHERS—
RESPONDENTS.

Contract to supply labour, construction of—Covenant, implied—Maps and specifications.

Plaintiffs agreed to supply labour to the defendants by loading and unloading waggons of sand for purposes of reclamation on the foreshore. The agreement was accompanied by maps and specifications. The plan showed a low rubble construction shown in section which was designated "temporary rubble toe to protect filling during reclamation." Plaintiffs sought to import into the contract an implied term that the defendants were to provide adequate protection to the filling up by sand by a temporary rubble during reclamation:

Held, that assuming that the contract had an implied condition, the condition was only to execute the protection as shown in the plan and that it was impossible to spell out of the plans and sections an obligation to do more than what was there shown. [p. 321, col. 2.]

Appeal from a judgment and decree of the Judicial Commissioner's Court, Sind, (Pratt, J. C. and Kemp, A. J. C.), dated the 8th August 1913, praying in favour of the respondents a decree of the same Court (Hayward, A. J. C.) in its District Court Jurisdiction.

Messrs. P. V. Lawrence, K. C., and A. M. Lat-ters, for the Appellants.

Mr. Upjohn, K. C., and Sir W. Garth, for the Respondents.

JUDGMENT.

LORD DUNEDIN.—The plaintiffs in this suit are the contractors who contracted to supply labour for reclamation work undertaken by the defendants, the Karachi Port Trust, at the north pool of Karachi.

By the contract entered into between the plaintiffs and the defendants the plaintiffs were to supply the labour for filling and emptying the waggons used in transporting sand from places on the shore and laying it down on the foreshore to be reclaimed. Work was done by the plaintiffs and payments were made therefor by the defendants.

The claim as originally launched consisted of one large item of Rs. 72,514 and of various small items. The trial Judge disallowed item 1 *in toto*, and in respect

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of the other items allowed Rs. 650, Rs. 150 of which had been admitted, and found the defendants entitled to the costs of the action. The Appeal Court recalled the judgment of the trial Judge and allowed Rs. 17,640 for the first item, and Rs. 1,900 in respect of the other items, and made a new order as to costs.

Before their Lordships' Board the parties agreed to settle all items except the first by allowing judgment for the plaintiffs for Rs. 1,350, the question of costs to be unaffected by this arrangement.

The sole question, therefore, that has been argued before this Board has been the question of liability for the first item. That item was in respect of 89,000 brass (a brass=100 cubic feet) of sand, alleged to have been handled and not paid for.

The clauses of the contract which are material to the determination of the question involved are as follows:

"1. The work required to be done by the contract is to find the necessary labour for filling and emptying the waggons.

2. The contract will be paid by measurement of the area reclaimed and before commencing work he must satisfy himself as to the correctness of the depths shown on the sections of the ground and agree to abide by same and the following stipulations.

* * * *

"11. The Port Trust are at present engaged in putting rubble protection to enclose the area to be reclaimed and this will be in progress probably when the work is commenced, and the contractor is not to make any claim for alleged or actual loss of material being washed away during the progress of the work and when quoting his rate for the labour in filling and emptying it, must include all and every such contingency as loss in bulk through washing or spreading by the sea, sinking and settlement, or leaking or blowing out of the waggons during transit from the sand hills to the site of reclamation.

12. There are approximately about 2,50,000 brass to be reclaimed, but the contractor will be paid strictly in accordance with the work when actually done on the sections of the ground at the completion

of the work and no allowance whatever as stated in paragraph 11 will be entertained for sinking, washing away, etc."

The area reclaimed was measured, after the operations of the plaintiffs were finished, by the engineers of the defendants. The plaintiffs, though invited to send their engineer to check the measurements, did not do so. In the result the defendants brought out the sum which was due in accordance with these measurements and paid the plaintiffs accordingly. As to the accuracy of these measurements there are concurrent findings of fact by the trial Judge and the Court of Appeal. The trial Judge says:—

"The defendants' calculations have been explained in full detail by the Port Engineer, Mr. Coad, and appear to have been liberal and reasonably accurate. The calculations have been entirely redone in light of such incorrectnesses as have been pointed out, and the result has been to show not a deficit but a considerable overpayment. It remains only to observe that plaintiffs declined defendants' offer to be present at and check the final measurements on the ground, and that it is impracticable to check them now on the ground owing to the subsequent completion of the reclamation. There would, therefore, appear to be no reason to suppose that there were any material miscalculations of the work done on the reclamation."

The Appeal Court Judges say:—

"Nor do we think the plaintiffs have shown that the final measurement sectional drawings are wrong, or that the depths in them are incorrect."

The plaintiffs, being thus debarred from challenging the defendants' measurements as to the amount of sand actually deposited on the ground, seek to make their case in the following way. By a calculation of the number of waggons filled and the average contents of each waggon, they say that they prove that so much sand was actually put on the ground. The difference between the amount so brought out and the amount as disclosed by the engineer's measurements is sand which has in some way disappeared. This sand, they say, has been washed away. Turning to the contract, they argue that the contract, when read with the plans and specifications, shows

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an implied covenant on the part of the defendants to afford a protection of rubble work to keep the deposited sand from being washed away, and averring that the defendants failed to afford such protection, they claim the value of their work on the sand deposited but rendered unavailable as damages for breach of contract on the part of the defendants.

Both the trial Judge and the Judges of the Court of Appeal were of opinion that the plans added an implied term to the contract, but they differed as to what that term was. The trial Judge held that it was to supply the protection actually shown on the plans and sections, that being a low rubble construction shown in section and designated on the plan "temporary rubble toe to protect filling during reclamation." He held that, judged by that standard, the defendants had, as a matter of fact, constructed all that they had covenanted to do. The result was that the plaintiffs had proved no breach and consequently no damage. The Judges of the Court of Appeal held that the implied covenant was to supply an "adequate" protection, and they considered that inadequacy was proved by the mere fact of the discrepancy between what they considered the proved waggon loads deposited, and the proved amount measured, there being in their view no means of accounting for that difference except by the supposition that the missing amount had been washed away and the fact of its being washed away being *per se* proof of the inadequacy of the protection.

It was argued on behalf of the defendants that as the contract itself is silent on the point, an implied obligation to afford "protection" by means of rubble work could not be drawn from the plans and sections, and that section 11 of the contract above quoted was destructive of any such idea. Their Lordships do not find it necessary to express an opinion whether that argument is sound or not. They are clearly of opinion that it is quite impossible to spell out of the plans and sections an obligation to do more than what is there shown. Indeed the learned Counsel for the plaintiffs admitted that he could not support the view of the Court of Appeal, which would extract from the contract which is silent on

the point, and from the plans and specifications which contain no words of obligation, but only show certain proposed construction, a covenant on the part of the defendants to afford an "adequate" protection. This concession, though candidly made, could not, in the opinion of their Lordships, have been with any prospect of success withheld.

This dislodges the judgment of the Court of Appeal, which is also based on what seems to their Lordships a fallacy. Taking the measurements of the contents of the waggons on the one hand, and the measurements of the stuff on the ground on the other, as equally accurate, and finding that the sum of the latter is less than the sum of the former, the learned Judges draw the inference that the difference must be accounted for by washing away. This, however, is a *non sequitur*. Not only may part of the sand have been blown away in transit, but the discrepancy might be caused by subsidence (the measurements having been effected from the data furnished by sectional drawings), and further the sectional drawings themselves might be erroneous, an error which by clause 2 of the contract the plaintiffs were content to abide by. Indeed the method employed by the learned Judges entirely ignores the stipulation of the contract that measurement of the area was to be the basis for arriving at the sum to be paid.

The case, therefore, is reduced to this, that assuming without deciding that the contract has an implied condition, their Lordships must hold that that condition was only to execute the protection as shown on the plans; and here there is a direct finding by the trial Judge who saw the witnesses that the defendants had done what they contracted to do, a finding which is undisturbed by any finding or even remark of the Court of Appeal. In such a case their Lordships think it impossible to disturb the finding of the trial Judge. The result is that the plaintiffs fail on the first item of the claim. The judgment appealed against must be recalled, and in accordance with the arrangement recited judgment entered for Rs. 1,350. As the defendants have been completely successful on the only substantial question in the case, they must

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have their costs in the Courts below and before this Board.

Their Lordships will humbly advise His Majesty in accordance with this opinion.

Appeal allowed.

Solicitors for the Appellants: Messrs. Sharp Pritchard & Co.

Solicitors for the Respondents: Messrs. T. L. Wilson & Co.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL CIVIL NO. 65 OF 1917
August 27, 1917.

Present :—Sir Lancelot Sanderson, Kt.,
Chief Justice, and Justice Sir John
Woodroffe, Kt.

SATISH RANJAN DAS—DEFENDANT—
APPELLANT

versus

MERCANTILE BANK OF INDIA, LTD.—
PLAINTIFFS—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), O. XXXIV,
r. 6—Mortgage decree—Mortgaged properties not
exhausted—Mortgagee, whether entitled to personal
decree.*

Order XXXIV, rule 6, of the Civil Procedure Code does not mean that a personal decree against the mortgagor cannot be obtained in any case where the whole of the mortgaged properties directed to be sold have not been sold for whatever cause it may be. [p. 327, col. 1; p. 328, col. 2.]

Where there is a deficiency after the sale of all the mortgaged properties which were available for sale at the date of sale under the mortgage decree, the mortgagee-decree-holder is entitled to enforce the liability of the mortgagor under Order XXXIV, rule 6, Civil Procedure Code. [p. 327, cols. 1 & 2; p. 329, col. 1.]

If it can be shown that the properties which were included in the mortgage and which could be sold in pursuance of the mortgage decree were in fact not sold owing to some action or default of the mortgagee, then the mortgagee would be debarred from obtaining a decree for personal liability under Order XXXIV, rule 6, Civil Procedure Code. [p. 325, col. 2; p. 326, col. 1.]

But the fact that some of the properties included in the mortgage decree have, since the date of the decree and by reason of the prosecution of his rights by a prior mortgagee and through no act or default of the decree-holder-mortgagee, ceased to be available for sale, is not sufficient to debar the claim of the mortgagee-decree-holder for a personal decree under Order XXXIV, rule 6, Civil Procedure Code. [p. 326, col. 1.]

[After the plaintiff, a second mortgagee, had obtained a mortgage decree, the mortgagor was adjudicated an insolvent. On an application made by a prior mortgagee to the Insolvency Court most of the mortgaged properties were sold by the Official

Assignee free from all incumbrances. This sale, which was not objected to by the plaintiff, was not sufficient to pay off even the claim of the prior mortgagee. The remaining items of the mortgaged properties were then sold by the plaintiff under his mortgage decree but the price realised by the sale was very small. The plaintiff thereupon applied for a personal decree against the mortgagor and his sureties:

Held, that the plaintiff was entitled to a personal decree under Order XXXIV, rule 6, Civil Procedure Code, although all the properties included in the mortgage decree obtained by him had not been sold under that decree. [p. 327, col. 2; p. 329, col. 1.]

Appeal from Original Civil No. 65 of 1917 in Suit No. 1158 of 1914 against the judgment of Chaudhuri, J., dated the 12th July 1917, giving a personal decree to the plaintiff against defendants Nos. 1 and 2.

Mr. B. C. Mitter, Officiating Advocate-General (with him Mr. C. C. Ghose), for the Appellant.

Mr. P. L. Buckland, for the Respondent.

JUDGMENT.

SANDERSON, C. J.—This is an appeal by the defendant, Mr. S. R. Das, against the judgment of Chaudhuri, J., whereby he held that the plaintiff Bank was entitled to a personal decree against the 1st and 2nd defendants.

It was contended that the plaintiffs were not entitled to a personal decree under Order XXXIV, rule 6 of the Code of Civil Procedure, inasmuch as the conditions precedent entitling them to ask for such a decree had not been fulfilled: and the terms of the decrees, dated 8th February 1915 and 28th February 1916, had not been carried out.

The facts were as follows :—

A. H. Guznavi was indebted to the Allahabad Bank and his indebtedness was secured by mortgage of certain properties.

He was also indebted to the plaintiff Bank. On the 1st August 1913, A. H. Guznavi executed a mortgage to the plaintiff Bank to secure the floating balance. This mortgage was with respect to the same properties as were covered by the mortgage held by the Allahabad Bank and was subject thereto.

On the 13th September 1913, the defendants, A. K. Guznavi (a brother of the mortgagor) and Mr. S. R. Das, executed a promissory note payable on demand in favour of the plaintiff Bank for Rs. 2,55,000 with interest thereon as security for A. H. Guznavi's indebtedness. On the 23rd September 1913, the plaintiff Bank, by a

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deed executed on that day wherein it was recited that the transferees had, at the request of the mortgagor, agreed to give to the Bank their joint and several promissory note for the amount secured by the within written Indenture, transferred the debt due to the plaintiffs from A. H. Guznavi and the mortgaged properties to the defendants A. K. Guznavi and S. R. Das.

On the 24th September 1913, the defendants, A. K. Guznavi and S. R. Das, deposited with the plaintiff Bank the title deeds, *viz.*, the mortgage of the 1st August 1913 and the transfer deed of 23rd September 1913, with the plaintiff Bank, and executed a declaration of mortgage to the effect that the said Indentures had been deposited to secure the payment by the said defendants of the sum of Rs. 2,55,000 secured by the said promissory note and interest, and undertook to execute a legal or formal sub-mortgage of the premises comprised in the Indentures.

On the 12th November 1914, the plaintiffs sued A. K. Guznavi, S. R. Das and A. H. Guznavi. By paragraph 5 of the plaint, the plaintiffs submitted that they were entitled to a decree against the 1st and 2nd defendants for the sums secured under promissory note of 13th September 1913, and they claimed further to be entitled to a mortgage decree in respect of the properties mentioned and contained in the Indentures of 1st of August 1913 and the 23rd September 1913.

In this suit a preliminary mortgage decree was made on the 8th of February 1915, and no personal decree in respect of the promissory note was made.

It was stated, during the course of the argument, that no personal decree in respect of the promissory note was asked for at the hearing.

On the 21st July 1915, A. H. Guznavi was adjudicated an insolvent.

In pursuance of the mortgage decree of 8th February 1915, the Registrar took an account of what was due to the plaintiff Bank for principal and interest on the promissory note and, on the 23rd July 1915, he reported that on the 11th February 1916 there would be due to the plaintiff Bank, upon and by virtue of the promissory note in the said decree mentioned, the sum of Rs. 2,73,026-10-10 for principal and interest

to the said 11th February 1916, and appointed the 12th February 1916 as the time for the defendants to pay the said sum of Rs. 2,73,026-10-10 and costs and interest.

Nothing was paid in respect of that decree on the date above mentioned or at any time.

In October 1915 an application was made by the Allahabad Bank to the Judge exercising Insolvency Jurisdiction, on notice to the plaintiffs, A. H. Guznavi, A. K. Guznavi and S. R. Das, and Greaves, J., made an order under the Presidency Towns Insolvency Act, 1909, that the properties included in the mortgage of the Allahabad Bank should be sold by the Official Assignee free from all incumbrances, and that the balance of the sale-proceeds, after payment of the costs of the sale and the claim of the Allahabad Bank, should be retained by the Official Assignee and be paid by him in discharge of other incumbrances in accordance with their respective priorities. On the hearing of this application, the defendant S. R. Das appeared and opposed the application, but the plaintiffs, though they had been requested by the attorneys of the defendant S. R. Das to oppose the application, did not do so.

In spite of the opposition of the defendant S. R. Das the Court made the order aforesaid. This order was not drawn up until 4th January 1916.

Nothing having been paid on the appointed day, *viz.*, the 12th February 1916, by the defendants, on the 28th February 1916 a final decree in this suit was made, whereby it was ordered that the premises charged under the mortgage in the decree of the 8th February 1915 mentioned, or a sufficient part thereof, should be sold subject to a prior mortgage in favour of the Allahabad Bank in the said decree mentioned. The drawing up of this order was directed to be postponed for three months, and we were informed during the argument that the plaintiffs protested against the postponement. On the 9th January 1917, the sale, directed by the order of the 4th January 1916 of the Insolvency Court, was carried out by the Official Assignee: the property realised about Rs. 60,000 only, which was not enough to meet the amount due to the Allahabad Bank upon the first mortgage:

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such amount, we were informed, was over five lakhs of rupees.

An application was, thereupon, made by the plaintiffs to Chitty, J., for a personal decree against the defendants, A. K. Guznavi and S. R. Das, for Rs. 2,88,862-3-3 and costs due under the decrees of the 8th February 1915 and 28th February 1916 and under an order in the suit dated 11th February 1915 and interest. On the 30th January 1917, Chitty, J., dismissed this application on the ground that the conditions precedent contained in the decree of the 8th February 1915 had not been fulfilled, i.e., that the mortgaged property had not been sold in pursuance of the mortgage decree.

On the 26th June 1917, this Court, on appeal, upheld Chitty, J.'s judgment.

On the 21st April 1917, pursuant to the decrees of the 8th February 1915 and the 28th February 1916, the Registrar put up for sale the equity of redemption in the following properties:—

"Lot A.—All that unexpired term of a verbal tenancy for six years from November 1911 of No. 7, Bowbazar Street, Calcutta (possession of which has already been surrendered), together with any rights still subsisting in the stock-in-trade (already sold by a prior mortgagee) and outstandings due to the defendant, A. H. Guznavi, in his business of the United Bengal Company.

Lot B.—All the claims of the defendant, A. H. Guznavi, against Messrs. Berg Sons & Co., Ltd., and Messrs. Donald Campbell & Co., respectively (which the said A. H. Guznavi says are non-existent).

Lot C.—All that the interest (if any) of the defendant A. H. Guznavi in the Zemindaris in the Districts of Mymensingh and Pabna (which interest was on the 9th January 1917 sold free from incumbrances by the Official Assignee of Calcutta as Assignee of A. H. Guznavi, an insolvent under an order of this Court, dated the 4th January 1916)."

At the sale one G. N. Kapur purchased the above-mentioned lots at the total of Rs. 20—Rs. 10 for lot A, Rs. 5 for lot B and Rs. 5 for lot C.

It appears that Chaudhuri, J., issued a Rule on the 5th March 1917 for a review of the decree of the 8th February 1915,

but on the hearing he dismissed the application for review.

On the 14th May 1917, an application was made by the plaintiff Bank to Chaudhuri, J., for a personal decree against the defendants, A. K. Guznavi and S. R. Das, for Rs. 2,93,893-0-11 and costs due to the plaintiffs under the decrees of 8th February 1915 and the 28th February 1916 and the order of 11th February 1915 and interest, and on the 12th July 1917, Chaudhuri, J., held that plaintiffs had fulfilled the requirements of the Civil Procedure Code and were entitled to a personal decree against the 1st and 2nd defendants for the said sum less the sum realised by the sale, if that sum had not already been taken into account, and a decree was made accordingly.

From this judgment the defendants, A. K. Guznavi and S. R. Das, have appealed.

The appeal which was argued was that of the defendant, S. R. Das, and it was agreed by learned Counsel that the appeal of the defendant, A. K. Guznavi, would, as a matter of course, follow the event of this appeal.

The decrees of the 8th February 1915 and of the 28th February 1916 were made in pursuance of the provisions of Order XXXIV, rules 4 (1) and 5 (2), and the application for a personal decree against the two defendants was in pursuance of Order XXXIV, rule 6.

It was contended by the learned Advocate-General on behalf of the defendant, S. R. Das, that in view of the provisions of the above-mentioned rules and in view of the terms of the said decrees, the Court had no jurisdiction to make a decree for personal liability of this defendant until all the properties included in the decree had been sold in pursuance thereof; that the words "or a sufficient part thereof" in Order XXXIV, rule 5 (2), which are also to be found in both the said decrees, showed that not less than the whole of the properties mentioned in the decrees must be sold in order to comply with the provisions of the rules and with the terms of the decrees, that the question of sufficiency could not arise unless it was intended the whole should be sold if necessary to liquidate the amount secured by the mort-

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gage, that as regards the lots mentioned in the Notification of Sale of the 21st April 1917, lot C comprised the interest (if any) of A. H. Guznavi in the Zemindaris, that these Zemindaris had been sold by the Official Assignee of A. H. Guznavi, an insolvent, pursuant to the order of Greaves, J., of the 4th January 1916, free from all incumbrances: that although it might be that such order was a wrong order, it was made by a Court of competent jurisdiction and that no appeal had been made against it, though the plaintiffs could have appealed, if they had so desired: that, consequently, the order for sale by the Official Assignee must be considered as a valid order, and the sale must be held a valid sale: that the properties having been sold free from incumbrances, the result of the sale was that the whole interest in the Zemindaris went to the purchaser and that thereafter the right of the plaintiffs was confined to the balance of the sale-proceeds, if there were any, after the first mortgagee's claim had been satisfied: that, consequently, as regards lot C, there was nothing which could be sold on the 21st April 1917, and therefore that, as the whole of the properties mentioned in the decrees had not been sold in pursuance of such decrees, the defendant could not be made liable personally.

It cannot be said that the sale of the 21st April 1917 was altogether nugatory: for there were included in the lots, two items which had not been sold by the Official Assignee, *viz.*, (i) "outstandings due to the defendant, A. H. Guznavi, in his business of the United Bengal Company" mentioned in lot A, and (ii) lot B, "all the claims of the defendant, A. H. Guznavi, against Berg Sons & Co., Ltd., and Messrs. Donald Campbell & Co., respectively, which the said A. H. Guznavi says are non-existent."

These two items were specifically mentioned in the mortgage of the 1st August 1913, which was one of the deeds referred to in the memorandum of deposit, dated the 24th September 1913, made by defendants, A. K. Guznavi and S. R. Das.

In this mortgage it was recited that the mortgagor was entitled to a sum of about £ 6,438-1-7 then owing by Messrs. Berg Sons & Co., Ltd., and also to a sum amount-

ing to £ 4,870-7-8 then owing by Messrs. Donald Campbell & Co.

Although these two items at the time of the sale were apparently of very little value, they were included in the mortgage, they were included by the Registrar in the Notification of Sale, they had not been sold prior to the 21st April 1917, and they were sold at the sale of that date by the Registrar in pursuance of the decrees of the 8th February 1915 and the 28th February 1916.

Further, the interest, if any, of A. H. Guznavi in the Zemindaris was sold at the same sale.

As regards this last item and also as regards the unexpired term, which had been surrendered, and the stock-in-trade at 7, Bowbazar Street, which had already been sold by a prior mortgagee, I think it must be taken that there was nothing in fact to sell.

Mr. Buckland, however, for the Bank, contended that this would not affect the Bank's right to a personal decree for the sale *purported* to be a sale of all the mortgaged property, and for the purposes of this case it made no matter whether the Bank had any title to the property purported to be sold and that consequently the decrees of the 8th February 1915 and the 28th February 1916 had been carried out.

This argument I do not adopt. I do not think it would be right to hold that the decrees had been carried out by means of what purported to be a sale by the Registrar, if the properties offered did not in fact exist at the time of the sale although they had been included in the mortgage. But this does not dispose of the case, for the plaintiffs urged that the decrees had been complied with, inasmuch as the Registrar sold in pursuance of the decrees all the properties covered by the mortgage which were in existence and available for sale at the time of the sale of the 21st of April 1917, and that more than this could not be done.

If it could be shown that the properties which were included in the mortgage, and which could be sold in pursuance of the decrees, were in fact not sold owing to some action or default of the plaintiffs so as to impose on the mortgagors a personal liability to which otherwise they would not

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have been liable, then I think the plaintiffs would be debarred from obtaining the decree for personal liability which they claim: see *Ram Ranjan Chakravarti v. Indra Narain Dass* (1). There are two grounds relied upon by the defendant in this respect.

First, it was argued that the plaintiffs should have appeared at the hearing of the application before Greaves, J., and that the plaintiffs should have joined the defendant, S. R. Das, in opposing the making of the order for sale by the Official Assignee free from incumbrances.

Reliance was placed on the fact that the plaintiffs received not only a notice of the application but also a request from the Attorneys of this defendant to oppose the application and, consequently, it was urged that the plaintiffs were to some extent responsible for the fact that the equity of redemption in the Zemindaris could not be sold in pursuance of the decrees.

I do not think this is sufficient to debar the plaintiffs' claim. The defendant, S. R. Das, was one of the second mortgagees who had made a sub-mortgage by the deposit of the deeds with the Bank. This defendant appeared by Counsel and opposed the application, and no doubt all that could be urged against the application was urged, and I do not think we ought to assume that if the Bank, who would have been claiming under the defendant, S. R. Das, had opposed the application, such opposition would have made any difference.

It is true that if the plaintiffs' advisers had been aware of the point which has now been taken (a point which, as far as this case is concerned, is purely a technical one), they might have urged it before the Judge and argued that a sale by the Official Assignee might prevent the decrees of the 8th February 1915 and 28th February 1916 being carried out so that the plaintiffs' remedy against these defendants personally might be endangered, but I think it is fairly obvious that such a possibility never entered into the consideration either of the plaintiffs or these two defendants at the time, and that they were relying upon the sale of the Zemindari

properties producing a sum sufficient to meet the claims of both the Banks.

Secondly, it was urged that although the order of the 28th February 1916 was postponed for 3 months, the sale by the Official Assignee did not take place until the 9th January 1917, and the plaintiffs might have applied to have the decree of the 28th February 1916 carried out before that time.

We have no information as to what was the cause of this delay and we are not at liberty to speculate.

The fact is patent, however, that considerable delay took place in carrying out both the mortgage decree of 28th February 1916 and the decree of the Insolvency Court of 4th January 1916. The sale by the Official Assignee did not take place until 9th January 1917.

The properties are apparently of considerable size, the preparation for the sale thereof would take some considerable time and they were thought to be of much greater value than the amount eventually realised; indeed, I think it was admitted during the argument that both the plaintiffs and these two defendants were hoping that the sale would realise enough to meet the claims of the two Banks and thus relieve these two defendants of all personal liability. Unfortunately this expected contingency did not happen, but I do not think that the plaintiffs, by reason of the delay, under the circumstances can be said to have been responsible for the fact that the equity of redemption was not available for sale by the Registrar under the mortgage decrees on the 21st April 1917. There remains, therefore, the point urged by the learned Advocate-General, viz., that inasmuch as all the properties included in the decrees were not sold in pursuance thereof, the plaintiffs are debarred from obtaining a personal decree against these defendants. The decrees do not mention the properties specifically, but the properties are described therein by reference to the mortgage of 1st August 1913 and the Indenture of 23rd September 1913.

The plaintiffs' security was a memorandum of deposit by the second mortgagees; and their security was, therefore, subject to the Allahabad Bank's first mortgage

(1) 33 C. 890; 10 C. W. N. 862.

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and subject to the rights of that Bank incidental to the first mortgage.

It was in pursuance of such rights that the Allahabad Bank obtained the order for the sale of the Zemindari properties free from incumbrances, and that, consequently, these properties were not available for sale on the 21st April 1917 in pursuance of mortgage decrees obtained by the plaintiffs.

The question, therefore, is whether the fact, that some of the properties included in the 'above-mentioned Indentures, and therefore included in the mortgage decrees, have since the date of the decrees and by reason of the prosecution of their rights by the first mortgagees and through no act or default of the plaintiffs become not available for sale, is sufficient to debar the plaintiffs' claim for a personal decree.

In my judgment, we should be putting too narrow and rigid a construction upon the provisions contained in the rules and upon the terms of the decrees if we were so to hold. The object of the rules obviously is that the remedy of the mortgagee should in the first instance be against the property mortgaged, and that such property should be exhausted before a personal liability is imposed upon the mortgagor. But the rules surely cannot mean that if a portion of the property, however small, which was included in the mortgage and therefore included in the mortgage decree as a portion of that which was to be sold, is destroyed or ceases to be available for sale after the date of the decree and through no fault of the mortgagee, then there can be no decree for personal liability against the mortgagor.

Yet this is what is involved in the argument of the learned Advocate-General.

It was not denied that if the provisions of Order XXXIV, rule 5, and the directions of the decrees as regards the sale of the properties have been complied with, the plaintiffs would be entitled to a personal decree under Order XXXIV, rule 6.

Having regard, therefore, to the fact that all the properties covered by the mortgage, which were in existence and which were available for sale at the date of the sale, were sold on the 21st April 1917, and assuming, as I have

held, that the plaintiffs were not responsible for the fact that some of the properties included in the mortgage were not in reality available for sale, though the sale purported to include them, I think it should be taken that the provisions contained in the rules and the directions contained in the mortgage decrees as to the sale have been complied with and that the plaintiffs are entitled to the personal decree which the learned Judge has directed. It was argued that this case was covered by our previous decision upon the appeal from Chitty, J. I do not think that is so: at that time no sale had taken place in pursuance of the mortgage decrees, whereas a material fact on this appeal is that a *bona fide* sale has been held whereby all the properties covered by the mortgage, which were available for sale, have been sold in pursuance of the decrees.

Some cases were cited before us, and much reliance was placed by the learned Advocate-General upon *Badri Das v. Inayat Khan* (2) and the case already referred to [*Ram Ranjan Chakravarti v. Indra Narain Dass* (1)].

The learned Judges in the Allahabad case apparently held on the facts of the case that either the previous sale of the Zemindari properties which had taken place was due to the fault of the appellant, or, if it was not, the appellant had still a right of redemption which had not been sold, and consequently that the whole of the mortgaged property had not been brought to sale.

As regards the case of *Ram Ranjan Chakravarti v. Indra Narain Dass* (1), the *ratio decidendi* was that as the mortgagees had released substantial portions of the property originally mortgaged and the purchasers of these portions from the mortgage debt, and without the consent of the mortgagors, it was held that the mortgagees could not release a portion of the mortgaged property to the detriment of the mortgagor, so as to impose on him a personal liability, to which otherwise he would not be subject. I do not think that either of these cases covers the present case, and it is not necessary, therefore, for me

(2) 22 A. 474; A. W. N. (1900) 132; 9 Ind. Dec. (N. S.) 1305.

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to say whether I agree with the decision in the Allahabad case. In any event it is not binding on this Court.

It is to be noted that on the facts of this case the point which has been relied upon by the appellant is merely a technical one; for, if the course, which the learned Advocate-General argued should have been taken, had in fact been followed, and if all the properties included in the plaintiffs' mortgage had been sold in accordance with the decrees, such properties must have been sold subject to the first mortgage of the Allahabad Bank: the debt due to that Bank was over five lakhs of rupees: the properties when sold by the Official Assignee produced Rs. 60,000: it was said that if the property had been sold by the Court instead of by the Official Assignee, it might have fetched more, having regard to the high reputation obtaining for sales by the Court. But making all due allowance in that respect, the difference between the price fetched by the property and the debt due to the Allahabad Bank is so large that it is obvious that even if the property had been sold by the Court, the first mortgage would not have been satisfied and there would have been nothing left for the plaintiffs.

Consequently, if that course had been followed, the two appellant defendants would have been in no better position. In fact they would have been worse off: they would not have obtained credit for even the Rs. 20, the result of the sale of the 21st April 1917, which has been directed to be deducted from the plaintiffs' claim.

For the above-mentioned reasons, in my judgment, this appeal should be dismissed with costs.

WOODROFFE, J.—It may be that if the whole of the mortgaged properties had been sold by the Official Assignee, there could not have been another sale under the mortgage decree. But that is not the case here. What was sold by the Official Assignee were Zemindaris in Mymensingh and Pabna. The Official Assignee did not sell two other properties, *viz.*, (a) outstandings due to A. H. Guznavi in his business of the United Bengal Company. The paper-book on this point has been mis-

printed, (b) the claims of the said defendant against Messrs. Berg Sons, Ltd., and Messrs. Donald Campbell & Co. It is said that nothing is due on any of these accounts. This may be the statement of A. H. Guznavi, but it does not prevent this apparent interest of his being sold. If it be the fact that a mortgagor represented that there was money due to him and mortgaged it, the mortgagee cannot be prejudiced in his personal remedies if such statement were in fact untrue. If it were so, a man might fraudulently represent that he was the owner of property and mortgage it and thus prevent the carrying out of a mortgage decree on the ground that there was no property to sell.

But it is next argued that even if properties (a) and (b) were not sold and could be sold under the mortgage decree, that would not entitle the mortgagee to a decree for the balance. It is argued that the property which must be sold before such balance is ascertained must be the whole property but that though properties (a) and (b) had not been sold, yet the Zemindaris had been sold and, therefore, the whole of the mortgaged property could not be sold so as to found an application for a personal decree for the balance. The Zemindari property was in fact put up for sale. Even if it be assumed that these properties could not be re-sold, then all the property which could be sold was in fact sold and fetched Rs. 20, which indicates that it is worth something. The argument of the appellant is of a highly technical character. I am not prepared to hold that the present case is without the scope of the order. No doubt the argument may be with strictness maintained that a personal decree cannot be obtained in any case where the whole of the property directed to be sold has not been sold for whatsoever cause may be. But such a rigid interpretation of the section would lead to manifest absurdity and injustice. Thus, as was put in the argument, if, after a decree directing the sale of land and a house, the latter should be burnt so that it could not be sold, in such a case on the argument of the appellant no personal decree could be got because, as a founda-

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tion for it, the whole mortgaged property, namely, land and house directed to be sold, could not be sold. We must look at this matter rationally and with reference to the reason of the rule, namely, that the personal liability will only be enforced where there is a deficiency after the sale of all the mortgaged property available for sale at the date of sale. In other words, the personal liability must not be improperly increased. I cannot say that the conclusion at which the learned Judge has arrived is erroneous, and I agree that the appeal should be dismissed with costs.

Appeal dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

EXECUTION OF DECREE APPEAL No. 18 of 1918.
June 26, 1918.

Present:—Pandit Kanhaiya Lal, Offg. J. C.,
and Mr. Daniels, Offg. 1st A. J. C.

Mirza SADIQ HUSAIN KHAN—DECREE-
HOLDER—APPELLANT

versus

Musammat UMMATULFATIMA
BEGUM AND OTHERS—JUDGMENT-DEBTORS—
RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXIV, rr. 4, 5, 10—Mortgage suit—Costs in appeal, whether part of decretal amount—Practice.

Costs awarded in mortgage suits, including costs of appeal, form part of the decretal amount and are realisable in the first instance by sale of the mortgaged property and not otherwise. [p. 329, col. 2.]

Appeal against the order of the Sub-Judge, Lucknow, dated the 14th March 1918.

The Hon'ble Mr. Wazir Hasan, for the Appellant.

Messrs. Zakur Ahmad and Bisheshar Nath Srivastava, for the Respondents.

JUDGMENT.—This appeal arises out of execution proceedings under a mortgage decree. There were two suits between the parties, a suit for sale on a mortgage brought by the appellant Sadiq Husain against the respondents Hashim Ali and Qasim Ali, and a declaratory suit brought by the latter against the former for a declaration that the property was not

liable to sale under the mortgage. The first Court decided both suits in Sadiq Husain's favour. The respondents were to a large extent successful in this Court but, on a further appeal being preferred to the Privy Council, their Lordships restored the decree of the Subordinate Judge. Both appeals were heard together and the successful appellant Sadiq Husain was awarded his costs of both suits by a single order. The costs were afterwards apportioned by this Court between the two suits. The question in this appeal is whether the costs incurred in the appeal to the Privy Council in the mortgage suit can be recovered in the first instance otherwise than from the mortgaged property.

The proceedings in mortgage suits and the form of the decree in such suits are regulated by the provisions of Order XXXIV of the Code of Civil Procedure, and in particular by rules 4, 5 and 10 of that Order. In accordance with that Order it is the settled practice in this country to treat costs in such suits, including costs in appeal, as part of the decretal amount realisable in the first instance by sale of the mortgaged property and not otherwise. If any authority is necessary for so well-settled a rule, we may refer to *Raj Kumar Singh v. Sheo Narayan Sahu* (1). The appellant's contention is that the Privy Council is not bound by the Code of Civil Procedure and that they have not expressly said that the costs in the mortgage suit are to be recovered as part of the mortgage decree. No doubt the Privy Council can override the Code of Civil Procedure if they wish, but the presumption is that unless they give special directions to the contrary, they intend the costs to be realised in the way in which they would be realised under the ordinary law. It is not to be expected that the Privy Council should enter into details as to the manner in which costs awarded by them are to be realised. That is left to the operation of the ordinary law. Even Courts of Appeal in India frequently omit to specify details of this kind. A case occurred quite recently in which the Allahabad High Court

(1) 35 C. 431; 12 Q. W. N. 364; 8 C. L. J. 152,

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was required to interpret one of its own decrees passed in a suit for sale on a mortgage, *Damber Singh v. Kalyan Singh* (2). The judgment was in much the same form as the Privy Council's order in the present case. It simply directed that the decree of the Court of first instance should be restored with costs in all Courts. The question arose whether the costs in appeal were recoverable as part of the mortgage decree from the mortgaged property or as an ordinary money decree. Their Lordships held that in construing the decree it was open to them to consider the nature of the suit and the general practice of the Court in regard to mortgage decrees and that having regard to these matters, the intention was that there should be the ordinary mortgage decree awarding the costs incurred in the suit and up to the time of the final decree of the High Court to be realised by sale of the mortgaged property. This is the conclusion at which the learned Subordinate Judge has arrived in this case and, in our opinion, it is a correct conclusion. The appellant has attempted to base a further argument on the fact that the costs in the two suits are dealt with together in the Privy Council's order. This certainly cannot be construed to mean that the costs in each suit were not to be realised in the manner appropriate to that suit. In fact this argument is two edged since the Privy Council deal in one sentence with costs before themselves and costs in the Court of the Judicial Commissioner and the appellant himself has treated the latter costs as recoverable under the mortgage decree. The decision of the learned Subordinate Judge is, in our opinion, correct and we dismiss this appeal with costs.

Appeal dismissed.

(2) 43 Ind. Cas. 557; 40 A. 109; 15 A. L. J. 914.

CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL No. 51 OF 1914.

May 18, 1916.

Present:—Sir Lancelot Sanderson, Kt.,
Chief Justice, and Justice Sir Asutosh
Mookerjee, Kt.

MOHAMMAD REAJUDDIN AHMAD—
PLAINTIFF No. 1—APPELLANT

versus

BASUDA SUNDARI DASI AND OTHERS—
DEFENDANTS—RESPONDENTS.

Landlord and tenant—Lease, permanent and heritable, grant of—Re-entry, right of, reservation of—Assignment of tenure.

When a landlord grants a permanent and heritable tenure in land, he has no estate left in him, unless he reserves to himself a right of re-entry or reversion. [p. 331, col. 2.]

Where one of the clauses of a lease was as follows:—
"If the said land and *bari* be not used for dwelling purposes the right under the *pattah* shall be void."
Held, that the clause did not amount to a reservation of a right of re-entry. [p. 331, col. 2.]

Appeal against the decision of Mr. Justice Mullick, dated the 8th April 1914, in Appeal from Appellate Decree No. 1590 of 1911, against the decree of the Subordinate Judge, 2nd Court, Barisal, dated the 29th March 1911, reversing that of the Munsif, Additional Court, Barisal, dated the 24th January 1910.

FACTS of the case will appear from the following judgment of

MULLICK, J.—The vendors of the defendants executed a *Kabuliyat* in favour of the plaintiff on the 7th Chaitra 1283, B. S. i. e., before the Transfer of Property Act came into operation. The plaintiff now sues the defendants in ejectment, on the ground that the vendors had no power to alienate. The Munsif has decreed the suit but the Subordinate Judge has dismissed it. Hence this second appeal. The *Kabuliyat* runs as follows:

"That on our prayer to get a lease of *karsa raiyati* of all the lands and the *bari*, you have granted us a *raiya karsa* lease of the lands of the *miras karsa* described in the schedule below at a *kaini mokurrari jama* of Rs. 14 payable annually. God forbid that if the land be not used as homestead lands the lease will become void and we will not be able to cut down old trees and raise and excavate earth; but if we are in need of doing such acts we shall do so after taking your permission. If we do these acts without your permission we shall pay compensation, etc., ...

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... keeping the former boundaries intact and improving the lands, we, our sons and grandsons (*putra pautradi krame*) shall enjoy the lands."

It is admitted before me that the Bengal Tenancy Act does not govern the case, the lands being only leased for the purpose of a homestead. It is also admitted that the tenancy is heritable and subject to a fixed rate of rent. But the plaintiff's contentions are that it is not alienable, that therefore it is only permanent in a restricted sense, that in the absence of express power to alienate the defendants must be held to be trespassers. Having regard to the words *kaimi mokurrari* and *putra pautradi krame* and the general nature of the lease, I agree with the Subordinate Judge that the tenancy is permanent in the fullest sense. Now all such tenures were before the enactment of the Transfer of Property Act by custom transferable and in this respect the Act has effected no difference in the law. The defendants, therefore, are not trespassers and the plaintiff's suit must fail. In any event the transfer to the defendants would be operative on the principle laid down in *Basarat Ali Khan v. Manirulla* (1) and the suit must be dismissed. The appeal is, therefore, dismissed with costs.

Babus Jyotis Chandra Hazra, for the Appellant.

Babu Brojendra Nath Chatterjee, for the Respondents.

JUDGMENT.

SANDERSON, C. J.—In my judgment this appeal should be dismissed. The question really depends upon the construction which is to be put upon the lease of the 19th of March 1879. The learned Vakil who has argued this case for the appellant admits that the tenure which was thereby created is a permanent and heritable tenure, and, therefore, it would come within the passage to which I drew his attention just now, in the case of *Nil Madhab Sikdar v. Naraitam Sikdar* (2). The passage is at page 828 and is as follows: "Moreover, it seems doubtful whether, when a landlord

grants a permanent and heritable tenure in land, he has any estate left in him, unless he reserves to himself a right of re-entry or reversion; for it has been held in the case of *Sonet Kooer v. Himmat Bahadoor* (3) that in the case of the grant of an absolute hereditary *mokurrari* tenure it will, on failure of heirs of the lessee, escheat to the Crown, and will not revert to the original grantor or his heirs." It is said by the learned Vakil that in the present case the landlord reserved to himself a right of re-entry, because he says the passage is: "God forbid, if the said land and *bari* be not used for dwelling purposes the right under the *pattah* shall be void." I doubt very much whether that should be construed to be a reservation of the right of re-entry by the landlord. It does not say so in so many words, and the form in which the right of re-entry is usually inserted is well-known, and it might have been inserted if it was intended. But even assuming that it does amount to a right of re-entry, upon what does that right depend? The passage which, it is now clear, has been correctly and accurately translated is this: "if the said land and *bari* be not used for dwelling purposes the right under the *pattah* shall be void." The learned Vakil wants us to put a construction upon that sentence in this way: "if the said land and *bari* be not used for dwelling purposes by us," or I suppose "by our sons, grandsons and so on," "then the right, etc." I do not think that that is the correct interpretation to be put upon that part of the lease, and I do not think that it should be limited in the way, which is contended. Therefore, even if it does amount to a reservation of the right of re-entry on the part of the landlord, the condition upon which it was based has not arisen. The tenure being a permanent one and also a heritable one was capable of assignment, unless there were words clearly and distinctly limiting that right of assignment, and clearly giving the landlord a right of re-entry on the alienation. I do not find that in the document.

For these reasons, I think that the judgment of Mr. Justice Mullick, based as it

(1) 2 Ind. Cas. 416; 10 C. L. J. 49; 36 C. 745.

(2) 17 C. 826; 8 Ind. Dec. (N. S.) 1095.

(3) 1 C. 391; 25 W. R. 232; 3 I. A. 92; 3 Sar. P. C. J. 609; 3 Suth. P. C. J. 257; 1 Ind. Dec. (N. S.) 245 (P. C.)

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was upon the same reasons which I have just now enunciated, is correct and, therefore, this appeal must be dismissed with costs.

MOOKERJEE, J.—I agree.

Appeal dismissed.

ODDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 52 OF 1917.

July 23, 1918.

Present:—Mr. Lindsay, J. C., and Mr.

Stuart, A. J. C.

Musammam BADSHAH KHANUM—

PLAINTIFF—APPELLANT

versus

BISHUNATH SINGH *alias* SHEONATH SINGH AND ANOTHER—DEFENDANTS—

RESPONDENTS.

Construction of document—Bond—Time fixed for payment—Limitation, commencement of.

A registered bond provided that the money lent thereunder would be repaid at the end of Jeth 1317 Fasli corresponding to the end of June 1910. The bond was sued upon on the 29th of June 1916:

Held, that for the purpose of this agreement the parties must be taken to have settled between themselves that the last day of Jeth 1317 Fasli was to be the same as the last day of June 1910, and that, therefore, the suit was within time. [p. 332, col. 2.]

Appeal against the order of the Subordinate Judge, Bahraich, dated the 11th January 1917.

Messrs. Mohammad Beg and M. A. Khan, for the Appellant.

Messrs. Rudra Dutt Sinha and Laddie Prasad, for the Respondents.

JUDGMENT.—The only question for decision in this case is one of limitation. The suit was brought on a bond which was executed on the 26th of May 1909. The bond was registered. The executant of the bond was one Saiyed Haider Mehdi who is impleaded as the second defendant, and the bond was executed in favour of the first defendant Bishunath Singh *alias* Sheo Nath Singh. The present plaintiff claims to be an assignee of the debt from Bishunath Singh.

The suit was instituted on the 29th of June 1916. The Subordinate Judge has held that it was put in seven days beyond limitation. In our opinion the decision

of the Subordinate Judge is wrong. The question has to be determined with reference to the language of the bond. In his judgment on the first issue the Subordinate Judge has reproduced *verbatim* the language of the deed which is relevant to the matter under consideration:—

"Iqrar karte hain ki mublighan mazkur mai sud akhira mah Jeth 1317 Fasli mutabiq akhira mah June san 1910 ada wa bebaq kar denge."

It is admitted that the last day of Jeth 1317 Fasli fell upon the 22nd of June 1910, and it was in view of this fact that the learned Subordinate Judge arrived at the conclusion that this suit had been filed a week beyond time. On the other hand, the contention is that for the purpose of this agreement the parties settled between themselves that the last day of Jeth 1317 Fasli was to be taken to be the same as the last day of June 1910. We think this contention must prevail. There were cases cited before the Subordinate Judge which support the contention. The Subordinate Judge, for reasons which we are not able to appreciate, held that these rulings were not applicable and he applied to the case the ruling of their Lordships of the Privy Council which is reported as *Jagatpal Singh v. Jageshwar Bakhsh Singh* (1). That was a case in which report had been made by a *patwari* regarding the death of a certain person. The *patwari* gave the date according to the Hindi calendar and by way of explanation added that the Hindi date corresponded to a certain date in the English calendar. Their Lordships held that for the purpose of deciding the question of the date of the death which was reported, the Hindi date was the proper date to be taken into consideration. Obviously there is a great difference between that case and the case now before us. Here for the purpose of payment the parties agreed between themselves that one date should correspond to another, and, in our opinion, the suit was within time if brought within six years from the 30th of June 1910. The case has been disposed of on this preliminary issue.

(1) 25 A. 143; 30 I. A. 27; 7 C. W. N. 209; 8 Sar. P. C. J. 367.

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We allow the appeal, set aside the decision of the first Court and send the case back for disposal on the merits. Costs here and hitherto will abide the result.

Appeal allowed.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 195 OF 1917.

July 19, 1918.

Present:—Mr. Justice Teunon and
Mr. Justice Newbould.

DIGENDRA CHANDRA BASAK—

PETITIONER—APPELLANT

versus

RAMANI MOHAN GOSWAMI—

RESPONDENT.

Provincial Insolvency Act (III of 1907), ss. 3, proviso, 43 (2), 46—Subordinate Judge declining to take action under s. 43—Appeal, whether lies—"Court" in s. 43, meaning of.

Per Teunon, J.—Against the order of a Subordinate Judge invested with insolvency jurisdiction in certain classes of cases under the proviso to section 3 of the Provincial Insolvency Act declining to take action against an insolvent under section 43 (2) of the Act, no appeal lies to the District Court. [p. 334, col. 1.]

Iyappa Nainar v. Manikka Asari, 27 Ind. Cas. 241; 40 M. 630, followed.

Per Newbould, J.—The word "Court" in section 43 of the Provincial Insolvency Act does not mean the Court of original jurisdiction only. [p. 335, col. 1.]

Appeal against the order of the District Judge, Dacca, dated the 23rd November 1917.

FACTS appear from the judgment.

Dr. Sarat Chandra Basak (with him Babu Bepin Chandra Bose), for the Appellant.—No appeal lay to the District Judge against the order of the Subordinate Judge and the order passed by the District Judge in appeal, which was incompetent, is without jurisdiction. No appeal lay against an order of the Subordinate Judge rejecting an application under section 43, clause 2 (b), of the Provincial Insolvency Act. Hence the order passed by the District Judge is without jurisdiction. Referred to *Iyappa Nainar v. Manikka Asari* (1).

The proceeding under section 43, clause 2 (b), of the Provincial Insolvency Act is

(1) 27 Ind. Cas. 241; 40 M. 630,

in the nature of a criminal proceeding.

The District Judge ought to have adopted a procedure laid down for criminal cases and ought to have framed charges; the notice was to show cause why the petitioner should not be committed to the Criminal Court; and the petitioner cannot be convicted without any charge having been framed.

Babu Prokash Chandra Pakrashi, for the Respondent.—The Court of the District Judge is a Court as defined in the Provincial Insolvency Act and the jurisdiction of the District Judge is concurrent with that of the Subordinate Judge. An appeal lay to the Court of the District Judge against an order refusing to annul an order of adjudication. Even if no appeal lay, he had concurrent jurisdiction with that of the Subordinate Judge and the order passed by the District Judge was perfectly valid having been passed in the exercise of his jurisdiction.

JUDGMENT.

TEUNON, J.—This is an appeal against an order made or purporting to be made by the District Judge of Dacca in the exercise of insolvency jurisdiction. By this order under section 43 (2) of the Provincial Insolvency Act, he sentences the appellant to three months' simple imprisonment on the ground that he had fraudulently concealed certain articles of property. It appears that on the 11th November 1914 the appellant applied to the Court of the 1st Subordinate Judge of Dacca, invested with jurisdiction in certain classes of cases under the proviso to section 3 of the Act, to be adjudged an insolvent. On the 1st May 1915, notwithstanding the opposition of 5 of the 7 creditors mentioned in the schedule to the application, an order of adjudication was made and a Receiver appointed for the properties of the insolvent.

Thereafter the Receiver enquired into certain allegations made by the creditors to the effect that the insolvent had concealed his *yautuk* properties, that is, the gifts made to him on the occasion of his marriage, and reported against the insolvent on the 1st July 1916. The Subordinate Judge, after hearing the creditors and the insolvent, came to the conclusion that the articles had been disposed of before the insolvency, declined to annul the order of adjudication and rejected the petitions of the opposing

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creditors in which, *inter alia*, they had prayed that the insolvent should be punished under section 43 (2).

Three of the creditors thereupon appealed to the District Judge, who directed the insolvent to show cause why he should not be committed to the Criminal Court under section 43 (2), and after taking evidence on both sides on the 23rd March 1917 made the order against which the present appeal has been preferred.

The contentions advanced before us are (1) that against the order of the Subordinate Judge declining to deal with the insolvent under section 43 (2) (b) no appeal lay to the District Judge, (2) that the proceedings before the District Judge were vitiated by certain irregularities and (3) that on the merits no sentence of imprisonment should have been imposed.

The first contention is based on the decision reported as *Lyappa Nainar v. Manikka Asari* (1), wherein it has been held that a creditor is not a person aggrieved by the refusal of the Court to sentence the insolvent under section 43 (2).

But the learned District Judge proceeds on the ground that inasmuch as under the proviso to section 3 his Court and the Subordinate Judge's Court have concurrent jurisdiction, the proceedings having been removed to his Court, his order under section 43 (2) was to be regarded as an original order. Here, in my opinion, he has fallen into error. No doubt the two Courts have concurrent jurisdiction, with the result that either Court has jurisdiction to entertain such applications, and the proceedings might be withdrawn or transferred by the District Court under the provisions of the Code of Civil Procedure from the one to the other. But orders made by the Subordinate Judge, while he had seisin of the case, could be interfered with by the District Court only under the provisions of section 46, which in the matters therein dealt with subordinates all other Courts to the District Court, or under the powers conferred by the Code of Civil Procedure in regard to civil suits as provided in section 47.

Though with some hesitation, I agree with the Madras High Court in holding that against the order of the Subordinate Judge declining to take action against the insol-

vent under section 43 (2) no appeal lay to the District Court.

The irregularities alleged are that the notice served upon the insolvent contemplated his punishment, if at all, not in the proceedings then taken by the District Court but in subsequent proceedings, that the District Court framed no formal charge, and that in the proceedings the insolvent was examined and cross-examined. With regard to the first of these contentions it is sufficient to say that any misapprehension on the part of the insolvent was removed in the course of the proceedings before the District Court. With regard to the remaining two I may point out that in the Provincial Insolvency Act there is no provision corresponding with section 104 (3) of the Presidency Towns Insolvency Act and that decisions under that Act, therefore, are of little assistance. On the contrary section 47 applies to all proceedings under the Provincial Insolvency Act the procedure in civil suits. In view, however, of the decision on the first question I need not come to any definite decision on these two questions.

On the merits we need not point out that when the insolvent made his application he had but recently attained his majority. It would seem, therefore, that the debts were incurred before or soon after he became of age. The father is no doubt well-to-do, but no obligation rests upon a father to re-imburse those who recklessly give credit to profligate young men, the more especially when in this case, some months before, the father had circulated notices warning his townsmen that he would not be responsible for debts contracted by his son.

On the merits, therefore, we think the sentence should be set aside.

This appeal is accordingly decreed.

NEWBOULD, J.—I am unable to agree with my learned brother that the order passed by the District Judge, under section 43 (2) of the Provincial Insolvency Act, was an appellate and not an original order. In the petition of appeal to this Court the first ground is that the District Judge had no jurisdiction to start proceedings. It also appears from the order-sheet of the proceedings in the Court of the Subordinate Judge that that officer did not contemplate exercising penal jurisdiction but directed an enquiry by the Receiver as to property

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alleged to have been concealed, under the erroneous idea that such concealment would be a ground for annulling the order of adjudication. This is evident from the orders of the 15th September 1915 and 22nd July 1916. In this view of the case the decision of the Madras High Court in *Iyappa Nainar v. Manikka Asari* (1) has no application.

I can see no grounds for accepting the second contention of the appellants that the word "Court" in section 43 of the Act means the Court of original jurisdiction.

I am in entire agreement with my learned brother that on the merits the sentence should be set aside and would decree the appeal on this ground.

Appeal decreed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 1884
OF 1903.

May 19, 1905.

Present:—Justice Sir Richard Harington, Kt.,
and Mr. Justice Mookerjee.

PURNA CHANDRA LAHA AND ANOTHER—

DEFENDANTS NOS. 5 AND 6—APPELLANTS

versus

SOUDAMINI BAISNABI AND OTHERS—

PLAINTIFFS—RESPONDENTS.

Ghatwali chakran land—Transfer, right of—Execution of decree—Sale of ghatwal's interest—Purchaser, rights of.

Defendant No. 1 was the *ghatwal* of certain lands. On 24th January 1899, in execution of a decree for money against him, his right, title and interest in the lands were sold and were purchased by the plaintiffs. Defendant No. 1 had executed a *kabuliyat* for these lands in favour of the Maharaja of Burdwan on 5th September 1896. The *kabuliyat* recited that at the time of its execution, negotiations were proceeding between the Government, the *zemindar* and the *ghatwal* for the resumption of these lands, which had not been at that time resumed and transferred to the *zemindar*. It was also clear from a lease, which was the counterpart of the *kabuliyat* and was executed on 29th January 1899 that up to that time the resumption had not taken place.

Held, that on the date of the execution purchase by the plaintiff, the judgment-debtor had not ceased to be a *ghatwal* and, therefore, had no transferable right in the lands, so that the plaintiff got nothing by his purchase at the execution sale. [p. 336, col. 1.]

Appeal against the decision of the District Judge, Bankura, dated the 22nd July 1903, affirming that of the Munsif, Bankura, 2nd Court, dated the 29th September 1902.

Babu Sarat Chander Dutt, for the Appellants.

Babu Shyama Prosanna Mojumdar, for the Respondents.

JUDGMENT.—This is an appeal on behalf of the defendants Nos. 5 and 6 in an action for recovery of possession of certain lands which were originally *ghatwali chakran* lands and situated in the *zemindari* of the Maharaja of Burdwan.

It appears that the defendant No. 1 was the *ghatwal* of these lands and on the 24th January 1899 in execution of a decree for money against him, his right, title and interest in these lands were sold and purchased by the plaintiff. The plaintiff alleges that at that time defendant No. 1 had obtained a transferable right in these lands by virtue of a *kabuliyat* executed by him in favour of the Maharaja on the 5th September 1896.

The whole question in dispute is as to the nature of the right created by this *kabuliyat*. If on the day of the auction-sale the defendant No. 1 had acquired a valid transferable right under this document, the plaintiff, as purchaser of that right, is entitled to succeed. If on the other hand it is found that defendant No. 1 had not at that time acquired any right which was capable of being transferred, the plaintiff has taken nothing and his suit is bound to fail. That document recites that at the time of its execution, negotiations were proceeding between the Government, the *zemindar* and the *ghatwal* for the resumption of these lands. It is quite clear, however, that the lands at that time had not been resumed and transferred to the *zemindar*. It is also quite clear from the lease, which is the counterpart of this document, and was executed on the 29th January 1899, that even up to that time the resumption had not taken place.

We must, therefore, proceed on the assumption that on the 5th September 1896, and up to the 24th January 1899, the defendant No. 1 was the *ghatwal* in possession and he was bound to perform the services as *ghatwal* to the Government. The lease expressly recites that if the Government for any reason does not release the executant from the performance of the *ghatwali* service in the manner aforesaid, he would not be bound by the *kabuliyat* executed by him

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and that it would be inoperative. There cannot be any possible doubt that up to 24th January 1899, the defendant No. 1 had not been released by the Government from the performance of the *ghatwali* service. It is manifest, therefore, that on the 24th January 1899 the defendant No. 1 had not ceased to be *ghatwal* and no valid rights had been created in his favour up to that date under the document of the 5th September 1896. If after the 24th January 1899, when the plaintiff purchased, there has been any transaction between the Government and the *zemindār* and the *ghatwal*, it is impossible to say that the plaintiff could derive any benefit from such transaction. Her title dates at the earliest from the 24th January 1899; she is purchaser of the right, title and interest of the judgment-debtor as they stood on that particular date. We have found that on that date the judgment-debtor had no transferable right; the plaintiff, therefore, has taken nothing by her purchase and cannot succeed.

The result is that this appeal must be allowed and the suit dismissed with costs in all the Courts.

Appeal dismissed.

ODDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 156 OF 1917.

July 18, 1917.

Present:—Mr. Lindsay, J. C.

Pandit IQBAL NARAIN AND OTHERS

—PLAINTIFFS—APPELLANTS

versus

Pandit SURAJ NARAIN AND ANOTHER—

DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 61—Deposit made by plaintiff on one date—Appropriation on behalf of defendant on another date—Limitation, commencement of.

It was agreed between the parties to an appeal that the cost of printing and preparing the record should be shared equally between them. In consequence of this arrangement the plaintiffs made a deposit in Court of a certain sum, out of which the Court subsequently appropriated the actual cost of printing and preparing the record. Thereafter the plaintiffs sued the defendants for contribution:

Held, that for the purpose of Article 61, Schedule I, of the Limitation Act the limitation for the suit began to run not from the date of the deposit but from the date of the appropriation.

Appeal from the order of the District Judge, Lucknow, dated the 24th January 1917, upholding that of the Subordinate Judge, Lucknow, dated the 18th October 1916.

Mr. A. P. Sen, for the Appellants.

Babu Lachman Prasad Varma, for the Respondents.

JUDGMENT.—The parties to this appeal were concerned in a certain litigation which went ultimately to the Privy Council. It was agreed between them that the costs of printing and preparing the record for the Privy Council should be shared between them in equal shares. In consequence of this arrangement the plaintiffs, Iqbal Narain and others, made a deposit in Court on the 25th of January 1912 of a sum of over Rs. 23,000. On the 29th of January 1913 the Court intimated that the actual costs of printing and preparing the record was Rs. 6,472-2-5. The present suit has been brought by the plaintiffs to recover the defendants' share of this sum. Both the Courts have dismissed the claim on the ground that it was barred by limitation. Article 61 of the First Schedule of the Limitation Act was applied and it was held by both the Courts that limitation began to run from the 25th of January 1912. In my opinion this decision was wrong. The date of payment for the purpose of Article 61 could not have been earlier than the 29th of January 1913. What was done on the 25th January 1912 was that the money was merely deposited in Court. It cannot be said that on that date there was any payment to any person on behalf of the defendants and until the money was appropriated in accordance with the actual estimate of which the parties were given notice on the 29th of January 1913, it cannot be said that there was any definite payment on the defendants' behalf. The suit was brought within three years from the 29th of January 1913 and is, in my opinion, within limitation. This is the only question which is raised in the case. The result is that the decision of the Court below is reversed and the plaintiffs' claim is decreed with costs in all three Courts.

Appeal allowed.

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MADRAS HIGH COURT.

CRIMINAL MISCELLANEOUS PETITION No. 403
OF 1918.

August 23, 1918.

Present:—Mr. Justice Sadasiva Aiyar and
Mr. Justice Napier.CROWN PROSECUTOR—COMPLAINANT
—PETITIONER

versus

BHAGAVATHI—ACCUSED—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 207, 254, 346, 347—Committal to Sessions, by Magistrate having power to sentence adequately, legality of—Grounds of commitment—Warrant cases, powers of Magistrates in trial of.

Section 254 of the Criminal Procedure Code makes it imperative on a Magistrate only to frame a charge, and not to complete the trial to conviction or acquittal. That section simply lays down the procedure for the trial of warrant cases where the Magistrate considers it right and proper for himself to go on with the trial and is in no way a limitation of the right of a Magistrate given to him under section 347 to commit a case for trial if he thinks that he should do so. [p. 338, col. 2.]

Section 347 of the Criminal Procedure Code does not restrict the grounds on which a Magistrate should arrive at his opinion to commit a case to want of jurisdiction in himself or to his inability, in his own opinion, to sentence the accused adequately. Even where he can inflict the maximum sentence for the offence, he may still commit the accused for trial to the Court of Session or the High Court on such grounds as complicated questions of law arising or the case being a fit one to be tried by a Jury or with the aid of Assessors. [p. 338, col. 1.]

Queen-Empress v. Kayemullah Mandal, 24 C 429; 1 C. W. N. 414; 12 Ind. Dec. (N. S.) 954, *King-Empress v. Dharam Singh*, 1 M. L. T. 61; A. W. N. 1906) 28; 3 A. L. J. 14; 3 Cr. L. J. 94 and *Empercr v. Jagmohan*, 4 Ind. Cas. 812; 11 Cr. L. J. 54; 6 A. L. J. 989, disapproved.

Per Napier, J.—The powers of a Magistrate, who has taken a warrant case on his file for trial, are as follows:—He may try it through himself if he has jurisdiction; he may, if he thinks he cannot inflict a proper sentence, act under section 364 or 349 and send it to a higher Magistrate, or he may, if he thinks that it is a proper case for Sessions, commit the accused under section 347 or if he has not power to commit, send it to another Magistrate to commit under section 346. [p. 340, col. 1.]

Petition praying that, in the circumstances stated therein, the High Court will be pleased to quash the committal order of the Court of the 3rd Presidency Magistrate, George Town, Madras, dated the 26th July 1918, in Calendar Case No. 13163 of 1918.

Mr. Sydney Smith, acting for the Crown Prosecutor, for the Petitioner.

Mr. V. Visvanatha Sastri, for the Accused.

JUDGMENT.

SADASIVA AIYAR, J.—This is an application

by the Crown Prosecutor for quashing the commitment made by the 3rd Presidency Magistrate, George Town, Madras, to the High Court Sessions of a case falling under section 304 (a) of the Indian Penal Code punishable with 2 years' imprisonment of either description or fine (of unlimited amount) or both and triable by a Court of Session or a Presidency Magistrate or a Magistrate of the First Class. The ground on which we are asked to quash the commitment is, that under section 254 of the Criminal Procedure Code, a Magistrate ought to try a case himself till it ends either in a conviction or acquittal before him (see section 258), unless he thinks that the offence could not be adequately punished by him, and that in this case it was impossible for the Magistrate to entertain such an opinion because he had powers under the Code to inflict imprisonment of either description up to 2 years, which is the maximum punishment provided for the offence. This argument, in the first place, ignores the fact that the offence is also punishable with fine of unlimited extent, whereas the Presidency Magistrate's powers of fining are limited to the amount of Rs. 1,000 [see section 32, Criminal Procedure Code, clause (a)] and cases are conceivable where a rich man guilty under section 304 (a) could more appropriately be sentenced to a fine of Rs. 5,000 by a Sessions Court than by a Presidency Magistrate with imprisonment and a fine of Rs. 1,000. However, this is a minor point.

The important question is, whether section 254 does make it imperative on the Magistrate, if the offence could be adequately punished by him, to try the case till the end and whether it imperatively forbids him from committing the case to the Sessions. So far as the words of section 254 go, that section only directs the Magistrate to frame a charge against the accused. What the Magistrate has to do after framing the charge must depend upon the provisions contained in the succeeding sections of the Code dealing with the further proceedings in the trials of warrant cases. In Chapter XXIV containing general provisions as to enquiries and trials, we have got 3 sections—sections 346, 347 and 349—which we were invited in the arguments to consider in this connection. Section 346 relates to the pro-

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cedure of a Magistrate other than a Presidency Magistrate in certain contingencies. That section may, therefore, be ruled out. As regards section 349 it relates to the procedure of a Magistrate of a 2nd or a 3rd Class under certain circumstances. That also has, therefore, no material bearing in the consideration of the question before us. Then we have got section 347, which gives very wide powers to a Magistrate. In any trial or proceeding before him and at any stage he can, even just before signing judgment, commit a case before him to a Court of Session or the High Court, (provided, of course, he is empowered to commit cases to that Court) if it appears to him that the case is one which ought to be tried by a Court of Session or the High Court. It does not restrict the grounds on which he should arrive at his opinion to want of jurisdiction in himself or to his inability, in his own opinion, to sentence the accused adequately. If he considers, for instance, that a complicated question of law arises or that some connected matter is already before the Court of Session or that the facts are such that trial with the aid of a Jury or with the aid of Assessors (who may be chosen from experts in the particular matters involved in the case) would be a more satisfactory procedure. I see nothing in section 347 to prevent a Magistrate from committing the case to a Court of Session. Section 347 does not say that the Magistrate is bound to put his reasons on record for entertaining the opinion that the case is one which ought to be tried by the Court of Session or the High Court. No doubt, the decision of the Bench in *Queen-Empress v. Kayemullah Mandal* (1) and the decisions of Single Judges of the Allahabad High Court reported as *King-Emperor v. Dharam Singh* (2) and *Emperor v. Jagmohan* (3) do support the contention of the Crown Prosecutor that unless the Magistrate thinks that he is unable to punish the accused adequately he ought not to commit the accused to the Court of Session. There are, however, two decisions, one in *Empress v. Kudrutoollah* (4) and

the other (of a Full Bench of this Court) *Ohinnimarigadu, In the matter of* (5), where there are observations which, in my opinion, indicate that the commitment by a competent Magistrate on the ground that in the Magistrate's opinion the case is a fit one to be tried by a Court of Session, cannot be interfered with by the High Court. And I think that the 24 Calcutta case [*Queen-Empress v. Kayemullah Mandal* (1)] and the two Allahabad cases [*King-Emperor v. Dharam Singh* (2) and *Emperor v. Jagmohan* (3)] have given much wider effect to the language of section 254 than that language could properly support. That section makes it imperative on the Magistrate only to frame a charge and not to complete the trial to conviction or acquittal. I would, therefore, dismiss this petition.

NAPIER, J.—I entirely agree. We are asked to exercise our powers under section 215 of the Criminal Procedure Code and quash a commitment to the High Court made by the Presidency Magistrate. We can, of course, only do so on a point of law and we are, therefore, not concerned with the reasons given by the Magistrate for making the commitment.

But it has been argued before us by the Crown Prosecutor that the commitment is bad in law in that the Magistrate has not certified that he cannot adequately punish the accused who is put up before him for trial and that even if he had done so, his reason would have been bad, because he has in fact power to inflict the maximum punishment. The offence for which the accused has been committed is section 304 (a), Indian Penal Code. Now, offences under this section are specifically stated in the 2nd Schedule of the Code to be triable by a Court of Session, a Presidency Magistrate or a Magistrate of the First Class. Therefore, at the outset this suggestion of the Crown Prosecutor leads to a somewhat extraordinary position, that a Court of Session which is specifically empowered under the section cannot try the case because it cannot be committed to it by a First Class Magistrate.

It is suggested, however, by the Crown Prosecutor that Schedule II, where it speaks of a Court of Session, had in mind that, although the commitment for offences is not one of the ordinary powers of the Magistrate of a 2nd and 3rd Class, still

(1) 24 O. 429; 1 C. W. N. 414; 12 Ind. Dec. (N. S.) 954.

(2) 1 M. L. T. 61; A. W. N. (1906) 23; 3 A. L. J. 14; 3 Cr. L. J. 94.

(3) 4 Ind. Cas. 812; 11 Cr. L. J. 54; 6 A. L. J. 989.

(4) 3 O. 495; 2 C. L. R. 2; 1 Ind. Dec. (N. S.) 899.

(5) 1 M. 239; 2 Weir 425; 1 Ind. Dec. (N. S.) 192.

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those Courts can be empowered under section 206, and, therefore, that the trial by a Court of Session provided for, in the 8th paragraph of the 2nd Schedule would arise in cases where the accused had been committed by a 2nd or 3rd Class Magistrate empowered in that behalf. It is a somewhat strained application of the provision. A more reasonable hypothesis seems to me to be that this allocation of this offence to the Court of Session as well as a Magistrate of the First Class is an indication that in some circumstances a Court of Session would be the proper tribunal to try the case.

Passing from that, we have to consider what are the powers possessed by Magistrates with regard to warrant cases. The Crown Prosecutor has suggested to us and, indeed this is the basis of the whole of his argument, that section 254 of the Criminal Procedure Code is exhaustive and that there is no power in a Magistrate to commit a case for trial where he is competent to try it and it can be adequately punished by him. This is a somewhat startling proposition because, as my learned brother has pointed out, it is a frequent practice of Magistrates in this country to commit cases for trial to the Court of Session for other reasons, namely, convenience, complexity of facts or other matters. The Crown Prosecutor would have us hold that the whole of this procedure is wrong. Now, the whole of this argument hinges on the word 'shall' which is to be found in section 254. The Crown Prosecutor argues that the section requires that he shall frame in writing a charge against the accused and carries with it a further requirement that, having done so, he shall proceed under the remaining sections of that Chapter. I should have some difficulty in appreciating this argument were it not that it has found favour with a Bench of the High Court of Calcutta in a case reported as *Queen-Empress v. Kayem-ullah Mandal* (1). But with deference to the learned Judges, it seems to me that, in that decision, they ignore the very wide powers given by the Code to a Magistrate under sections 207 and 347. Section 207 provides the procedure on enquiry in cases which are exclusively triable by a Court of Session or the High Court, or, in the opinion of the Magistrate, ought to be tried by such Court. There are, therefore,

a class of cases which are not triable exclusively by a Court of Session but which ought to be so tried. If we turn to section 347, which is in the Chapter containing general provisions as to enquiries and trials, we find a wide and general power given to Magistrates with regard to cases coming before them for trial. The words are: "If in any inquiry before a Magistrate, or in any trial before a Magistrate before signing judgment, it appears to him at any stage of the proceedings that the case is one which ought to be tried by the Court of Session or High Court, and if he is empowered to commit for trial, he shall stop further proceedings and commit the accused under the provisions hereinafter contained." If he is not empowered to commit for trial, he should proceed under section 346. That section says that if it appears to the Magistrate that the case is one which should be tried or committed for trial by some other Magistrate, he shall stay proceedings and submit the case with a brief report to any Magistrate, to whom he is subordinate or to such other Magistrate having jurisdiction as the District Magistrate directs. That is to say, whether the Magistrate has power to commit or not, if he thinks that the case is one which ought, in his opinion, to be tried by a Court of Session, he has absolute power to stop any further proceedings in the trial by himself. If he can commit, he may, If he cannot himself commit he may send to a Magistrate who will commit. It seems to me to be impossible to argue successfully that a specific provision like this in section 347, read together with section 207 which lays down the procedure in enquiries in such cases, can be limited because section 254 says that the Magistrate trying a warrant case shall frame a charge. Even if those words which are to be found in section 254 had been repeated in sections 255 and 256, I should still be of opinion that they were no bar to the exercise by a Magistrate of his power to commit a case. That section simply lays down the procedure for the trial of warrant cases where the Magistrate considers it proper and right for himself to go on with the trial, and is in no way a limitation of the right of a Magistrate given to him under section 347 to commit a case for trial if he thinks that he should do so.

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The Crown Prosecutor has been unable to refer us to any section authorising a Magistrate to commit for trial where he cannot inflict a proper sentence which, according to him is the proper course, whereas there is a distinct provision for submission to a higher class Magistrate in such cases to be found in section 349. I am at a loss, therefore, to comprehend why the wide words of section 347 should be curtailed by reference to section 254 when there is a specific section, namely, section 349, which deals with circumstances referred to in section 254. My learned brother has referred to one case of this Court, *Chinnimarigadu, In the matter of (5)*, and it seems to me to be conclusive on the point, for it lays down as axiomatic that it is competent to a Magistrate to say whether from the gravity of the matter or for any other sufficient reason the Sessions Court is the proper tribunal for the disposal of the case.

To sum up, the powers of the Magistrate, who has taken a warrant case on his file for trial, are as follows:—He may try it through himself if he has jurisdiction; he may, if he thinks he cannot inflict a proper sentence, act under section 346 or section 349 and send it to a higher Magistrate, or he may, if he thinks that it is a proper case for Sessions, commit the accused under section 347 or if he has not power to commit, send it to another Magistrate to commit under section 346. This being my view of the law, I am of opinion that we have no jurisdiction to quash the committal in this case and that the trial before the Judge sitting in Session must go on.

M. C. P.

Petition dismissed.

PATNA HIGH COURT.

CRIMINAL REVISIONS NOS. 464 AND 483 OF 1917.

February 5, 1918.

Present:—Mr. Justice Roe and Mr. Justice Jwala Prasad.

MOUSI LAL AND ANOTHER—ACCUSED
—PETITIONERS IN CR. R. NO. 464 OF 1917
LAL BAHADUR SINGH—PETITIONER
IN CR. R. NO. 483 OF 1917

versus

EMPEROR—RESPONDENT IN BOTH.

Penal Code (Act XLV of 1867), ss. 224, 323, 353—
Escape from lawful custody—Warrant, defective, effect of—Arrest, legality of—Hurt caused to constable in rescuing person from custody—Offence.

One L. was arrested by a constable under a warrant, which was not signed by the Magistrate issuing it and which was made over to the Thana Officer on an order purporting to have been made by the District Superintendent of Police but not signed by anybody. L. was rescued by the other accused, who caused unnecessary hurt to the constable in effecting the rescue:

Held, (1) that the warrant was defective and that the constable having purported throughout to act under the warrant, the arrest of L. was illegal and that the latter was not, therefore, guilty of any offence in effecting his escape; [p. 340, col. 2.]

(2) that the persons who effected L.'s rescue were guilty of an offence under section 323 of the Penal Code. [p. 341, col. 1.]

Criminal revisions against an order passed by the Sessions Judge, Muzaffarpur, dated the 12th November 1917, affirming that of the Sub-Divisional Officer, Muzaffarpur, dated the 26th September 1917.

Messrs. Hasan Imam and G. C. Pal, for the Appellants in No. 464.

Mr. G. C. Pal, for the Appellant in No. 483.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—The accused in Criminal Revision No. 483, Lal Bahadur, has been convicted of an escape from lawful custody and sentenced to six months' rigorous imprisonment. The lawful custody is alleged to have been effected by one Mathura Lal, constable, on a warrant which, it is admitted, was not signed by the Magistrate issuing it and made over to the Thana Officer on an order purporting to be made by the District Superintendent of Police, but not signed by anybody. It was admitted for the purpose of the argument in the Courts below that this warrant is defective. We need not go into this question. It is alleged, however, that the warrant itself was sufficient authority for the arrest, inasmuch as by it the constable had reason to believe that the person to be arrested had committed a cognizable offence. Had the constable said so himself, we might conceivably have accepted this view, but nowhere in his evidence does he suggest that he had reason for such belief. He purports to have acted under cover of the warrant, and we must take the case as stated by the complainant in it. Lal Bahadur must be acquitted and discharged from his bail if he is not required for any other offence.

In Criminal Revision No. 464, the same remarks apply. It is clear on the evidence

SEETARAMIAH, *In the matter of.*

that the three men convicted of effecting the accused's rescue caused unnecessary hurt to the constable. One of the injuries inflicted was a blow over the eye with 'Dhanta'. We are not able to hold that this assault was justified even if the arrest of Mathura Lal was technically wrong. It was Basdeo Singh who is responsible for the principal injury, Mauji Lal was responsible really for the whole occurrence by giving the orders to beat the constable in order to rescue the accused.

The three accused were sentenced to nine months' rigorous imprisonment each, under section 353. In the exercise of our powers in revision we alter these convictions to convictions under section 323 and direct that Basdeo Singh be sentenced to six months' rigorous imprisonment, Mauji Lal to three months' rigorous imprisonment, and Kari Singh to three months' rigorous imprisonment. We see no reason to continue the bonds into which the accused have been directed to enter for the keeping of the peace. Clearly this was an offence committed on a sudden impulse. Lal Bahadur has now been convicted on the principal charge. There is no cause for anticipating a further breach of the peace by the accused.

Convictions altered.

MADRAS HIGH COURT. SPECIAL BENCH.

REFERRED CASE No. 6 OF 1918.

September 30, 1918.

Present:—Sir John Wallis, Kt., Chief Justice,
Justice Sir William Ayling, Kt., and
Mr. Justice Seshagiri Aiyar.

*In the matter of Mr. A. SEETARAMIAH,
2ND GRADE PLEADER, PRACTISING IN THE*

DISTRICT OF GANJAM.

*Legal Practitioners Act (XVIII of 1879), ss. 12, 13,
14—Pleader, conviction of, for keeping common gaming
house—Misconduct—Procedure applicable.*

The conviction of a Pleader for keeping a common gaming house amounts to misconduct implying a defect of character and unfitting him to be a member of the profession. [p. 342, col. 1.]

Weare, In re; Incorporated Law Society, Ex parte, (1893) 2 Q. B. 439; 62 L. J. Q. B. 598; 69 L. T. 522; 58 J. P. 6, applied.

In the case of a Pleader's conviction for a criminal offence the procedure prescribed in sections 13 and 14 of the Legal Practitioners Act need not be

followed, and the case re-tried under the Act. The only question for the High Court to determine is, whether the offence implies a defect of character unfitting the person to be a Pleader. [p. 341, col. 2.]

Rajendro Nath Mukerji, In the matter of, 22 A. 49; 3 C. W. N. 736; 1 Bom. L. R. 708; 26 I. A. 242; 7 Sar. P. C. J. 556; 9 Ind. Dec. (N. S.) 1064 (P. C.), followed.

Case stated under section 12, Act XVIII of 1879, by the District Judge, Ganjam.

The Hon'ble Mr. S. Srinivasa Ayyangar (Advocate General), for the Government.

Mr. K. Sreenivasa Ayyangar, for the Vakils' Association.

Mr. K. V. L. Narasimham, for the Respondent.

JUDGMENT.—In this case the District Judge of Ganjam has reported to the High Court that the respondent has been convicted of keeping a common gaming house, in Berhampore town, an offence under section 6 of the Towns Nuisances Act, III of 1889, and sentenced to a fine of Rs. 100. The District Judge has followed the procedure prescribed with regard to charges under sections 13 and 14 of the Legal Practitioners Act by issuing a notice, framing a charge and hearing the respondent although, strictly speaking, that procedure is not required in cases such as this, which come under section 12 of the Act. Section 12 empowers the High Court to "suspend or dismiss any Pleader or Mukhtar holding a certificate issued under section 7 who is convicted of any criminal offence implying a defect of character which unfits him to be a Pleader or Mukhtar, as the case may be." The decision of the Privy Council in *Rajendro Nath Mukerji, In the matter of* (1) shows that we are not now to retry the case but that the question before us is whether the offence of which the respondent has been convicted implies a defect of character unfitting him to be a Pleader. Now, the offence is that the respondent, who is a Pleader of more than 20 years' standing and, according to his own showing, a man of considerable property, used the office which he rented for his business as a common gaming house and was discovered there at night with a number of people of all ranks of society with cards, coveys and other gambling instruments. Lord Esher, M. R., in *Weare, In re; In*

(1) 22 A. 49; 3 C. W. N. 736; 1 Bom. L. R. 708; 26 I. A. 242; 7 Sar. P. C. J. 556; 9 Ind. Dec. (N. S.) 1064 (P. C.).

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incorporated Law Society, Ex parte (2), which was a case of a Solicitor who had been convicted of allowing houses belonging to him to be used as brothels, indicated the considerations which ought to guide the Court in these cases. He referred to the observation of Lord Mansfield in the earlier case of *Brounsall, Ex parte* (3) that it is necessary that members of all branches of the legal profession should stand free from all suspicion, and pointed out that the Court had not only to consider the Solicitor's duties to his clients, but also whether his conduct was of such a personally disgraceful character that he ought not to remain a member of a strictly honourable profession, and that other members of that profession ought not to be called upon to enter into that intimate intercourse with him that is necessary between two Solicitors even though they are acting for opposite parties. We think that the offence of which the respondent has been convicted is one which affects his character and the learned Advocate-General has shown that this is certainly so according to Hindu ideas.

We think that, in the circumstances, we are bound to deal with him under the Legal Practitioners Act and we have carefully considered what the sentence should be. This is the first time that any such case has come before the Court and it is possible that the Pleader was not fully alive, as he ought to have been, to the gravity of his conduct. We think it is sufficient to direct in this case that he be suspended from practice for six months. But this is not to be regarded as a precedent in future cases which may come before the Court. The respondent must also pay the costs of the day.

M. C. P.

Pleader suspended.

(2) (1893) 2 Q. B. 439; 62 L. J. Q. B. 596; 69 L. T. 522; 58 J. P. 6.

(3) (1778) 2 Cowp. 829; 98 E. R. 1385.

GNANAKANNU v. VEERAVAGU.

PATNA HIGH COURT.

CRIMINAL REVISION No. 341 of 1918.

September 30, 1918.

Present:—Mr. Justice Mullick.LACHMAN RAM AND OTHERS—2ND PARTY—
PETITIONERS*versus*DHIRU DUSADH—1ST PARTY—OPPOSITE
PARTY.

Criminal Procedure Code (Act V of 1898), ss. 144, 145—Dispute as to land—Section applicable.

Section 144, Criminal Procedure Code, is applicable only to temporary orders in urgent cases of nuisance or apprehended danger. It is not applicable in cases where there is a dispute as to land for the settlement of which section 145 provides the appropriate remedy.

Criminal revision from an order of the Magistrate of Ranchi.

The Hon'ble Mr. S. K. Sahay, for the Petitioners.

Mr. Panchanan Banerji, for the Opposite Party.

ORDER.—The remedy adopted by the learned Deputy Magistrate was misconceived. Section 144, Criminal Procedure Code is applicable only to temporary orders in urgent cases of nuisance or apprehended danger. It is not applicable in cases where there is a dispute as to land for the settlement of which section 145, Criminal Procedure Code, would seem to provide the appropriate remedy. The Magistrate should have proceeded under that section or section 107, Criminal Procedure Code. His order under section 144, Criminal Procedure Code, is set aside on the ground that it was made without jurisdiction.

Order set aside.

LOWER BURMA CHIEF COURT.

CRIMINAL REVISION No. 314B of 1916.

January 12, 1917.

Present:—Mr. Justice Parlett.

GNANAKANNU—APPLICANT

versus

VEERAVAGU—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 195—Penal Code (Act XLV of 1860), s. 211—Making false charges against several persons—Separate offences—Sanction to prosecute in respect of each offence, whether should be granted.

A person who falsely charges several persons with having committed an offence is guilty of as many separate offences and there is no impropriety in his being called to account under section 211 of the Penal Code in respect of each of such false charges. [p. 343, cols. 1 & 2.]

DIPCHAND V. EMPEROR.

Mr. Gaunt, for the Applicant.

Messrs. Wiltshire and Bose, for the Respondent.

JUDGMENT.—On 31st March 1916 respondent laid information at the Police station that on Poonuswamy Nadar had caused hurt to him with a *dah*, and that applicant and others were present and abetted the causing of hurt. On 3rd April he filed a complaint to the same effect. Applicant and others appeared in Court and subsequently on 1st July applicant was discharged. On 10th July he applied for sanction to prosecute the respondent for falsely charging him with an offence under section 211, Indian Penal Code. On 21st July the applicant and respondent and their Pleaders appeared and arguments were heard, and the case was adjourned for orders on 24th July. Orders were not ready then, and the case stood over till the 26th, when sanction to prosecute was granted. On the same day the Magistrate gave judgment acquitting the other persons accused in the hurt case and ordering respondent's prosecution for falsely charging them.

On 2nd August applicant instituted a prosecution on his sanction and the trial proceeded till 16th August. On the 22nd August the respondent applied to the Sessions Court to revoke the sanction and on 6th October this was done. The applicant now seeks to have it restored.

The Sessions Judge's reasons for revoking the sanction were that the interests of justice will be sufficiently served by the prosecution of the respondent ordered by the Magistrate on 26th July and that to allow the sanction to stand would be unduly harassing the respondent in that he would be twice prosecuted for practically one offence, and that it was never intended by the Legislature that Courts should be used for the purpose of gratifying people's own feelings against other persons.....I cannot agree with the Sessions Judge. It is not the case that respondent's allegation that he was cut with a *dah* is entirely false. Having been so cut he falsely accused Poonuswamy Nadar of cutting him and applicant and others of being present and abetting the cutting. It seems to me that to falsely charge one person with being implicated

in a crime is not the same offence as to falsely charge another person with being implicated in the same offence. The circumstances under which and the motives from which such false charges are made may be totally different, and it appears to me that there is no impropriety in the offender being called to account for making each of such false charges. In the present instance it does appear that the alleged false charge as against the petitioner may have been in some respects on a different footing from those against the other five persons, and I do not consider that the prosecution in respect of the five constituted sufficient reason for disallowing a prosecution by the petitioner, though in the event of both prosecutions ending in conviction it might be proper to take the sentence in one into account in passing sentence in the other. I think there were not sufficient reasons for revoking the sanction and I restore it. The trial in Criminal Regular No. 177 of 1916 of the First Additional Magistrate of Insein will proceed.

Order accordingly.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 133 OF 1918.

July 18, 1918.

Present:—Sir Henry Drake-Brookman,
Kt., J. C.DIPCHAND—ACCUSED—APPLICANT
versus

EMPEROR—COMPLAINANT—NON-APPLICANT.

Criminal Procedure Code (Act V of 1905), s. 260 (1), cls. (d), (i)—House-breaking by night and theft—Value of property stolen over Rs. 50—Summary trial, legality of.

A Magistrate is not authorized to split up an offence so as to give himself jurisdiction over the parts which he would not have over the whole, thereby depriving the accused of his right to appeal. [p. 344, col. 1.]

Empress v. Abdool Karim, 4 O. 16; 3 C. L. R. 44; 2 Ind. Dec. (N. S.) 12, followed.

Clause (i) of section 260 (1) of the Criminal Procedure Code must be read with clause (d), which only permits a summary trial for theft under section 390 of the Penal Code where the value of the property stolen does not exceed Rs. 50. [p. 344, col. 1.]

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The offence of house-breaking by night under section 457 of the Penal Code, accompanied by a theft of property worth more than fifty rupees, cannot legally be tried summarily under section 260 of the Criminal Procedure Code.

Summary procedure in cases of serious offences even though legal is inappropriate.

Empress v. Bhikia, 13 C. P. L. R. 17, followed.

Criminal revision of the judgment and finding given by the Sub-Divisional Magistrate, First Class, Damoh, on the 28th May 1918; in Summary Trial Case No. 53 of 1918.

Mr. G. L. Subhedar, for the Applicant.

ORDER.—The applicant for revision has been summarily tried and convicted by a Sub-Divisional Magistrate of the 1st Class for an offence of house-breaking by night punishable under section 457, Indian Penal Code. An unappealable sentence of three months' rigorous imprisonment has been passed. The first information was laid on the 7th March last, the informant giving at the same time a list of stolen property which he valued at Rs. 127-7-0. On the 16th April he gave a supplementary list, including articles valued at Rs. 50-9-0. The total value of the stolen property was, therefore, Rs. 178.

The case was clearly one which could not legally be tried summarily. It is true that under clause (i), section 260 (1), Criminal Procedure Code, offences under section 457, Indian Penal Code, may be so tried, but that clause must be read along with clause (d), which only permits a summary trial for theft under section 380 where the value of the property stolen does not exceed Rs. 50. The principle applicable is akin to the general one that a Magistrate is not authorized to split up an offence so as to give himself jurisdiction over the parts which he would not have had over the whole, thereby depriving the offender of his appeal. See *Empress v. Abdool Karim* (1).

The District Magistrate, who was called upon to show cause why the conviction and sentence should not be set aside, has admitted that the procedure adopted was illegal and no other point is now pressed before me. The proceedings of the Magistrate are set aside and the applicant will be re-tried in the manner laid down in Chapter XXI of the Criminal Procedure Code for the trial of warrant cases. He has already been transferred to the under-

trial ward and will remain there till the re-trial is concluded. As stated in my order of the 28th ultimo, I am not prepared to allow him bail. The attention of the Sub-Divisional Magistrate should be directed to this Court's Criminal Circular No. 1—20 and also to the decision in *Empress v. Bhikia* (2). Summary procedure in this case, even if legal, would have been inappropriate, inasmuch as the offence committed was a very serious one, a house having been broken into while the owner along with most of his fellow-townsmen had evacuated the place owing to plague. The record contains no basis for a finding that the house-breaking was committed by night and that being so, a conviction under section 457 could not have been sustained.

Conviction set aside.

(2) 13 C. P. L. R. 17.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 394 OF 1918.

August 3, 1918.

Present:—Mr. Justice Piggott.

MATHURA AND OTHERS—ACCUSED—
APPLICANTS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 15, 16, 350—Rules framed by U. P. Government under s. 16, validity of—Trial before Bench of Magistrates—Judgment by Bench other than Bench which heard evidence, legality of.

The rules framed by the United Provinces Government under section 16 of the Criminal Procedure Code provided that in the case of Benches consisting of not more than three members, any two of the members shall form a *quorum*. It was also provided that if a Bench held an adjourned sitting for the disposal of a part-heard case, and the members at the adjourned sessions were not the same as sat at the first hearing of the case, the provisions of section 350 of the Code of Criminal Procedure would be held to apply to the case:

Held, (1) that the rules were *intra vires* the Government; [p. 346, col. 1.]

(2) that the effect of the rules was that any trial commenced before any two members of a Bench could lawfully be continued before any other two members, provided that if exception was taken by the accused to the proceeding before a differently constituted Bench, the trial must either be recommenced *de novo* or adjourned to a subsequent

(1) 4 C. 18; 3 O. L. R. 44; 2 Ind. Dec. (N. S.) 12.

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date on which the same Magistrates who commenced the trial might find it convenient to sit together. [p. 347, col. 2.]

At the first hearing of a case before a Bench of Magistrates the evidence for the prosecution was recorded. At the second hearing one of the Magistrates was replaced by another, who was not present at the first hearing, but the accused having stated that they had no objection to the trial being proceeded with, the trial was concluded and on a subsequent date judgment was pronounced by the Bench before which the trial had commenced.

Held, that one of the Magistrates who delivered the judgment being absent on the date of the second hearing it could not be said that the accused were not prejudiced, and that, therefore, the proceedings at the last hearing, when judgment was pronounced, were illegal and must be set aside. [p. 348, cols. 1 & 2.]

Criminal revision from an order of the District Magistrate, Farrukhabad.

Mr. Peary Lal Banerji, for the Applicants.

Mr. R. Malcolmson (Assistant Government Advocate), for the Crown.

JUDGMENT.—In this case the three applicants, Mathura, Gangadin and Jagannath, have been convicted of an offence under section 13 of the Gambling Act, III of 1867. The one and only question raised by this application is, whether the trial of the applicants was or was not vitiated by any illegality or material irregularity in connection with the constitution of the Court which tried them for this offence. The Court in question was a Bench of Honorary Magistrates sitting at the town of Kaimganj. I find that the Local Government, in the exercise of the powers conferred upon it by section 15 of the Code of Criminal Procedure, had appointed three gentlemen, Mr. Jan Alam Khan, Mr. Nazir Ali Khan and Pandit Chaube Peary Lal, to be a Bench of Magistrates exercising jurisdiction in this particular place. It is not denied that the offence of which the applicants were tried was one within the jurisdiction of the aforesaid Bench, or that the sentence passed was one within the competence of the said Court. The point taken is as follows.

There were three hearings of this case in the trial Court. On December the 5th, 1917, the case was taken up by Mr. Nazir Ali Khan and Mr. Jan Alam Khan and the evidence for the prosecution was recorded. On the 16th of December 1917 when the Court resumed its sitting for the trial of this case, there were present on the Bench Mr. Jan Alam Khan and Pandit Chaube

Peary Lal. The accused were asked to state whether they desired this Bench to re-commence the trial *de novo*, or rather, I should say, that they were asked whether they would like to have the trial adjourned until the same two Magistrates who had commenced the trial should find it convenient to sit together again. The precaution was taken of obtaining from the accused a written petition, in which they stated that they had no objection to the hearing of the case proceeding before the Bench as then constituted and added that they particularly desired that there should be no delay in the disposal of the case. I understand that at the end of the hearing of December the 16th, 1917, the evidence had been completely taken, the accused had been examined and arguments had been heard. Nothing was left to be done except for the Court to pronounce judgment. The record does not make it quite clear why, under these circumstances, an adjournment of five days was ordered, but I am inclined to suspect that this was done under a *bona fide* belief that the proceedings would be more regular if judgment in the case were pronounced by the same two members of the Bench of Magistrates who had commenced the trial. It is admitted that on the 21st of December no objection was taken on behalf of the accused persons to the action of Mr. Nazir Ali Khan and Mr. Jan Alam Khan in proceeding to pass judgment. As bearing on the legality of these proceedings it requires to be noted further that, under section 16 of the Code of Criminal Procedure, the Local Government, or subject to the control of the Local Government the District Magistrate, is empowered to make rules for the guidance of the Magistrates' Benches in respect of various subjects, including amongst others the constitution of the Bench for conducting trials. The Local Government of these Provinces has issued for general information a set of draft rules and these have been generally adopted under the authority of the Magistrates of various districts. It is not suggested that these rules are not in force in the district of Farrukhabad. Indeed I understand from the orders of the District Magistrate and of the learned Sessions Judge on this record that the said rules are undoubtedly in force. Now under the

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second of these rules, it is laid down in respect of a Bench consisting of not more than three members, that any two of these shall form a *quorum*. In the next rule it is provided that, if the Bench holds an adjourned sitting for the disposal of a part-heard case, and the members at the adjourned sessions are not the same as sat at the first hearing of the case, the provisions of section 350 of the Code of Criminal Procedure will be held to apply to the case. The present applicants have brought the question of the legality of their trial to the notice of the District Magistrate in appeal and have also laid it before the Sessions Judge in revision. Both these Courts have expressed the opinion that the proceedings of the Bench of Honorary Magistrates were justified under the rules above referred to and that the trial was, under the circumstances, a perfectly legal one. I have been referred to various decisions of the Calcutta and Madras High Courts, of which the most important is that of *Hardwar Singh v. Khaga Ojha* (1). In that case the learned Judges of the Calcutta High Court laid it down very broadly, that an Honorary Magistrate may not give judgment and pass sentence in a case unless he has been a member of the Bench during the whole of the hearing of the case. The attention of the Hon'ble Judges had been drawn to a rule framed by the Local Government of Bengal, purporting to make the provisions of section 350 of the Code of Criminal Procedure applicable to a case like the one now in question, but they held that this rule was *ultra vires* not being justified by anything in the provisions of section 16 of the Code of Criminal Procedure. The Madras High Court has in two reported cases adopted the same principle. I have seen the rules framed by the Local Governments of Bengal and of Madras under section 16 aforesaid, and I may say at once that these rules differ in one material particular from those framed by the Local Government of these Provinces. They contain nothing similar to the direction given by rule 2 of the rules framed under the orders of our Local Government, by which any two members of a Bench of Honorary

Magistrates consisting of three members shall form a *quorum*. As to the meaning of that expression there can, I conceive, be no room for doubt. In the case of any Board of Directors or other Committee, if there is a rule providing that so many members of the said Board or Committee shall form a *quorum*, the meaning of the rule is that, as soon as the requisite number of members is gathered together, the entire authority of the said Board or Committee vests in the *quorum* so assembled, and obviously this authority extends to the transaction of business adjourned from a previous meeting as well as to the taking up of fresh business. The first question then about which there must be a definite decision is whether a rule directing that any two members of a Bench of Honorary Magistrates consisting of not more than three members shall form a *quorum*, is one which the Local Government was entitled to make, or to cause to be made, under section 16 of the Code of Criminal Procedure. As a mere matter of judicial interpretation it seems to me that such a rule clearly falls under section 16, clause (c), of the Code of Criminal Procedure, being covered by the words:—"the constitution of the Bench for conducting trials." When the Local Government appointed the three gentlemen already mentioned to be a Bench of Honorary Magistrates exercising certain powers within the limits of the town of Kaimganj, the inference would be, in the absence of any rule or order to the contrary, that the Bench would not be properly constituted unless all three of the gentlemen named were present at each and all of its sittings. The Local Government regarded this as inconvenient and was of opinion that, for the convenience of the public, the work which it desired the Bench of Magistrates at Kaimganj to carry out could best be performed by appointing three Magistrates and then empowering any two of them to sit together as a complete Court for the trial of cases or the transaction of other business. I repeat that, in my opinion, it was within the competence of the Local Government to pass orders to this effect under the provisions of sections 15 and 16 of the Code of Criminal Procedure.

I have now to consider what would be

(1) 20 C. 870; 10 Ind. Dec. (N. S.) 585.

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the result if the Local Government had issued no further directions for the guidance of this Bench of Magistrates. In my opinion the consequence would be that any trial commenced before any two members of this Bench could lawfully be continued before any other two members. The learned Judges of the Calcutta and Madras High Courts had no such rule before them as that which I have quoted regarding the number of Magistrates necessary to form a *quorum*, and the decisions pronounced by them, are, therefore, of no direct application to the present case. In saying this I do not wish to ignore the fact that on the principles laid down in the case of *Hardwar Singh v. Khaga Ojha* (1), it would be difficult to accept the proposition that the Legislature intended to empower the Local Government to pass any orders the effect of which would be as above stated. I think that the learned Judges of the Calcutta High Court assumed, as a sort of major premise underlying the whole of their decision, that there was something repugnant to natural justice in the suggestion that the presiding officer of any Court should pass any final decision in a criminal trial, except upon evidence the whole of which had been tendered in his presence and heard by himself personally. I can only say that this proposition seems to me a very arguable one, and that under the Indian system of criminal procedure the exceptions to this rule seem to me to outnumber the instances. I must admit, therefore, that I do not find myself able to approach the consideration of the question quite from the same point of view as that taken by the learned Judges of the Calcutta High Court. At the same time I have endeavoured to discuss, as a pure question of law, the question whether sections 15 and 16 of the Code of Criminal Procedure, read together, do or do not authorise the Local Government to make rules, the effect of which would be that any two Magistrates out of a Bench of three or more should constitute a *quorum* for the transaction of all business and the hearing of all cases lawfully coming before such Bench for disposal, including the further hearing of a criminal trial adjourned from a previous sitting. For the reasons stated I have come to the conclusion that the Local Government is

so empowered and that the rules under which this Bench of Honorary Magistrates was constituted were perfectly legal. If I am right so far, then the question of the competence of the Local Government to make the further rule directing Magistrates' Benches, under specific circumstances, to be guided by the provisions of section 350 of the Code of Criminal Procedure, requires to be discussed on a wholly different basis from that adopted in the decisions of the Calcutta and Madras High Courts. It becomes an exception in favour of accused persons, engrafted by the Government rules upon the general direction that any two members of a Bench of three Magistrates shall, for all purposes, form a *quorum*. In practice it amounts to nothing more than this, that the Local Government directs the Bench of Magistrates in question, if it should find it is sitting to take up an adjourned trial with a Bench differently constituted from that which commenced the trial of the case, and exception is taken on behalf of the accused to the trial proceeding under such circumstances, then either to recommence the trial *de novo*, or to adjourn it to a subsequent date on which it may be found convenient for the same two Magistrates to sit who had commenced the trial of the case. It is in fact a direction to Benches of Honorary Magistrates that, under certain circumstances, they are to refrain, at the request of the accused, from exercising a power which would otherwise be theirs. Looked at in this way I think that the rule was one within the competence of the Local Government. If I were to hold the contrary it certainly would not help the applicants in the present case. It is merely an exception engrafted by the Local Government upon the rule which it had previously made regarding the constitution of the Bench for conducting trials.

Having said this, I now come to the consideration of what took place in this particular case. I have not the slightest hesitation in holding that the proceedings of the 16th of December 1917 were regular and proper and within the competence of the Bench of Honorary Magistrates. Strictly speaking, this proposition is not challenged by the petition in revision which lies before me for disposal. What the petitioners object to is the procedure followed on the

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21st of December 1917 when two Magistrates, one of whom had not heard the cross-examination of the prosecution witnesses or the defence evidence, proceeded to dispose of the case. To the contention of the applicants on this point the Courts below have in substance replied that it was for the accused persons to object on the 21st of December 1917, when Mr. Nazir Ali Khan and Mr. Jan Alam Khan took their seats upon the Bench to pass judgment in this case. Technically the opinion expressed by the District Magistrate and by the learned Sessions Judge on this point is in accordance with the wording of the first proviso to section 350, clause (1), of the Code of Criminal Procedure; but it is important that District Magistrates and this Court also should not overlook the second proviso to the same sub-section. It does not matter whether the accused did or did not object to the constitution of the Bench on the 21st of December 1917; nor is it necessary for the Court to consider whether they had a reasonable opportunity of doing so, whether they may not have been taken by surprise, whether judgment may not have been pronounced under such circumstances as left them no convenient opportunity of entering a protest. The real question is whether the accused persons were prejudiced by the procedure adopted on the 21st of December 1917. A question such as this is one which the Court can only examine with reference to the general circumstances of each particular case. Ordinarily speaking, one would be inclined to hold that it is prejudicial to an accused person that judgment should be passed against him by a Magistrate who has only heard the prosecution witnesses examined in chief, and was not present at their cross-examination or at the hearing of the defence evidence. So far as the record before me goes, I cannot feel certain that Mr. Nazir Ali Khan had himself perused the entire record of the cross-examination of the prosecution witnesses and the depositions of the witnesses for the defence. He most probably did so; but he may have accepted his learned colleague's account of what had taken place at the sitting of December the 16th. Moreover, although I am reluctant to refer to a matter of this sort, I cannot altogether shut my eyes to the fact that

the accused persons are all Hindus, and that the case was one of such a nature that these accused persons may well feel that it was an advantage to them to have a Hindu gentleman present on the Bench when the matter was finally disposed of, specially when the question of sentence was being considered. I think, therefore, that the Honorary Magistrates in this case committed an error of judgment when they did not proceed to dispose of the case on the 16th of December, and I am not prepared to say that the accused may not have been prejudiced by the procedure followed at the final hearing of the case.

Under these circumstances the order which I pass is that the proceedings of the 21st of December 1917 be set aside, the conviction and sentence be quashed, and that the case be returned to the same Bench of Honorary Magistrates to be disposed of from that stage at which, in my opinion, an error was committed. In effect my order is that the two Magistrates who presided at the hearing of December 16th, 1917, namely, Mr. Jan Alam Khan and Pandit Chaube Peary Lal, do proceed to consider their decision in this case and to prepare a judgment and deliver the same in due course of law. The record is returned with the above directions.

Record returned.

PATNA HIGH COURT.

LETTERS PATENT APPEALS.

June 20, 1918.

Present:—Mr. Justice Mullick and
Mr. Justice Thornhill.

BABUJAN MISIR AND ANOTHER—

PETITIONERS

versus

SHEO SAHAY CHAUDHURY AND OTHERS—

OPPOSITE PARTY.

Letters Patent (Patna), cl 10—Order staying proceedings, whether judgment—Order of single Judge staying proceedings in criminal case—Appeal, whether lies:

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An order staying proceedings is not a "judgment" within the meaning of clause 10 of the Letters Patent of the Patna High Court, inasmuch as such order contains no final adjudication of the rights of the parties. [p 350, col 2.]

An order of a single Judge staying proceedings in a criminal case is an order made in the exercise of criminal jurisdiction, and, therefore, no appeal lies against it under clause 10 of the Letters Patent. [p. 350, cols. 1 & 2.]

Letters Patent Appeal from an order of Justice Sir Ali Imam, Kt., dated the 22nd April 1918, in Criminal Revisions Nos. 118 and 119 of 1918.

Messrs. *P. R. Das* and *Shiva Narain Bose*, for the Petitioners.

Messrs. *Asghur* and *D. N. Sircar*, for the Opposite Party.

ORDER.

MELLICK, J.—The question before us is whether two petitions of appeal presented respectively by Babujan Misser and Kanto Chaudhury against an order, dated the 22nd April 1918, made by Mr. Justice Imam, a learned Judge of this Court, can be maintained under the law.

It is contended on behalf of the petitioners that the order of the learned Judge is appealable under clause 10 of the Letters Patent of this Court. Notice was issued by a Division Bench of this Court upon the respondents named in the petition to show cause why the appeals should not proceed. Cause is now shown before us by Mr. Sircar while Mr. Das appears on behalf of the petitioners.

The order of Mr. Justice Imam was made under the following circumstances.

Two cases are now pending in the Court of a Magistrate in the District of Bhagalpur, in which Babujan and Kantoo are respectively the complainants and Shew Sahay and others are the accused and in which charges have been framed under sections 379 and 143, Indian Penal Code, for theft of paddy in respect of certain disputed land.

In January 1917 proceedings were instituted under section 145, Criminal Procedure Code, in respect of these lands between Deo Nandan as the first party and the above-mentioned Shew Sahay Choudhary as the second party, the former claiming under a mortgage and the latter resisting the possession delivered to the former by the Civil Court in enforcement of that mortgage. In February 1917 the possession of Deo Nandan was confirmed, but upon an

application to this Court that order was set aside and the case was re-opened with a direction to add certain persons as parties. The further inquiry thus directed is still pending. The complainant in each of the two above-mentioned theft cases claims as tenant under Deo Nandan.

An application was made by the accused before the Magistrate trying the theft cases for the stay of the proceedings till the disposal of the case under section 145, Criminal Procedure Code, but was refused. An application in revision was then made to the District Magistrate with a similar result. Then an application for revision was made to this Court and was heard by Mr. Justice Imam sitting alone as a Judge of this Court, and on the 22nd April last he made an order directing that the proceedings in the trial under sections 379 and 143, Indian Penal Code, should be stayed pending the decision in the case under section 145, Criminal Procedure Code.

The point which we have now to determine is whether an appeal under the Letters Patent lies to this Court against Mr. Justice Imam's order.

The matter clearly depends upon clause 10 of the Letters Patent of the Patna High Court, the material portion of which is as follows:—"And We do further ordain that an appeal shall lie to the High Court of Judicature at Patna from the judgment (not being an order made in the exercise of revisional jurisdiction in a case, which has been called for by the said Court, and not being a sentence or order passed or made in the exercise of criminal jurisdiction) of one Judge of the said Court, or of one Judge of any Divisional Court constituted in pursuance of section 108 of the Government of India Act of 1915."

Mr. Das contends that the order was not made in the exercise of revisional jurisdiction, but in the exercise of the Court's powers of general superintendence under section 107 of the Government of India Act of 1915. He also urges that in order to bar the right of appeal the order must be made not only in the exercise of revisional jurisdiction but also in the exercise of criminal jurisdiction.

In my opinion his contention cannot be accepted. The words within brackets should,

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in my opinion, be paraphrased as follows:—"Except an order made in the exercise of revisional jurisdiction in a case which has been called for by the said Court and except a sentence or order passed or made in the exercise of criminal jurisdiction." If the contention put forward by Mr. Das were correct, then the words "not being an order made in the exercise of criminal revisional jurisdiction in a case, which has been called for by the said Court" would have been quite sufficient for the purposes of the draftsman.

Again comparing this clause with the corresponding clause in the Letters Patent granted to the High Court of Calcutta in 1865, it is clear that the intention of the draftsman was to restrict the right of appeal by prohibiting appeals (1) in respect of sentences or orders passed or made in the exercise of criminal jurisdiction as before, and (2) in respect of orders made in the exercise of revisional jurisdiction in other cases, namely, civil cases.

The result is that whereas in the Calcutta High Court a Letters Patent appeal lies against the judgments of a Judge sitting alone in the exercise of civil revisional jurisdiction, in the High Court of Patna no such appeal lies.

On the other hand, the effect of the interpretation suggested by Mr. Das would be that the right of appeal has been not restricted but extended by the Letters Patent of this Court and that not only is there an appeal against civil judgments in revision as before but that a new right of appeal has been conferred against judgments passed in the exercise of original and appellate criminal jurisdiction. In my opinion the language of the clause does not favour such an interpretation.

Furthermore clause 10 appears under the heading of civil jurisdiction. It could not appropriately confer under that heading a right of appeal in a matter connected with the exercise of criminal jurisdiction. Obviously it intends to define the limits of the right of appeal against certain judgments on the civil side only.

Therefore, in the present cases the order of Mr. Justice Imam having been clearly made in the exercise of criminal juris-

diction the petitioners have no right of appeal.

In this view it is unnecessary to decide whether or not the order of Mr. Justice Imam was one made in the exercise of revisional criminal jurisdiction, but if it were necessary to decide that point, I would say that his order was in revision of the order of the District Magistrate. The revisional powers conferred by the Criminal Procedure Code are sufficiently wide to justify his interference in a matter of this kind.

But there is another ground which is, in my opinion, completely fatal to Mr. Das. In my opinion the order staying proceedings is not a judgment within the meaning of clause 10 of the Letters Patent. The order contains no final adjudication of the rights of the parties. To use the language of Sir Richard Couch, it is not a decision which affects the merits of the question between the parties by determining some right or liability [*The Justices of the Peace for the Town of Calcutta v. The Oriental Gas Company* (1)]. It merely directs whether one case shall have priority in point of time over another. Therefore, there being no judgment, no appeal lies.

The result is that both the petitions of appeal must be dismissed with costs. Hearing fee one gold *mohur* in each case.

THORNHILL, J.—I agree.

Petitions dismissed.

(1) 17 W. R. 364; 8 B. L. R. 433.

MIRZA v. EMPEROR.

PUNJAB CHIEF COURT.
CRIMINAL APPEAL No. 232 OF 1918.
September 18, 1918.

Present:—Mr. Justice Broadway.

MIRZA AND OTHERS—CONVICTS—APPELLANTS
versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 363, 365, 366—Kidnapping girl over 16 years of age—Offence—First information report, delay in making, effect of.

Accused were charged under section 363, Indian Penal Code, with having kidnapped a minor girl from the guardianship of her parents. It appeared that although according to the prosecution the accused were seen taking the girl away at about midnight and the girl's father at once proceeded to the *thana* where he reached before sunrise, no report was recorded till 12 noon. It appeared further that the girl was over 16 at the time when she disappeared:

Held, (1) that as the girl was not a minor under 16 years of age the accused were not guilty of an offence under section 363, Indian Penal Code; [p. 352, col. 1.]

(2) that the extraordinary delay in making the first information report was very suspicious and the fact that the girl was over 16 strengthened the belief that she went off of her own accord and that consequently the accused could not be convicted under section 365 or 366, Indian Penal Code. [p. 352, col. 2.]

Appeal from the order of the Magistrate, 1st Class, exercising enhanced powers under section 30, Criminal Procedure Code, Gujranwala, dated the 18th March 1918, convicting the appellants.

Dr. Khalifa Shuja-ud Din for the Hon'ble Mr. Muhammad Shafi, for the Appellants.

Lala Mul Chand, R. S., Public Prosecutor, for the Crown.

JUDGMENT.—The appellants in this case, 10 in number, have been convicted of offences under section 363 and section 452, Indian Penal Code, and have been sentenced to various terms of imprisonment. They have appealed through Mr. Muhammad Shafi for whom Mr. Shuja-ud-Din has appeared before me, while I have heard Rai Sahib Mul Chand for the Crown.

The story for the prosecution is briefly this. On the night of the 26th-27th September 1916, Mahla and his nephews Sadda and Sammun were sleeping at their cattle-pen some 7 *killas* from their village, while at their house were sleeping Musammat Rahmon wife of Mahla, Musammat Rani daughter of Mahla and two guests Musammat

Ahmo or Rahmo and Musammat Bego. About midnight these women were awakened by hearing Musammat Rani cry cut and Musammat Rahmo saw her daughter being taken away by a large number of men including these appellants. Nota, Mughli, Mirza and Tahri were actually carrying off Musammat Rani and they were pursued by her mother who was, however, pushed aside by the other miscreants.

Mahla and others arrived on hearing the uproar but by the time Mahla reached the spot the girl had been taken away by Mirza, Tahri and Mughli, but the other raiders were collected at the house of Tahri and Mirza armed with *dangs*. This house is said to be some 2 *karams* from Mahla's (*vide* page 7).

The people collected but Mahla, with remarkable self-control, begged them not to attack the raiders as he intended to make a report. He accordingly left for the Police Station, Pindi Bhattian, which is said to be 6 *kos* distant. When he had gone about one *kos*, he met Mughli son of Amira, Lambardar of Lundan, and from him learnt that his daughter had been taken away on a mare by Tahri, Mirza and Mughli towards the south. He then went on to the Police Station where he arrived before sunrise, but was unable to wake any one till 12 noon when his report was duly recorded.

The Police then went to the village and commenced an enquiry, with the result that they sent up the appellants and others, who have not been convicted, for trial. One Muhammeda son of Hasta was said to have absconded and proceedings against him were taken under section 512, Criminal Procedure Code.

The girl too had not been recovered. She was said to have been about 13 or 14 years of age, and the Magistrate, accepting the statement of her parents, held she was a minor.

When the case came before me on appeal on the 31st May 1918 Mr. Shafi put in certain birth certificates and contended that according to these the girl was over 16. Counsel for the Crown agreeing I remanded the case under section 528,

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Criminal Procedure Code, for an enquiry as to the girl's age and the Magistrate has reported that in his opinion the girl was born on 30th July 1899, which would make her over 16 at the time when she disappeared.

Mr. Mul Chand then urged that the appellants should be held guilty under section 365 or section 366, Indian Penal Code.

According to Mahla, and there are other witnesses to the same effect, the motive for this kidnapping of *Musammât Rani* was revenge. He says that *Musammât Rani*, sister of *Tabri*, *Mirza* and *Khanun* was enticed away by *Mehra*, a cousin of complainants, some 2 years before and that one year before his cousin *Bagga* had taken away his daughter (*Mehro*) who was wife of *Tabri*.

Now there are certain features in the prosecution story which to my mind render it very doubtful.

The evidence of *Mahla* and his wife is far from convincing. It is difficult to believe that a number of men should collect in the way alleged, forcibly remove a woman and then all but three of them stay standing a few *karms* off while the villagers collected. Further it is also remarkable that instead of starting a hue and cry and going in pursuit *Mahla* should have not only remained calm himself but have insisted on the villagers not doing anything as he intended to report the matter. Then we find that *Mahla* has no idea as to the age of his daughter, he arrives at it by a process of calculating the age of his younger daughter, who he says was 10 or 11 years old, and goes on to say that *Musammât Rani* was "probably" born some two or three years before, "perhaps" in the house of her grandmother. This is significant, having regard to the fact that *Musammât Rani* was over 16 when she disappeared. Again there is the extraordinary delay in making the report. The affair took place at midnight. No one was injured and *Mahla* went at once to the Police Station, yet the report was not made till 12 noon. *Mahla* realised the difficulty and in order to get over it stated that though he reached before sunrise he

could wake no one in the Police Station till noon. This story is clearly incredible, yet it is clear that the report was not made till 12 in the day.

It was urged that really what had happened was that *Musammât Rani*, who is grown up, had gone off with *Muhammeda* son of *Hasta* of her own free will and accord and that the fact was not discovered till early next morning, whereupon *Mahla* and his friends set to work and made up this case and went to the *Thana*, reaching there at noon when the report was duly written.

According to *Mahla* the appellants are all related to one another. *Muhammeda* absconder is the son of *Hasta*, whose daughter is the mother of *Tabri*, *Mirza* and *Khanun*. *Tabri's* house is only a few *karms* away from *Mahla's* and there seems every likelihood that *Muhammeda* and *Musammât Rani* became enamoured of each other and eloped.

I am inclined to believe that this is what happened and that the delay in the report is due to the fact that the elopement was not discovered till the early morning, when a council was held and *Muhammeda's* relatives dragged in.

I have carefully considered the evidence and am extremely suspicious of its correctness. The delay in the report is especially suspicious. The girl *Musammât Rani* was over 16 and I believe she went off with *Muhammeda* of her own accord. I do not believe the story of the attack, and I accept this appeal and setting aside the conviction and sentences direct that the appellants be released forthwith.

Appeal accepted.

HIRDEY NARAIN v. ALAM SINGH.

ALLAHABAD HIGH COURT.

EXECUTION SECOND APPEAL No. 1644
OF 1917.

July 29, 1918.

Present :—Sir Henry Richards, Kt., Chief
Justice, and Mr. Justice Tudball.HIRDEY NARAIN—JUDGMENT-DEBTOR—
APPELLANT

versus

—ALAM SINGH—DECREE-HOLDER—
RESPONDENT.*Limitation Act (IX of 1908), s. 4—General Clauses Act (X of 1897), s. 10, applicability of—Pre-emption decree—Money not paid within time prescribed—Court, power of, to extend time.*

Section 4 of the Limitation Act and section 10 of the General Clauses Act only apply to the cases in which a period of limitation has been prescribed as mentioned in those sections, and do not apply to a condition prescribed in the decree itself.

A pre-emption decree in its very terms becomes a decree in favour of the defendant vendee when the conditions imposed upon the plaintiff have not been complied with, so that where the decree has become final no Court has power to alter its terms so as to extend the time allowed for payment.

Execution second appeal from a decree of the District Judge, Saharanpur, reversing that of the Subordinate Judge, Dehra Dun.

Mr. Nehal Ohand, for the Appellant.

Mr. Kailas Nath Katju, for the Respondent.

JUDGMENT.—This appeal arises under the following circumstances. The plaintiff in a pre-emption suit obtained a decree for pre-emption on the 11th of October 1915. By this decree he was directed to lodge in Court the pre-emption money within six months, and it further decreed that in the event of his failing to do so the suit would stand dismissed with costs. It will thus be seen that the decree was a decree in favour of the plaintiff on certain conditions. If those conditions were not fulfilled, the decree became a decree in favour of the defendant vendee. The plaintiff did not deposit the money within six months. The last day which would have enabled the plaintiff to comply with the decree was the 11th of April 1916. This was a holiday. It was alleged (and it has been found by the Court below) that the money was brought to the Nazir on the 12th of April, a day on which the Court was sitting. On that day he obtained a *chalan* which would have enabled him to have deposited the money in the Treasury provided the Treasury was sitting. It appears that the Treasury was

not open on the 12th and was only open for an hour on the 13th and the result was that the deposit was not completed until the 14th. The Court of first instance on an application to execute the decree held that the money had not been deposited in Court within the time, specified in the decree. On appeal the lower Appellate Court held that the money must be deemed to have been deposited within time, applying (apparently by analogy) section 4 of the Limitation Act and section 10 of the General Clauses Act. This Court has held that in the case of a pre-emption decree, which has become final, no Court has any power to alter the terms of the decree so as to extend the time allowed for payment. It must be remembered that the decree in its very terms becomes a decree in favour of the defendant vendee when the conditions imposed upon the plaintiff have not been complied with. In the present case the plaintiff pre-emptor appears not to have had his money ready until the period of six months had almost expired. In the end it was a money-lender who came with the money accompanied by the plaintiff's agent on the 12th of April 1916. In our opinion, section 4 of the Limitation Act and section 10 of the General Clauses Act only apply to the cases in which a period of limitation has been prescribed as mentioned in those sections, and do not apply to a condition prescribed in the decree itself. The respondent's learned Vakil has referred to the cases of *Sambasiva Chari v. Ramasami Reddi* (1), *Shooshee Bhusan Rudro v. Gobind Chunder Roy* (2) and *Munna Lal v. Radha Kishan* (3). In our opinion none of these authorities apply to the circumstances of the case we have before us. We allow the appeal, set aside the order of the Court below and restore the order of the Court of first instance with costs in all Courts.

Appeal allowed.

(1) 22 M. 179; 8 M. L. J. 265; 8 Ind. Dec. (N. S.) 127.

(2) 18 C. 231; 9 Ind. Dec. (N. S.) 154.

(3) 30 Ind. Cas. 186; 13 A. L. J. 793; 37 A. 591.

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NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 62 OF 1915.

April 23, 1918.

Present:—Mr. Batten, Offg. J. C.

BANMALI—DEFENDANT—APPELLANT

versus

Thakur NIHAL SINGH—PLAINTIFF

—RESPONDENT.

Transfer of Property Act (IV of 1882), Ch. V, s. 51—Lease, agricultural—Ch. V, whether applicable—Ejectment—Notice, reasonable—Estoppel against landlord in favour of tenant—Burden of proof—Improvements made by tenant—Compensation, whether can be awarded.

A lease of a village or of a share in a village for the purpose of bringing it under cultivation is a lease for agricultural purposes and the provisions of Chapter V of the Transfer of Property Act do not apply to it as laid down in section 117 of the Act. [p. 355, col. 2.]

In the case of an agricultural lease the tenant is entitled to a reasonable notice before ejectment. What is a reasonable notice is a question of fact. [p. 355, col. 2; p. 356, col. 1.]

Jagut Chunder Roy v. Rup Chand Chango, 9 O. 48; 11 C. L. R. 143; 5 Shome L. R. 88; 4 Ind. Dec. (N. S.) 684; *Radha Gobind Koer v. Rakhal Das Mukherji*, 12 C. 8; 6 Ind. Dec. (N. S.) 56; *Digambar Mahto v. Jhari Mahto*, 26 C. 761; 13 Ind. Dec. (N. S.) 1087, followed.

A notice giving the tenant more than six months for vacation is a reasonable notice. [p. 356, col. 1.]

The length of the period for which a tenant has been holding land does not, in the absence of any contention that the rent has never been enhanced, raise any presumption that the tenancy is a permanent one. [p. 356, col. 2.]

To raise an equitable estoppel against a lessor precluding him from suing for possession on the determination of the tenancy, the tenant must show facts sufficient to justify a legal inference that the lessor has by plain implication contracted that the right of tenancy should be changed into a right of permanent occupancy. [p. 356, col. 2; p. 357, col. 1.]

Beni Ram v. Kundan Lal, 26 I. A. 58; 21 A. 498; 1 Bom. L. R. 400; 3 O. W. N. 502; 7 Sar. P. O. J. 523; 9 Ind. Dec. (N. S.) 1022 (P. O.), followed.

Section 51 of the Transfer of Property Act does not apply to tenants. [p. 357, col. 1.]

A tenant is not entitled, either under the Transfer of Property Act or apart from it, to any compensation for any improvements made by him on the land during the continuance of his tenancy. [p. 357, cols. 1 & 2.]

Ismail Khan Mahomed v. Jaigun Bibi, 27 C. 570; 4 C. W. N. 210; 14 Ind. Dec. (N. S.) 374; *Rajah of Venkata-giri v. Mukku Narasaya*, 7 Ind. Cas. 202; 37 M. I. 8 M. L. T. 258; (1910) M. W. N. 369, followed.

Collier v. Baron, 2 N. L. R. 34, disapproved.

Appeal against the decree of the Divisional Judge, Raipur, in Civil Appeal No. 99 of 1914, dated the 18th November 1914.

JUDGMENT.—This appeal arises out of a suit for ejectment brought by the Zemindar of the Gundardehi Zemindari, in the Drug Tehsil, of the Drug District against the appellant, the *theke*dar of the village of Limora. It appears from the District Gazetteer that there are 55 villages in the Zemindari, of which 41 are leased to *theke*dars, of whom 28 have received the status of a protected *theke*dar under section 65-A of the Central Provinces Land Revenue Act, 1881. The village was held by Mukti, the father of the appellant, on an annual *theke* Jama of Rs. 300, which was subsequently enhanced to Rs. 351. The Jama was again enhanced to Rs. 396 at the time of the execution of Exhibit P-1, dated 8th December 1904, which the plaintiff describes as a *kabuliyat*, that is to say, counter part of a lease for six years. The deed recites as follows:—

"Upto this date I used to pay a Jama of Rs. 351 including cesses, but now the cesses have been enhanced by Rs. 45 so I will now pay a total Jama of Rs. 396, including cesses, annually in two equal instalments up to the time of the new Settlement, that is to say, for six years."

This document was not registered.

The Zemindari estate was under the management of the Court of Wards from 1st January 1906 to 10th September 1913. On 23rd June 1911 the Deputy Commissioner, as agent of the Court of Wards, issued a notice to Mukti stating that the *theke* expires, according to the *kabuliyat*, on 30th June 1911, and calling upon him, to vacate possession on 30th June 1911. Mukti was dead and the notice was received by his son the appellant Banmali. On the 30th August 1911 a 2nd notice was issued to Mukti, saying that the *theke* Jama for 1911-12 would not be received and warning him that he would be liable to a suit for possession and damages. On the 28th November 1911 a 3rd notice was issued to Banmali himself, giving time till the end of May 1912 to vacate the village. Banmali refused to accept service of this notice.

Banmali then applied to the Revenue Authorities for protected status. Sometime in the beginning of 1913 the Financial Commissioner passed a final order, allowing Banmali to select 100 acres out of the

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home farm to be his occupancy holding, but refusing him protected status. Banmali applied to the Financial Commissioner for review of this order, and the Financial Commissioner on 19th May 1913 passed an order (Exhibit P-7) refusing the application and informing Banmali that he would lose the benefit of the former order unless he selects his 100 acres in three months. Banmali refused to comply with the order and on 21st November 1913 the Financial Commissioner cancelled the grant of occupancy rights (Exhibit P-6). Meanwhile on 8th April 1913 the plaintiff himself sent a notice, which Banmali refused to accept, to the effect that Banmali would be liable to legal proceedings if he retained possession of anything more than the 100 acres.

The learned Divisional Judge has found that Mukti first became *thekeedar* about 1870, and that the defendant has failed to prove the terms of the lease. Some document appears to have been executed but it is not forthcoming, and clearly it was not registered. He has also decided that the document of 8th December 1904 is not a lease but a mere agreement to pay enhanced Jama till the next Settlement, which it was assumed would take place in 1910. He has found that the appellant has failed to prove by evidence that the original lease to Mukti was a lease in perpetuity, and that the collateral facts do not establish that the lease is a perpetual one.

On the question of notice the learned Divisional Judge has held that the third notice, dated 28th November 1911, giving Banmali notice to quit before the 1st June 1911 was sufficient notice. The defendant pleaded that the lease year coincided with the agricultural year, which in Drug expires on 31st March. The Judge expresses the opinion that the lease year expires at the beginning of June, but I doubt if this can be characterized as a definite finding.

The Divisional Judge has also held that by reason of clause (h) of section 108 of the Transfer of Property Act the appellant is not entitled to compensation for improvements, and on the evidence adduced by the appellant has held that he has failed to prove the exact nature or value of the improvements, or that he

has made any improvements other than such as he would naturally make for the beneficial enjoyment of even a temporary lease, or that the Zemindar allowed Mukti and Banmali to spend more money than he otherwise would, under the impression that the Zemindar acquiesced in the expenditure and tacitly guaranteed its benefit to the lessee.

The first ground of appeal is to the effect that as the plaintiff set up a lease for a term and not a lease from year to year, it lay on him to prove that the lease had come to an end. On this point I agree with the Divisional Judge's observations in paragraph 9 of his judgment. The pleadings are not scientific, as is usual in the *Mofussil*. The appellant has in no way been prejudiced, and if the evidence shows that the lease was merely a lease from year to year, the plaintiff is entitled to any remedy he is entitled to on that finding.

The second ground of appeal is that the notices were not legally sufficient to terminate even a year to year lease. It is contended that it is not proved that the lease year ended at the beginning of June. The 3rd notice gave more than 6 months' notice ending with the end of May. The learned Counsel for the respondent argues that even if section 106 of the Transfer of Property Act applies, the notice is sufficient. He contends that it is evident that neither party knows when the tenancy began, and the defendant's witnesses who say that the original lease was in writing do not say in what quarter the lease began. The main contention for the respondent, however, is that the lease being a lease for agricultural purposes, the provisions of Chapter V of the Transfer of Property Act do not apply to it, as laid down in section 117 of the Act. This contention must in my opinion prevail. It was observed by Ismay, J. C., in *Anup Singh v. Khuman Singh* (1) that a lease of a village or of a share in a village is clearly a lease for agricultural purposes and the provisions of Chapter V of the Transfer of Property Act do not, therefore, apply. The observation is particularly opposite to this case, where the lease was for the purpose of bringing the land under cultivation. In such cases the tenant is entitled to reasonable notice, and what is reason-

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able notice is a question of fact, *vide Jagut Chunder Roy v. Rup Ohand Ohango* (2), *Radha Gobind Koer v. Rakhal Das Mukherji* (3) and *Digambar Mahto v. Jhari Mahto* (4). I have no doubt whatever that the 3rd notice was a reasonable notice as it gave more than six months for vacation, and there would be no crops left on the land on the date mentioned in the notice. It is not alleged that there is any local custom or local law bearing on the question. This ground of appeal, therefore, fails, if the lease was one from year to year.

The 3rd and 4th grounds of appeal are to the effect that the conduct of the plaintiff in standing by and allowing the defendant to erect costly structures of a permanent character, to raise embankments and to build tanks raises a presumption that the lease was a perpetual one, and estops the defendant from pleading that the lease was a temporary one. In this connection the appellant's Counsel complains that no attention was paid to an application made to the first Court by the appellant asking that an Engineer be appointed as Commissioner to make an estimate of the cost incurred in making improvements. This application was presented on the 25th September 1914 at a very early stage of the case, before the defendant was represented by a Pleader, and it does not appear to have been brought to the notice of the Court at the time. Subsequently the defendant's Pleader made no allusion to the application and did not renew it, and he closed his case without asking for the appointment of a Commissioner. In these circumstances the application must be held to have been dropped, and the appellant has no legitimate grievance.

I have no doubt whatever that the learned Divisional Judge is right in holding that the length of the period for which the appellant and his father have been holding the village as tenants does not raise a presumption that the tenancy is a permanent one. The tenure commenced in about 1870, and the suit was filed in April 1914, so that the lessees have been in possession for about 44 years.

(2) 9 C. 48; 11 C. L. R. 143; 5 Shome L. R. 88; 4 Ind. Dec. (N. S.) 654.

(3) 12 C. 82; 6 Ind. Dec. (N. S.) 56.

(4) 26 C. 761; 13 Ind. Dec. (N. S.) 1087.

The learned Divisional Judge has cited *Nabu Mondul v. Oholim Mullik* (5), where long possession for upwards of 60 years was held not to justify the presumption of a permanent grant; a similar view was taken in *Narayanbhat v. Davlata* (6); it is not contended that the rent has not from time to time been enhanced.

The pleadings on which these grounds of appeal are based are that in 1868 a permanent lease was given to Mukti, that on the faith of the clear declaration by the Zemindar that the lease was perpetual, Mukti made considerable improvements by excavating a tank at a cost of about Rs. 8,000; by laying out gardens on an area of 8 acres at a cost of Rs. 2,000, by building pucca houses at a cost of about Rs. 10,000 and by erecting embankments of fields at a cost of about Rs. 2,000; that the Zemindar stood by and allowed Mukti to make these improvements and cannot eject the defendant without making compensation; and that the plaintiff is estopped by this conduct from ejecting the defendant.

The learned Divisional Judge has held that the defendant has failed to prove any express declaration on the part of the Zemindar that the lease was a permanent one, and in this Court the contention is that the conduct of the Zemindar in standing by creates a presumption of permanency and estops him from ejecting the defendant. Among the cases relied on for the appellant are *Dattatraya Rayaji Pai v. Shridhar Narayan Pai* (7) and *Yeshwadabai v. Ramchandra* (8), but, as pointed out in *Ismail Khan Mahomed v. Jaigun Bibi* (9), in the former case there were very special circumstances, while in the latter case the land was *fazendari* land from which the tenant could not be ejected. The law on the subject has been clearly expounded by the Judicial Committee in *Beni Ram v. Kundan Lal* (10), where it was laid down that to raise

(5) 25 C. 896; 13 Ind. Dec. (N. S.) 584 (F. B.).

(6) 15 B. 647; 8 Ind. Dec. (N. S.) 436.

(7) 17 B. 736; 9 Ind. Dec. (N. S.) 483.

(8) 18 B. 66; 9 Ind. Dec. (N. S.) 553.

(9) 27 C. 570; 4 C. W. N. 210; 14 Ind. Dec. (N. S.) 374.

(10) 26 I. A. 58; 21 A. 496; 1 Bom. L. R. 400; 3 C. W. N. 502; 7 Sar. P. C. J. 523; 9 Ind. Dec. (N. S.) 1022 (P. C.).

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an equitable estoppel against the lessor precluding him from suing, on the determination of his tenancy for possession, the tenant should show facts sufficient to justify the legal inference that the lessor has by plain implication contracted that the right of tenancy should be changed into a right of permanent occupancy. Here the learned Divisional Judge has held as follows:—

"In the present case the lease was of an agricultural village, and even on a definite tenure for a fixed period, or an indefinite tenure from year to year with (*sic*) any assurance at all of extended tenure, the lessee was bound by his own interest to build residential houses and carry out certain routine improvements. Otherwise he would not have obtained the full benefit of his lease. In the absence of clear proof or strong presumption that the Zemindar allowed Mukti and Banmali to spend more money than he otherwise would, under the impression that the Zemindar acquiesced in the expenditure and tacitly guaranteed its benefit to the lessees, I am unable to hold that Banmali has proved that he is entitled to retain possession."

In the Privy Council case last quoted it was laid down that acquiescence is not a question of fact, but of legal inference, from the facts found, and upon it the judgments of the first and the Appellate Court are not final. But I can see no reason whatever for dissenting from the conclusions of the learned Divisional Judge. It is a common occurrence for Zemindars to give leases of villages for the purpose of bringing them under cultivation, and of necessity the lessees undertake such works and erect such dwelling houses as are necessary, but it does not follow that leases must, therefore, be deemed to be permanent, in the absence of an express contract to that effect.

The last ground of appeal is that the appellant is entitled to compensation for the improvements. Section 51 of the Transfer of Property Act certainly does not apply to tenants, *vide* *Ismail Khan Mahomed v. Jaigun Bibi* (9) and *Rajah of Venkatagiri v. Mukku Narsaya* (11), nor

(11) 7 Ind. Cas. 202; 37 M. L. J. 8 M. L. T. 258; (1910) M. W. N. 369.

apart from the provisions of the Transfer of Property Act is a tenant entitled to this relief. The case of *Collier v. Baron* (12) was not one of tenancy.

Since the appeal was argued my attention has been drawn to an unpublished ruling of Skinner, A. J. C., in First Appeal No. 17 of 1910, in which he allowed compensation to a tenant for improvements by "virtue of the provisions of section 70 of the Contract Act, and of our Court's general power to impose equitable conditions on the relief they grant." This ruling is unsupported by authorities, and speaking with due respect, I am unable to follow it.

There is a series of connected appeals of the same nature from another District, and I had hoped before the delivery of this judgment to have the benefit of the arguments therein, but those appeals have been postponed in the hope of a compromise and have not yet been fully argued.

The appeal is dismissed with costs.

Appeal dismissed.

(12) 2 N. L. R. 34.

ODDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 135 OF 1917.

November 9, 1917.

Present:—Pandit Kanhaiya Lal, A. J. C.

Thakur BAHADUR SINGH—

PLAINTIFF—APPELLANT

versus

Thakur AUSERI SINGH—DEFENDANT—

RESPONDENT.

Custom opposed to ordinary law, proof of—Wajib-ul-arz, construction of—Hindu Law—Widow, power of alienation of.

Nothing short of the most cogent evidence can be accepted as proof of a custom repugnant to the ordinary rule of succession or power of disposal prescribed by it. [p. 358, col. 2.]

If a construction can be put on a *wajib-ul-arz* which is compatible with the rules of the personal law of the parties, that is the construction to which a Court should adhere. [p. 358, col. 2.]

Where a *wajib-ul-arz* declared that a sonless widow was entitled to the property of her husband for her

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life and had every kind of power over the same in case of personal necessity or to meet the revenue demand:

Held, that the entry did not amount to a custom under which the widow had unlimited power of disposal.

Appeal against the order of the District Judge, Sitapur, dated the 15th January 1917, reversing that of the Subordinate Judge, Sitapur, dated the 29th May 1916.

Messrs. A. P. Sen and Badri Prasad Gupta, for the Appellant.

Babu Ram Chandra, for the Respondent.

JUDGMENT.—Lone Singh died leaving a widow, Musammat Chandra Kuar, who inherited his estate. She sold the share inherited by her from her husband in one of the villages to certain persons, from whom the defendant-respondent obtained it by pre-emption. Musammat Chandra Kuar died on the 5th November 1914. The plaintiff is the next reversionary heir of her husband and claims possession of the property, comprised in the said sale, with mesne profits, alleging that the sale was effected without any legal necessity. The defence was that the sale was made for valid necessity and that according to a custom of the family Musammat Chandra Kuar had an absolute right to transfer the property in dispute in any way she liked. No evidence was produced on behalf of the defendant-respondent to prove that any legal necessity existed for the sale. The existence of the alleged custom was negatived by the Court of first instance, but affirmed by the lower Appellate Court.

The question for determination in this appeal is whether the finding of the lower Appellate Court is justified by the terms of the *wajib-ul-arz*, on which it has relied. Lone Singh was a resident of the village Pachera and had a share, now in dispute, in the village Saraiyan and in other villages. The *wajib-ul-arzes* of the village Pachera and Saraiyan are similar in terms. Both of them declare that a sonless widow is entitled to the property of her husband for her life and has every kind of power over the same in case of personal necessity or to meet the revenue demand (*ba zarurat zati wa malguzari sarkar*). The lower Appellate Court interprets these terms as implying that she has an unlimited power of disposal;

but the very terms of the *wajib-ul-arz* impose limitations on that power, for outside the existence of some personal necessity or a necessity for the payment of the Government revenue, no power of transfer is recognized. It is unnecessary to refer to the unreported decisions to which reference has been made in the course of the arguments. The principle governing the interpretation of such *wajib-ul-arzes* was laid down in *Dhondhe Singh v. Sant Bahsh Singh* (1), where it was stated that if a construction could be put on a *wajib-ul-arz* which was compatible with the rules of the Hindu Law, that was the construction to which the Court should adhere. That principle was enforced in *Ram Dat v. Sukhia* (2). In the present instance the *wajib-ul-arz* limits the power of disposition to cases of personal necessity or necessity to pay the Government revenue. But personal necessity may be necessity in the nature of maintenance which would be perfectly valid to justify an alienation even under the Hindu Law. The existence of arrears of Government revenue may equally be a good necessity to justify an alienation of a part of the estate to save the remainder. It is not possible, therefore, to treat the *wajib-ul-arz* as necessarily inconsistent with the provisions of the Hindu Law. As observed in *Ohandika Singh v. Ram Dulari* (3), where it is sought to prove a custom inconsistent with the ordinary law, nothing short of the most cogent evidence can be accepted as proof of a custom repugnant to the ordinary rule of succession or power of disposal prescribed by it. If the custom had been that a widow could transfer the estate inherited by her from her husband without necessity of any kind, there would have been no occasion for the limitation placed in the *wajib-ul-arz* to regulate its disposal. No legal necessity having been proved in this case the sale made by the widow cannot be upheld.

The appeal is, therefore, allowed, the decree of the lower Appellate Court set aside and that of the Court of first instance, restored with costs throughout.

Appeal allowed.

(1) 3 O. C. 181.

(2) 25 Ind. Cas. 869; 1 O. L. J. 470.

(3) 12 Ind. Cas. 403.

GANANATH SATPATHY, v. HARIHAR PANDHI.

PATNA HIGH COURT.

LETTERS PATENT APPEAL No. 101 OF 1917.

July 21, 1918.

Present:—Sir Dawson Miller, Kt., Chief Justice, and Mr. Justice Mullick.

GANANATH SATPATHY AND OTHERS—

APPELLANTS

versus

HARIHAR PANDHI AND OTHERS—

RESPONDENTS.

Landlord and tenant—Occupancy holding, transfer of part of—Transferee, position of—Recognition of transfer by co-sharer landlord, effect of—Suit by landlord against recorded tenant—Declaration, suit for, by transferee, maintainability of—Specific Relief Act (I of 1877), s. 42, applicability of.

A landlord cannot interfere with the possession of a transferee of a part of a non-transferable occupancy holding and if he does so, the transferee is entitled to recover possession from him by suit. Until, however, he is actually dispossessed, he is not entitled to a declaration that a tenant alleged by the landlord to be his tenant is not his tenant and that a decree obtained by the landlord against his alleged tenant is fraudulent. Having no legal title or interest which the landlord is concerned to deny, the transferee cannot invoke the operation of section 42 of the Specific Relief Act in his favour. [p. 360, col. 2; p. 361, col. 1.]

If some out of a number of co-sharers recognise the transfer either of a part or the whole of a non-transferable occupancy holding, the remaining co-sharers are not entitled to eject the transferee. By obtaining recognition from a co-sharer landlord, however, the transferee does not acquire any right or valid title in the holding itself as against the entire body of landlords. Notwithstanding such recognition the remaining co-sharers can sue the original tenant for the entire rent without impleading the transferee. [p. 361, col. 2; p. 362, col. 2.]

If the consenting landlords choose to repudiate their consent and to join the non-consenting landlords in suing the original tenant for the entire rent on the footing that the consent given by them does not operate to create a division of the tenancy, it is open to them to do so. [p. 362, col. 1.]

Letters Patent Appeal against the judgment of Mr. Justice Roe, dated the 28th March 1917, in Second Appeal No. 2395 of 1915, modifying the decision of the Subordinate Judge, Outtack, dated the 9th August 1915.

Mr. Sushil Madhav Mullick, for the Appellants.

Mr. Achalendra Nath Das, for the Respondents.

JUDGMENT.

MULLICK, J.—This appeal arises out of a suit which was instituted by the four plaintiffs against defendants Nos. 1 to 8, the landlords, defendant No. 9, Kusun Behara the recorded tenant of the holding in dispute, and against defendant No. 11,

Jasoda Dei the daughter-in-law of the aforesaid Kusun Behara. The dispute relates to a holding of about $4\frac{1}{2}$ acres, out of which in or about the year 1898 Kusun Behara mortgaged an area of 1 man to the plaintiffs. On the 27th January 1899 Kusun Behara conveyed with the consent of the landlords an area of 1 man out of the holding to the plaintiffs. On the 28th January 1899, Kusun Behara transferred the remainder of the holding to his daughter-in-law Jasoda Dei. In 1910 the plaintiffs sued Kusun Behara upon the mortgage of 1898 and obtained a sale certificate on the 31st August 1910 and delivery of possession on the 11th April 1911. The case of the plaintiffs is that they thereby became possessors not only of the 1 man which was transferred in 1899 and in respect of which their title was recognised by the joint landlords, but also of the additional area of 1 man which was conveyed to them by the mortgage of 1898. In 1911, however, the joint landlords sued Jasoda Dei the transferee for the rent of the holding as constituted after deduction of the 1 man in respect of which they had recognised the transfer to the plaintiffs. A decree was obtained but the plaintiffs having deposited the decretal amount the decree was not enforced by sale. The defendants again sued Jasoda in 1912 for the rent of the holding and a decree having been obtained, the 15th July 1912 was fixed for the sale of the holding. The plaintiffs, apprehending that their title to the area purchased in execution of their mortgage decree would be jeopardised, brought the present suit on the 6th June 1913 claiming the following declarations:—

"(1) That it may be decided that we the plaintiffs have got the right of purchase in auction in the land in claim and that it may be decided that the defendants Nos. 9 and 10 have no right or concern therein.

"(2) That it may be proved that the suit, the decree, the execution of the decree in respect of the said land of the defendants Nos. 1 to 8, are illegal, invalid and inoperative.

"(3) That our right of purchase in auction in the said land may be declared and our possession therein may be confirmed, or if it be decided that we ought to get possession, we may be given possession."

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"(4) That till the final decision of the suit the injunction may be given to the defendants Nos. 1 to 8 for staying the auction sale of the land in claim."

It will be convenient to notice here that Kusun Behera died during the pendency of the suit and his sons Hari Behera and Bera Behera have been substituted in his place.

The Munsif dismissed the whole suit. There was an appeal to the Subordinate Judge, who decreed it. There was next a second appeal to this Court, which was heard by Mr. Justice Roe sitting alone, with the result that the decree of the learned Subordinate Judge was set aside and in substitution therefor the following declarations were given to the plaintiffs:—

"(1) That it be declared that the transfer of Kusun Behera to Jasoda Dei was fraudulent, without consideration and invalid as against the plaintiffs.

"(2) That by his purchase of the rights of Kusun Behera the plaintiff has good title as against the defendants Nos. 9 and 10 to the lands purchased in execution of his decree.

"(3) That it be declared that the landlords' suit against Jasoda Dei was fraudulently instituted with the intention of ousting the plaintiff from the land.

"(4) That no execution of any decree obtained against Jasoda Dei will affect the rights of the plaintiff and Kusun Behera's representatives."

Against this decree the landlords, defendants Nos. 1 to 8, prefer the present Letters Patent Appeal.

With regard to the declarations made by the learned Judge of this Court affecting the rights of the plaintiffs as against their transferor Kusun Behera and his representatives, it is conceded by the learned Vakil for the appellants that there can be no objection. No relief is claimed in this appeal as regards the first two declarations given by the learned Judge. We will not, therefore, consider that part of the decree of the learned Judge.

The contest really centres round the third and fourth declarations which affect the landlords, and it is contended that as against them the plaintiffs acquired no title by their auction-purchase in execution of their mortgage decree and they are not entitled to any declaration which in

any way recognises their title as transferees in respect of a part of the holding. The effect of the declarations made by the learned Judge of this Court is indirectly to compel the landlords to recognise the transfer, and it is contended that section 42 of the Specific Relief Act, cannot be invoked for this purpose. It is clear that the Orissa Tenancy Act, which came into operation in 1913, does not determine the rights of the parties but there is some doubt whether the Bengal Tenancy Act or Act X of 1859 is applicable. But there can be no doubt that whichever Act applies, no transfer of a part of a non-transferable occupancy holding is valid against the landlords without their consent in writing. The position, therefore, is that unless it can be shown that the entire body of landlords recognised the mortgage sale in favour of the plaintiffs, they cannot be said to have any title against the landlords in respect of this land. The first question, therefore, is, whether, although they have no title against the landlords, they are entitled to an injunction prohibiting the landlords from executing a decree obtained by them against a tenant alleged by them to be the lawful tenant of the land.

The second question also follows from this, viz., whether the plaintiffs are entitled to attack a decree obtained by the landlords against the alleged tenant on the ground that that tenant is not the legal tenant and on the ground that the decree is fraudulent. In my opinion the answer to both questions must be in the negative. It is true that the landlords cannot interfere with the possession of the transferee of a part of a non-transferable occupancy holding and that if they do so, the transferee is entitled to recover possession from them by suit. That right to recover possession arises, not by reason of any title in the holding as against the landlords, but from the tenant's undisputed right to transfer a part of his holding. Here the landlords have not yet dispossessed the plaintiffs and it is not known whether they will do so. When that time comes it will be open to the plaintiffs to adopt such remedies as the law gives them, but before that time comes the plaintiffs are not entitled to a declaration that a tenant alleged by the landlords to be their

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tenant is not in fact their tenant and that a decree obtained by the landlords against their alleged tenant is fraudulent. Having no legal title or interest which the landlords are concerned to deny, the plaintiffs cannot invoke the operation of section 42 of the Specific Relief Act in this suit.

It is urged, however, that the suit is justified by the decision of their Lordships in the case of *Dayamayi v. Ananda Mohan Roy Chowdhuri* (1). Having carefully considered the decision of their Lordships in that case, it does not seem to us that there is any justification for the contention that because a landlord cannot eject the transferee and because if he does eject him he is liable to restore possession, the transferee has a right to obtain a declaration prohibiting the landlord from proceeding with an action against his recorded tenant. The transferees here cannot be permitted to attack on the ground of want of consideration or fraud the conveyance made by Kusun Bahera in favour of Jasoda Dei. If the holding should be sold they may possibly be competent to attack the sale but at this stage they have no right of suit.

Reliance is next placed upon a decision by a learned Judge of this Court sitting alone in Second Appeal No. 796 of 1915, where certain observations were made which may support the view that a transferee in the position of the plaintiffs is competent to obtain the declarations which they are seeking here. But on referring to the record of that case it would seem that the contest was between a transferee who had purchased a part of a non-transferable holding in execution of a mortgage sale and a co sharer landlord who had obtained a decree for rent against the recorded tenant. If the decree in that case had the effect of an ordinary money decree, possibly the mortgagee purchaser might be entitled to the declaration which he sought. But if the learned Judge intended to lay down the general proposition that a transferee of a portion of a non-transferable occupancy holding is entitled to attack the validity of decrees obtained by the landlord against his recognised tenant, then it seems to me that

that view of the law is not supported by the Full Bench ruling in *Dayamayi's case* (1) on which the learned Judge relied. So far, therefore, as the above two decisions are concerned, they do not seem to support the contention of the respondents before us.

The learned Vakil for the respondents then urges that they are not trespassers, that they have certain rights as to possession against the transferrer, the recorded tenant, and that they have also a right of re-entry in the event of dispossession against the landlords. These rights do not, however, in my opinion, render it competent for them to attack transactions and proceedings between the landlords and the recognised tenant to which they are not parties.

Finally it is contended by the learned Vakil for the respondents that in this case the transfer to the plaintiffs had been recognised by defendants Nos. 3, 5 and 6, who represent the greater part of the interest of the joint landlords. Now though it has been found that on the back of the sale certificate issued to the plaintiffs on the 31st August 1910, defendants Nos. 3, 5 and 6 recorded their consent on the 28th January 1912, it is certainly a somewhat suspicious circumstance that this consent was given only two days before the first decree for rent was obtained by the joint landlords against Jasoda. However that may be, the learned Subordinate Judge having come to the definite finding that defendants Nos. 3, 5 and 6 have recognised the transfer in respect of the mortgaged lands, his finding in this respect cannot be challenged. The question is, whether that recognition confers a right upon the plaintiffs to attack the rent-decree which those defendants together with their co-sharers have obtained from their alleged tenant. In my opinion it does not. It is true that if some out of a number of co-sharers recognise the transfer either of a part or the whole of a non-transferable occupancy holding, the remaining co-sharers are not entitled to eject the transferee; and the case of *Hossein Mahomed v. Fakir Mahomed* (2) merely affirms the proposition that they can sue for joint posses-

(1) 27 Ind. Cas. 61; 42 C. 172; 18 C. W. N. 971; 20 C. L. J. 52 (F. B.).

(2) 4 Ind. Cas. 740; 10 C. L. J. 318.—

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sion with the transferee. That case certainly does not support the contention that by obtaining recognition from a co-sharer landlord the transferee acquires any rights or valid title in the holding itself as against the entire body of landlords. I think that notwithstanding such recognition the remaining co-sharers could sue the original tenant for the entire rent without impleading the transferee. In the present case, therefore, the recognition of the transfer by defendants Nos. 3, 5 and 6 does not in any way operate to defeat the rent-decree which has been obtained by the entire body of landlords. If, as appears to be the case, defendants Nos. 3, 5 and 6 chose to repudiate their consent and to join the non-consenting landlords in suing the original tenant for the entire rent on the footing that the consent given by them does not operate to create a division of the tenancy, it was open to them to do so. Therefore, whether the Bengal Tenancy Act or Act X of 1859 applies, the division of the holding in this case was not operative for want of the necessary consent and the suit for rent brought by the joint landlords was a properly constituted action. It may be that the transferees in this case will be entitled to sue the defendants Nos. 3, 5 and 6 for damages for fraud, but that is a different matter and does not affect the present suit. The result, therefore, is that the appeal is decreed and the suit is dismissed against defendants Nos. 1 to 8 with costs in all Courts. The remaining defendants are not appealing and the decree as against them will stand. The effect of our decree, therefore, is that as against defendants Nos. 1 to 8 the declarations made by the learned Judge of this Court will be inoperative. It is to be noted that in the memorandum of appeal filed against the judgment of Mr. Justice Roe the name of Chandi Debia the widow of Sham Sunder, defendant No. 6, does not appear on the record either as appellant or respondent but that of her husband appears in the category of respondents. Her failure to join her co-sharers in the Letters Patent Appeal cannot, however, debar the appellants from obtaining the relief which they seek.

MILLER, C. J.—I agree.

Appeal allowed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 477 OF 1917.

June 20, 1918.

*Present:—*Mr. Justice Fletcher and Mr. Justice Panton.SATIS CHANDRA BANDOPADHYA
AND OTHERS—DEFENDANTS—APPELLANTS*versus*

NATABAR DOME—PLAINTIFF—

RESPONDENT.

Bengal Village Chowkidari Act (VI B. C. of 1870), s. 1, applicability of—Services required, nature of—Evidence.

Each and every case that comes before the Courts in which there may be definite and conclusive evidence to satisfy the Court as to what was the nature of the services required from the service tenure-holder cannot be held to be governed by section 1 of the Bengal Village Chowkidari Act. [p. 363, cols. 1 & 2.]

Appeal against the decree of the District Judge, Bankura, dated the 9th December 1916, reversing that of the Munsif, 3rd Court, at Bishnupur, dated the 23rd December 1913.

Babus *Bepin Behari Ghose I* and *Satcowripati Roy*, for the Appellants.

Babus *Baidyanath Dutt* and *Bejry Oomax Chatterjee*, for the Respondent.

JUDGMENT.

FLETCHER, J.—This case comes up again on appeal to this Court from the final decision of the learned District Judge of Bankura, dated the 2nd September 1916, reversing the decision of the Munsif of Bishnupur. The plaintiff brought the suit for a declaration of his *dakbardari simandari chakran* right to the lands mentioned in the schedule to the plaint and also for recovery of possession thereof. The case was fought in this Court on more than one occasion. The plaint was filed in March 1909 and we are now in 1918, and it is unfortunate that litigation of this nature has dragged on for so many years and has not been finally decided yet. The case is this: The Government was persuaded in the year 1894 to appoint a Commissioner under the Chowkidari Chakran Act for the purpose of resuming the land in question on the statement that they were *chowkidari chakran* lands. These lands were resumed and transferred to the Maharaja of Bardwan, who transferred them to the *putniars*, who settled them with the defendants Nos. 4 and 5. The plaintiff brought the suit on the

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ground that the lands were not *chowkidari chakran* lands at all but that they were held by him and his ancestors on the footing that they should perform other duties in lieu of enjoying these lands. The case has been dealt with in this way: The learned District Judge has found that the duties which the plaintiff and his predecessors were bound to perform with reference to these lands were not the duties mentioned in Schedule I of the Chowkidari Chakran Act and that, therefore, the Government had no right to resume these lands under the provisions of the said Act. Apparently, that seems to be the view of the Government also. The learned Judge has also found that grave fraud was practised both on the Government officials and on the plaintiff with reference to the resumption of these lands and that, therefore, the lands cannot be taken to be resumed at all.

The second question raised by the appellants before us is this: It is said, that the plaintiff according to his own case was not a service tenure-holder at all but was a mere occupant of the lands, being permitted to occupy them in lieu of wages for performing the duties that were assigned to him. It may be that the first paragraph of the plaint as translated is not a very accurate translation. But from the prayer in the plaint it is quite clear that the plaintiff was not asking for a declaration of any such right but was asking for a declaration of his *dakbardari simandari chakran* right which was the right of a service tenure-holder, and the purpose for which he brought the suit was not to have his temporary right from which he might be dismissed any day declared. The real case is that the plaintiff wants to have a declaration of his *chakran* right to these lands.

Then it is said, on the decision of the case of *Lalu Deme v. Bejoy Chand* (1), that the provisions of the Chowkidari Chakran Act apply to *simandars* of the Thana in which the property is situated. But that case did not and could not decide that, each and every case that came before the Court in which there might be definite and conclusive evidence to satisfy the Court as to what was the nature of the services

(1) 33 Ind. Cas. 553; 43 C. 227; 20 C. W. N. 494.

required from the service tenure-holder was to be governed by section 1 of the Chowkidari Chakran Act. It stated the general rule as to the *simandari*. It did not say that the duties of the *simandars* who had been performing these duties from generation to generation fall within the terms of section 1 of that Act.

The judgment of the learned District Judge, I think, ought to be affirmed and this appeal dismissed with costs.

PANTON, J.—I agree.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1624 OF 1917.

April 22, 1918.

Present:—Mr. Justice Shah Din.

GHULAM AND OTHERS—PLAINTIFFS—
APPELLANTS

versus

JOWALA SINGH—DEFENDANT

—RESPONDENT.

Punjab Tenancy Act (XVI of 1887), s. 77 (3) (d)—Jurisdiction of Civil and Revenue Courts—Occupancy tenant, death of—Reversioner of deceased, claiming to succeed to occupancy—Suit by landlord to eject reversioner, nature of.

Where on the death of an occupancy tenant an alleged reversioner of his claims to succeed to his rights on the ground that the common ancestor of himself and the deceased tenant had occupied the land, his claim does not fall within clause (d) of sub-section 3) of section 77 of the Punjab Tenancy Act, and is, therefore, not one which can under the said sub-section be heard and determined only by a Revenue Court. [p. 364, col. 2.]

A suit by the landlord to eject the reversioner on the ground that he is not entitled to succeed to the land as occupancy tenant thereof, is cognisable by a Civil Court and not by a Revenue Court. [p. 364, cols. 1 & 2.]

Second appeal from the order of the Additional District Judge, Hoshiarpur, at Jullundur, dated the 20th March 1917.

Mr. Dalip Singh, for the Appellants.

Mr. Jagan Nath, for the Respondent.

JUDGMENT.—This appeal and Second Appeals Nos. 1625, 1626 and 1627 of 1917 are connected and they can all be disposed of in one judgment. The suits out of which these four appeals have arisen, were brought by the proprietors of four different plots of agricultural land which were comprised in

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the occupancy holding of one Attar Singh, deceased, who was succeeded by his widow, Musammât Santi. On her death mutations of the plots in question were effected in favour of one Jowala Singh, who had entered into possession of the said plots and who claimed that he had a right to succeed to them on the grounds that he was a collateral of Attar Singh, deceased, and that the lands had been held at one time by the common ancestor of himself and Attar Singh.

The present suits were instituted by the proprietors against Jowala Singh for possession of the four plots on the usual allegations that the occupancy holdings had been acquired by the father of Attar Singh, deceased, and not by the alleged common ancestor of the deceased and Jowala Singh. The Subordinate Judge decreed all the suits, holding that Jowala Singh had failed to prove that the lands in question had been held by the common ancestor of himself and Attar Singh. On appeal the District Judge has held, on the authority of *Mihan Singh v. Bhagwan Kaur* (1), that the suits are governed by the "proviso" to sub-section (3) of section 77 of the Punjab Tenancy Act, inasmuch as "the proper course for the plaintiffs was either to sue under clause (d) of the said sub-section to prove that the defendant had no right of occupancy or to sue under clause (e) to eject him." The learned Judge has accordingly set aside the decrees of the Subordinate Judge and sent back the cases to him with a direction that he should comply with the procedure laid down in the "proviso" to sub-section (3) of section 77 aforesaid.

In my opinion the view taken by the District Judge is clearly erroneous, and the suits as laid are cognizable by a Civil Court and are not governed by the "proviso" above referred to. It will be observed that in *Mihan Singh v. Bhagwan Kaur* (1) the defendants were admittedly "tenants" holding under the plaintiffs as their landlords, and the sole dispute between the parties was as to whether or not the defendants were "occupancy" tenants of the land on which stood the trees which they claimed to have a right to cut in case of need. The matter in dispute was, therefore, one which under clause (d) of sub-section (3) of section 77 of the Punjab Tenancy Act could be heard and

determined only by a Revenue Court, and upon that ground the "proviso" to that sub-section was clearly applicable to the case. In the present cases, on the other hand, the defendant, according to the allegations in the plaint, is not a tenant of the plaintiffs but is a mere trespasser; and as he claims to succeed to the lands in dispute as an alleged collateral of the deceased occupancy tenant and on the ground that the common ancestor of himself and the deceased tenant had occupied the land, his claim clearly does not fall within clause (d) of sub-section (3) of section 77 of the Act and is, therefore, not one which can under the said sub-section be heard and determined only by a Revenue Court, cf. *Mewa Singh v. Nathu* (2):

For the reasons given, I hold that the suits as laid are cognizable by a Civil Court and the "proviso" to sub-section (3) of section 77 of the Punjab Tenancy Act does not apply to them. I accordingly accept all the four appeals, set aside the orders of the District Judge and remand the suits for a fresh decision on the merits. The plaintiffs will get their costs in this Court and other costs will be costs in the cause.

Appeal accepted.

(2) 22 P. R. 1894.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1415 OF 1916.

July 20, 1918.

Present:—Sir Henry Richards, Kt., Chief Justice, and Mr. Justice Tudball.

NANHEY MAL—DEFENDANT—

APPELLANT,

versus

CHAIT RAM AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Negotiable Instruments Act (XXVI of 1881), ss. 64, 76—Bill of exchange—Presentment, necessity of—Damage caused by non-presentment—Burden of proof.

The payee of a bill of exchange endorsed it to the plaintiff and subsequently became insolvent. The plaintiff sued the drawer and drawee of the bill without having presented the bill to the latter either for acceptance or for payment. It was found that the drawer had drawn the bill against goods supplied to the drawee:

(1) 37 Ind. Cas. 390; 111 P. R. 1916.

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Held, (1) that no presentment having been made the drawee was not liable on the bill at all;

(2) that the onus of showing that the drawer could not suffer damage from want of presentment lay on the plaintiff;

(3) that the drawer having supplied goods to the drawee as the value of the bill of exchange it must be presumed that he had suffered damage from want of presentment and that, therefore, he too was not liable on the bill.

Second appeal from a decree of the Officiating Subordinate Judge, Farrukhabad.

Dr. Surendro Nath Sen, for the Appellant.

The Hon'ble Dr. Tej Bahadur Sapru, for the Respondents.

JUDGMENT.—This appeal arises out of a suit instituted on foot of a *hundi*. It appears that the appellant Nanhey Mal sent certain potatoes to Hari Kishore, a firm in Calcutta. Nanhey Mal drew a bill payable at sight on Hari Kishore at Calcutta. The bill was in favour of Mathra Das Mohan Lal, who sold it the very same day to the plaintiffs, that is, on the 2nd of April 1913. The plaintiffs sent the *hundi* in an unregistered letter to their agent at Cawnpur. The letter and the bill appear to have miscarried in the post, but owing to the carelessness of the plaintiffs the loss was not discovered for nearly fourteen months afterwards. Some negotiations proceeded between the plaintiffs and Nanhey Mal with a view to getting a duplicate. Exactly what form those negotiations took is not clear, but it would seem that if the plaintiffs had given satisfactory evidence of the loss and had offered an indemnity to Nanhey Mal, the latter might have been compelled by proper proceedings to give a duplicate. No such proceedings were in fact ever taken—but the present suit was instituted on the 14th of April 1915. Hari Kishore was made a party as also was Nanhey Mal. Admittedly the bill of exchange was never presented either for acceptance or payment to Hari Kishore nor apparently was even a demand made from the latter. The Court of first instance dismissed the suit as against Hari Kishore but gave a decree as against Nanhey Mal. The lower Appellate Court confirmed the decree. Nanhey Mal appeals. The other persons who were parties to the appeal in the Court below are not parties to this appeal. The question is, whether Nanhey

Mal is liable under the circumstances Section 64 of the Negotiable Instruments Act provides that a bill of exchange must be presented for payment in the manner mentioned in that and subsequent sections. Section 76 provides that no presentment for payment is necessary in certain circumstances. The section says: "No presentment for payment is necessary, and the instrument is dishonoured at the due date for presentment, in any of the following circumstances." Clause (d) says, "as against a drawer if the drawer could not suffer damage from want of such presentment." This Court has held that the onus of showing that the drawer could not suffer damage from want of presentment lies on the holder suing on the bill. Admittedly in the present case no such proof was given. As a matter of fact in the present case Hari Kishore received potatoes from Nanhey Mal for the value of the *hundi*, in other words, it was the way in which Hari Kishore was paying for the potatoes. It is quite impossible to say under these circumstances that Nanhey Mal could not have suffered damage by reason of the non-presentation for payment of the bill to Hari Kishore. The person in whose favour this bill was drawn has gone bankrupt and a similar fate conceivably might have happened to Hari Kishore. We allow the appeal, set aside the decrees of both the Courts below and dismiss the suit as against the appellant with costs in all Courts.

Appeal allowed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1831 OF 1914.

April 25, 1918.

Present:—Sir Henry Rattigan, Kt.,
Chief Judge, and Mr. Justice LeRossignol.
FAIZ BAKHSH AND OTHERS—DEFENDANTS—
APPELLANTS

versus

NIAMAT KHAN AND OTHERS—PLAINTIFFS—
Musammat SAKINA AND OTHERS—

DEFENDANTS—RESPONDENTS.

*Punjab Land Revenue Act (XVII of 1887), s. 117—
Partition of shamilat—Decision of Revenue Officer,
whether res judicata—Procedure.*

FAIZ BAKHSI v. NIAMAT KHAN.

The question whether the *shamilat* of a village should be partitioned in accordance with ancestral shares or *hasab rasad khewat* is a question of title, within the meaning of section 117 of the Punjab Land Revenue Act and is triable by a Civil Court. [p. 366, col. 2.]

Where a Revenue Officer without observing the formalities of a trial by a Civil Court decided that the *shamilat* of a village should be partitioned in accordance with ancestral shares:

Held, that the proceedings of the Revenue Officer not being taken under section 117 of the Punjab Land Revenue Act, his decision could not operate as *res judicata* in a subsequent civil suit. [p. 366, col. 1.]

Second appeal from the decree of the Divisional Judge, Hoshiarpur, dated the 23rd April 1914.

The Hon'ble Mr. Fazal-i-Hussain, for the Appellants.

Bakshi Tek Chand, for the Respondents.

JUDGMENT.—Khairu Khan, son of Aziz Khan, one of the respondents in this case, has died leaving a widow. She has not yet been brought upon the record, but inasmuch as her late husband did not appear in the Courts below and was merely a *pro forma* defendant, we see no necessity for further delaying the hearing of this case which has now been before the Courts for five years.

The main question for decision here is whether the *shamilat* of the parties' village is to be partitioned in accordance with ancestral shares or *hasab rasad khewat*; in other words, what is the measure of the parties' rights in the *shamilat*? The Courts below have decreed in favour of the plaintiffs and have held that possession of *khewat* land is the sole measure of the rights of the parties in the *shamilat* land, and the defendants, who contend that the correct measure in the *shamilat* is their ancestral shares, have come to this Court on second appeal.

The first point urged on behalf of the appellants was that inasmuch as the Revenue Officer, who carried out the partition, decided after consideration that ancestral shares were the proper measure, he must be taken to have decided the matter under section 117 of the Land Revenue Act and that the matter is *res judicata*. In this view we are unable to concur, for the Revenue Officer does not purport to have been acting under section 117. The question was one of title, and was, therefore, triable by a Civil Court. The Revenue Officer did not observe the formalities of a trial

by a Civil Court; he did not call for a plaint, nor did he call for evidence, nor did he style himself a Civil Court, nor did he draw up a decree. On the contrary he styled himself Assistant Collector of the 1st grade and his order is headed 'Mode of partition.' It is quite clear to us that neither in essence nor in form were the proceedings of the Revenue Officer proceedings taken under section 117 of the Land Revenue Act, and this objection is, therefore, overruled.

The only remaining point is that dealing with the merits of the case. The village was originally a Zemindari village, and on equitable as well as on general grounds the case for partition according to ancestral shares appears to be by far the stronger. But the Courts below have decided in favour of the *hasab rasad khewat* theory on the ground that, though in the statement of the proprietors appended to the pedigree table it is laid down that *shamilat* on partition shall be divided according to ancestral shares, there is a statement in clause No. 10, sub-clause (4), of the *wajib-ul-arz* that partition shall be according to possession and they have held that this statement, which is in violent conflict with the first mentioned, must be preferred, inasmuch as it is reproduced in the proprietary column in the *jamabandi*. Where the lower Courts have gone wrong is in assigning a necessarily higher value to the *jamabandi* entry than to the entry in the *wajib-ul-arz*, for the *jamabandi* entry is a mere reproduction of the results obtained from enquiry from the proprietors of the village and the best evidence of the results of that enquiry is to be found in the pedigree table entries and in the *wajib-ul-arz*. The entries in the *jamabandi* and the entries in *wajib ul-arz* and pedigree-table are both of them portions of the revenue record, and the *jamabandi* entries are certainly not of greater weight than the entries in the other papers. Now, the statement in the pedigree-table, on which reliance is placed by the appellants, is a very detailed statement showing how the village was settled, what the original rights were and how the possession of the various members of the village community, after originally being based upon ancestral shares, became founded on actual possession. The document goes on to say that, although

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in respect of the *khewat* land possession is the sole measure of right, the partible *shamilat* land on partition shall be distributed according to ancestral shares. It is obvious from this that the attention of the declarants was directed to the very question which is now claiming a decision from us, and that they gave a categorical answer in favour of distribution according to ancestral shares. The statement, on the other hand, on which the respondents rely, is a statement which was not a necessary portion of the answer to the question to which it purports to be a part of the answer. That statement purports to have been made in reply to a question regarding forest, waste, culturable or unculturable, reclaimed waste, grazing land and impartible land. Sub-clause (4) is headed "Impartible land", and with regard to that the statement is that cattle stands, roads, etc., shall not be liable to partition. Then follows the statement relied upon by the respondents, which is totally unnecessary and superfluous "The remainder shall be partitioned according to possession." Now this statement upon which the respondents base their claim is unreliable for these two reasons, first, it was quite uncalled for by the question, because the question referred only to impartible property and not to partible, secondly, if it was necessary to mention partible property it was quite unnecessary to mention the measure of right in that partible property and when it is weighed against the clear statement appended to the *shajra nasb* in which the partition of the *shamilat* as a whole is adverted to and an answer with reasons is supplied, its value cannot be but very small, and the almost irresistible conclusion must be that *hasab rasad khewat* was introduced by mistake. In our opinion there can be no doubt as to the relative value of the two conflicting entries and we hold that the *shamilat* of this village is divisible among the parties in accordance with their ancestral shares.

We, therefore, accept the appeal and dismiss the plaintiffs' suit with costs throughout.

Appeal accepted.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1255 OF 1916.

July 26, 1918.

Present:—Sir Henry Richards, Kt., Chief Justice, and Mr. Justice Tudball.

HASAN ALI KHAN—PLAINTIFF—

APPELLANT

versus

AZHARUL HASAN AND OTHERS—

DEFENDANTS—RESPONDENTS.

Mortgage of entire interest in sixteen-annas mahal—Groves, whether included in mortgage.

The owner of a sixteen-annas *mahal* obtained decrees against certain persons who had certain rights in the *mahal* as grove-holders. In execution of these decrees he put up to sale the interest of the grove-holders and purchased it himself. Subsequently he mortgaged his entire interest in the *mahal* to the plaintiff without any sort of reservation.

Held, that the interest of the grove-holders acquired by the mortgagor merged in his estate as *zemindar* and was included in the mortgage. [p. 368, col. 1.]

Second appeal from a decree of the Subordinate Judge, Allahabad.

Mr. Peary Lal Banerji, (with him Messrs. B. E. O'Connor and S. A. Haidar), for the Appellant.

Mr. Nihal Chand for Mr. W. Wallach (with him Mr. Haribans Sahai), for the Respondents.

JUDGMENT.—The facts connected with this appeal may be shortly stated as follows:—One Ali Mazhar having become the owner of the sixteen-anna Mahal mortgaged the same to the plaintiff's predecessor. The mortgage is most comprehensive in its terms, the mortgagor purporting to mortgage his entire interest without any sort of reservation. A decree was obtained on foot of this mortgage. The property was sold and purchased by the plaintiff or his predecessor. The present suit is brought to recover certain fractional shares in three groves. It appears that prior to the mortgage which we have mentioned above, Ali Mazhar obtained decrees against certain persons who had certain rights as grove-holders. In execution of these decrees he put up to sale the interest (whatever it was) of the grove holders and purchased it himself. The argument put forward on behalf of the defendants is that this interest was an interest separate altogether from the *Zemindari* and it did not form portion of the mortgaged property, and consequently

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did not pass to the plaintiff when he purchased under the mortgage decree. It seems to us that this contention is not sound. We have already mentioned that the acquisition of the grove-holders' interest was prior to the mortgage and we have referred to the terms of the mortgage deed. There was no reason of any kind why the interest of the grove holders should not merge in the inheritance. Ali Mazhar was the sole owner of the sixteen anna Mahal. At that time there was no reason why it would in any way be for the benefit of Ali Mazhar to keep outstanding the interest of the grove-holders. It is absolutely clear under the circumstances of the present case that the interest of the grove-holders, purchased and acquired by Ali Mazhar, merged in his estate as Zemindar. Furthermore, the very terms of the mortgage-deed are quite wide enough to include and comprehend every interest that he possessed at the date of the mortgage in the sixteen-anna Mahal which he sold. We allow the appeal, set aside the decree of the lower Appellate Court and restore the decree of the Court of first instance with costs in all Courts.

Appeal allowed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

APPEAL FROM APPELLATE DECREE NO. 162
OF 1916.

November 29, 1916.

Present:—Mr. Mittra, Offg. A. J. C.
DEOCHAND AND OTHERS—DEFENDANTS—
APPELLANTS

versus

BINJRAJ—PLAINTIFF—RESPONDENT.

Mortgages, consolidation of, whether permitted—Transfer of Property Act (IV of 1882), s. 61.

The rule of consolidation of mortgages is a technical rule of English Law and is not founded on general principles of justice. Even prior to the enactment of the Transfer of Property Act the rule was not applicable to India [p. 369, col. 1.]

A mortgagor or a person claiming under him is, therefore, in the absence of a contract to the contrary, entitled to redeem a subsequent mortgage without redeeming an earlier mortgage. [p. 369, col. 1.]

Appeal against the decree of the Divisional Judge, Nerbudda Division, Hoshangabad, dated the 3rd December 1915, confirming that of the Subordinate Judge, Khandwa, dated the 31st July 1915.

Dr. H. S. Gour, for the Appellant.

Mr. G. P. Dick, for the Respondent.

JUDGMENT.—On the 4th of April 1872, Sebastian and J. C. Desouza executed a simple mortgage of their house in Khandwa in favour of the defendants' predecessors. The principal sum of Rs. 600 was payable with interest at the rate of 2 per cent. per month after twelve months. On the 31st of July 1872 the same mortgagors executed a usufructuary mortgage of the same house (Exhibit P-1). On the 4th July 1914, the plaintiff purchased from J. C. Desouza and P. V. Desouza, son of Sebastian Desouza, their right, title and interest in the house. The plaintiff made a deposit under section 83 of the Transfer of Property Act, which was refused. Hence this suit for redemption of the mortgage, dated the 31st July 1872.

The defendants denied the title of the plaintiff to redeem, and claimed Rs. 1,048 for repairs and improvements said to have been made to the house. They further claimed that the plaintiff is bound to pay the money due under the prior mortgage of the 4th April 1872, and the amount claimed for mortgage money due on the two mortgages was Rs. 10,202-1-0.

The first Court held on oral evidence that the consideration for the second mortgage included the amount due under the prior mortgage, and allowed Rs. 45 as cost of reconstructing a wall. To this interest at 9 per cent. from the end of Sambat year 1959 was added. The rest of the claim for improvements was dismissed. The plaintiff was also directed to pay the principal amount secured by Exhibit P-1, that is, Rs. 1,236. The mortgagees' costs were disallowed on the ground that they had improperly refused the tender or deposit made under section 83 of the Transfer of Property Act. On appeal, the learned Divisional Judge has confirmed the decree, and this appeal has been filed by the mortgagees.

The first point for decision is, whether the plaintiff is bound to redeem the mort-

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gage of the 4th of April 1872. There is no contract to that effect. Under the Transfer of Property Act, section 61, as interpreted in *Tajjo Bibi v. Bhagwan Prasad* (1), the mortgagees cannot claim that the earlier mortgage should also be redeemed, but the case is not governed by the Transfer of Property Act, but by the law which prevailed prior to its enactment. Apart from contract, the rule of consolidation was recognised by the Bombay High Court in *Vithal Mahadev v. Daud* (2). A different view was, however, taken in *Odoy Churn Rana v. Bhujohury Janah* (3). In a later case, *Narayan Venkoba v. Pandurang Kamat* (4), the rule was held to be a technical rule of English Law, and not founded on general principles of justice and was, therefore, held to be inapplicable to the Mofussil of Bombay. Even the Madras High Court, which takes a different view [*Subramania Aiyar v. Balasubramania Aiyar* (5)] of the interpretation of section 61, seems to concede this right to the mortgagee, if the law of limitation places no obstacle in his way [*Balasubramania Nadar v. Sivaguru Asari* (6)], but in the present case there is such an obstacle. The ruling in *Shitalal v. Nanhelal* (7) is more in accordance with the Allahabad view than the Madras view. I hold, therefore, that the plaintiff is entitled to redeem the mortgage in suit, without redeeming the earlier mortgage.

It is urged that, under the terms of Exhibit P-1, the mortgagors had only a right to redeem within two years, the stipulated period for the redemption of the mortgage. This is a view which cannot be accepted. The term was fixed for the convenience of the mortgagors, but the document provides that even if the money is offered within the two years, the mortgagees were bound to accept the same. The document also provided that the mortgagors were at liberty to sell the house within the said period, if they wished to do so. These provisions were laid down in the

(1) 16 A. 295; A. W. N. (1894) 93; 8 Ind. Dec. (n. s.) 192.

(2) 6 B. H. C. R. A. C. J. 90.

(3) 11 W. R. 310, 2 B. L. R. App. 45; 1 Ind. Dec. (n. s.) 1062.

(4) 7 B. 536; 4 Ind. Dec. (n. s.) 354.

(5) 30 Ind. Cas. 317; 33 M. 927; 29 M. L. J. 195.

(6) 11 Ind. Cas. 623; 21 M. L. J. 562 at p. 565.

(7) 17 Ind. Cas. 129; 8 N. L. R. 123.

interests of the mortgagors, not of the mortgagees. They cannot be read so as to restrict the rights of the mortgagors to a redemption within the period of two years. The law allows them 60 years for redemption, and a contract curtailing that period of redemption would be void, if the document could be interpreted in the way suggested by the appellants, but I hold that such an interpretation cannot be accepted. The mortgage was only a security for a debt. It does not provide for the mortgagees being owners of the property after the two years, and if it did, it would, in effect, so far be a mortgage by conditional sale. In *Laxman Devideen v. Bajji Bai* (8) it was held that such mortgages did not execute themselves upon default of payment on the due date, and this is in accordance with the decision of their Lordships of the Privy Council in *Gokuldoss v. Kripa-ram* (9). Assuming, therefore, that there was an implied contract that the mortgagees were to be the owners of the property, if they failed to pay the principal sum after two years, their right of redemption was not lost, as the Punjab Code, which contained a chapter regarding redemption, and the spirit of the Bengal Regulation XVII of 1806 were regarded as in force here, previous to the Central Provinces Laws Act of 1875.

It is urged that the mortgagees' possession became adverse when they commenced to improve the house. It is difficult to see how it could be adverse merely because the mortgagees made improvements, in respect of which they can only claim a charge, so far as the improvements are authorised by law. It is not an unequivocal communication of an intention to hold as owner. It is quite consistent with the position of a mortgagee with a charge for the money so spent. However, the so-called improvements have not been proved except a petty item of Rs. 45 said to have been spent in Sambat year 1959, that is the year 1903, and as the present suit was instituted on the 12th of October 1914, no question of a title by prescription arises in the case.

(8) 8 C. P. L. R. 113.

(9) 13 B. L. R. 205; 3 Sar. P. C. J. 279.

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The last point argued is that the mortgagees' costs have been improperly disallowed. The reason given by the first Court for disallowing their costs is that they have improperly refused to accept the deposit made under section 83. The Subordinate Judge adds that they might have been paid the additional amount, had they claimed it. The lower Appellate Court thinks that the additional item of Rs. 45 was not claimable by the mortgagees. The claim for Rs. 45 has been decreed upon the evidence of D. W. No. 3, who says that a wall had fallen down and it had to be re-built. I am not prepared to differ from the first Court's view on this point. No doubt the contract between the parties does not provide for any such claim, but I think the provisions of the Transfer of Property Act in this respect merely codify the rules of equity. It is, however, unnecessary to pursue this subject further. The mortgagees made a preposterous claim for over Rs. 11,000 and they have succeeded in obtaining a decree for Rs. 1,333. Under these circumstances the order for costs does not call for interference on my part. The appeal is dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1482 OF 1916.
July 26, 1918.

Present:—Mr. Justice Phillips and
Mr. Justice Kumaraswami Sastri.

ABDUL HASHIM SAHIB AND OTHERS—
PLAINTIFFS—APPELLANTS

versus

KADER BATCHA SAHIB (DIED) AND
OTHERS—DEFENDANTS—RESPONDENTS.

Specific Relief Act (I of 1877), s. 39—Mortgage—Lease by mortgagee—Suit by mortgagor for declaration that mortgage was unsupported by consideration and for its cancellation, maintainability of.

Plaintiff sued for a declaration that a mortgage executed by him in favour of 1st defendant was not supported by consideration and for cancellation of the instrument. The 1st defendant had leased one of the items of the property in dispute to the 2nd defendant, whose title as lessee was upheld in a suit brought by him against the plaintiff.

Held, (1) that the mortgage-deed could not be cancelled, inasmuch as the matter had passed beyond the stage of contract to that of an executed conveyance

and the deed was neither void nor voidable for non-payment of consideration; [p. 372, col. 1; p. 371, col. 2]

(2) that the plaintiff was not entitled to relief by way of cancellation of the deed, also on the ground that the parties could not be put in *status quo ante* by reason of the lease executed by the 1st to the 2nd defendant; [p. 372, col. 2.]

(3) that the prayer for declaration could not be granted inasmuch as there was no proof of any danger to the mortgagor's title to the properties. [p. 371, col. 2; p. 372, col. 2.]

Second appeal against the decree of the District Court, Salem, in Appeal Suit No. 105 of 1915, preferred against the decree of the Principal District Munsif, Salem, in Original Suit No. 451 of 1914.

Mr. P. N. Marthandam Pillai, for the Appellants.

Mr. T. R. Venkatarama Sastri, for the Respondents.

JUDGMENT.

PHILLIPS, J.—In this case the plaintiffs sued for a declaration that the suit mortgage deed is not supported by consideration and is void and for its cancellation. The plaintiff properties were mortgaged by the plaintiffs to the 1st defendant and it has been found that the consideration money was not paid. The 1st defendant, however, leased one of the items to the 2nd defendant who is now in possession, and it has been decided in another suit that the 2nd defendant is entitled to retain possession and that his lease is valid. The 2nd defendant's lease is based on the plaintiff mortgage deed inasmuch as he is a lessee of the mortgagee and to the extent of the possession of the 2nd defendant, the mortgage deed must be held to be valid.

The plaintiffs' suit has been dismissed on the ground that it will not lie under section 39 of the Specific Relief Act, because the document is neither void nor voidable and there is no apprehension of any injury to the plaintiff's right. It has been contended before us that the mortgage deed is a void document inasmuch as no consideration has passed. It has no doubt been held that a suit will not lie to compel a person either to lend or to borrow money, that is to say, the Court will not decree specific performance in a suit to enforce the execution of such a contract and it is contended that, if plaintiff cannot sue for specific performance, he must be entitled to have the contract cancelled. In this case, however, there is

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something more than a contract to mortgage, because the mortgage deed has been executed and registered and possession has been given under it. It is, therefore, a complete conveyance of a mortgage right to the 1st defendant.

This case is on all fours with the case reported as *Basingappa v. Virupaxapa* (1). There it was held that, in a case where the mortgagee had failed to pay consideration for the mortgage deed, plaintiff was not entitled to bring a suit under section 39 of the Specific Relief Act. The other side relied on *Ramaswami Chettiar v. Sundara Reddier* (2) and *Kumarappan Chettiar v. Narayanan Chettiar* (3). In the first case, the suit was brought by the mortgagee to enforce his mortgage when he had not paid any consideration for it and it was held that, inasmuch as there was no debt due, there was nothing to be charged on the land and the mortgagee could not enforce his charge on the land before he had paid the mortgage-money. In *Kumarappan Chettiar v. Narayanan Chettiar* (3) also the plaintiff was mortgagee without possession and sued to enforce the mortgage for which no consideration had been paid. In those two cases, Spencer, J., held that the mortgage was a nullity and was inoperative. I think the present case can be distinguished from those cases on the ground that possession has been given under the mortgage, even if it can be held that a mortgage is void when it has merely been executed without consideration and nothing further has taken place. In *Tirumal Raju v. Pandla Muthial Naidu* (4), where only part consideration was paid, the mortgage was held to be valid, as also in *Rashik Lal v. Ram Narain* (5), where reference is made to *Tatia v. Babaji* (6), where Farran, C. J., pointed out the distinction between a perfected conveyance and a mere contract. In *Govindammal v. Gopalachariar* (7) it was held that the execution of a sale-deed

completed the contract and the fact that there was no consideration for it did not make it void. Under section 58 of the Transfer of Property Act: "A mortgage is the transfer of an interest in specific immoveable property for the purpose of securing the payment of money advanced or to be advanced," so that on execution of a registered deed in accordance with section 59, the mortgage would be complete although the mortgage money had not actually been paid to the mortgagor. It is difficult to draw a distinction between the transfer of immoveable property by way of sale and a transfer by way of mortgage. If a *śāla* is complete by the execution of the registered instrument, it appears to me that a mortgage is also complete and can be enforced. The mortgagor would not then be entitled to sue for cancellation of the instrument, but if the consideration was not paid to him, he would have his remedy in damages for breach of the contract. This view does not, I think, conflict with the principle that a suit will not lie to enforce a contract to lend or to borrow, for in this case, the contract has been completed by the conveyance and it is not a case of suing to enforce the contract. Under section 39 of the Specific Relief Act plaintiff cannot bring a suit because the document is not void nor is it voidable.

It is, however, contended that his prayer for a declaration should be granted. So far as the 2nd defendant is concerned, it has been decided by a Court of law that he is not entitled to such a declaration. As against the 1st defendant a decree declaring that no consideration passed might be justifiable, but a declaration to this effect is only asked for jointly with a declaration that the deed is void, and it seems to me that the declaration as to consideration should not be decreed as both the lower Courts have found that plaintiff has no reasonable apprehension of danger and plaintiff has not asked for this particular relief alone against 1st defendant.

The second appeal is, therefore, dismissed with costs.

KUMARASWAMI SASTRI, J.—The plaintiff is the appellant. He [sued] for a declaration

(1) 5 Bom. L. R. 392.

(2) 23 Ind. Cas. 805.

(3) 35 Ind. Cas. 455.

(4) 9 Ind. Cas. 289; 35 M. 114; 21 M. L. J. 169; 1911 1 M. W. N. 113; 9 M. L. T. 236.

(5) 13 Ind. Cas. 573; 34 A. 273; 9 A. L. J. 193.

(6) 22 B. 176; 11 Ind. Dec. (N. S.) 699.

(7) 16 M. L. J. 524.

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that the deed of mortgage executed by him was not supported by consideration, for cancellation of the deed, for a declaration that the lease executed by the 1st defendant in favour of the 2nd defendant was not binding on plaintiff. Though there is a prayer for "confirming the possession of item No. 1 by the plaintiff" only the two declarations prayed for were valued and stamp duty paid thereon. The defendant executed a lease of item No. 1 in favour of the 2nd defendant on the 7th September 1911 for a period of 3 years, and at the date of the suit (12th June 1914) the lease had about three months to run. The 2nd defendant filed Original Suit No. 248 of 1912 on his lease, alleging that plaintiff obstructed him and got a decree in his favour restraining the appellant from disturbing his possession which, it is now admitted, was confirmed on appeal.

Various defences were raised but for the purpose of this second appeal it is necessary to consider only two, namely, that plaintiff's remedy was only to sue for the consideration recited in the deed, assuming that it was not paid, and that plaintiffs are not entitled under the Specific Relief Act for the relief claimed.

Both the District Munsif and District Judge dismissed the suit on the preliminary ground that the plaintiff was not entitled to the declarations sought for, even assuming that the allegations in the plaint are true.

As regards the prayer for the cancellation of the mortgage deed, I think it must fail. A distinction has to be drawn between a case where the matter rests simply on contract and where it has passed to the stage of an executed conveyance and, in the latter case, mere non-payment of consideration will not render the transaction void or voidable. See *Rashik Lal v. Ram Narain* (5), *Balingappa v. Virupaxapa* (1). The question has also been fully discussed by Wallis, C. J., in Appeal No. 64 of 1916. In the present case no fraud, misrepresentation or mistake is alleged and no case has been made out for cancellation.

Another ground for refusing the prayer is that the parties cannot be put on *status quo ante* as the mortgagee has executed a lease of one of the items of property which has been upheld as against the plaintiff. It is unnecessary to decide whether a mortgagee

who pays no consideration can, by the simple expedient of transferring his mortgage right or leasing a portion of the property, plead the transfer in bar to a suit for consideration or whether it is not competent to any Court as against such mortgagee to cancel the document in so far as it affects rights not transferred to any *bona fide* third party, as the lease in this case has been held to be binding on the plaintiff in the suit filed by the lessee and the matter is concluded between the parties. It is well settled that, when a contract is voidable, the right to determine it is subject to the condition that an innocent third party will not be affected by the cancellation or even a wrongdoer in case of delay on the part of the party entitled to rescind and that as a condition to a rescission there must be restitution *in integrum*, so that the parties may be put in *status quo* by the Court. See *Olough v. L. & N. W. Railway Company* (8), *Western Bank of Scotland v. Addie* (9), *Erlanger v. New Sombrero Phosphate Co.* (10).

As regards the prayer for a declaration that the mortgage is not supported by consideration, it is clear that a mortgage affects the property only to the extent to which money is advanced as security, *Ramaswami Chettiar v. Sundara Reddiar* (2), *Kumarappan Chettiar v. Narayanan Chettiar* (3). If there was no consideration, there would be nothing for the mortgagor to pay when a suit is filed. Though there may be cases where a Court will grant a declaration or injunction on proof of danger to the mortgagor's title to the properties, I do not think there is anything in the allegation in the plaint which would justify a Court in exercising its discretion in favour of the mortgagor who has come to Court 3 years after the execution of the deed of mortgage. Both the lower Courts are of opinion that plaintiffs have no reasonable apprehension of any serious injury in the future.

In the result the second appeal fails and is dismissed with costs.

M. C. P.

Appeal dismissed.

(8) (1872) 7 Ex. 26 at p. 34; 41 L. J. Ex. 17; 25 L. T. 708; 20 W. R. 189.

(9) (1867) 1 H. L. (Sc.) 145 at p. 165.

(10) (1878) 3 A. C. 1218; 39 L. T. 269; 26 W. R. 65.

GOPI CHAND v. MALAN.

PUNJAB CHIEF COURT.
FIRST CIVIL APPEAL NO. 280 OF 1916.
May 1, 1918.

Present:—Sir Henry Rattigan, -KT., Chief
Judge, and Mr. Justice LeRossignol.

GOPI CHAND—PLAINTIFF—APPELLANT
versus

Musammal MALAN AND OTHERS—DEFENDANTS
—RESPONDENTS.

Hindu Law—Adoption of daughter's son, validity of—Ceremonies, necessary—Custom, special, proof of—Aroras of Lahore District.

In the Punjab an elaborate religious ceremony is quite unnecessary for a valid adoption according to Hindu Law but there must at least be a formal giving and taking of the child to be adopted. [p. 374, col. 1.]

The adoption of a daughter's son by a Hindu is opposed both to the Hindu Law and the general agricultural custom of the province, and a person setting up such an adoption must prove a special custom in favour of its validity. [p. 374, col. 2.]

There is no special custom among the Aroras of Lahore District which permits the adoption of a daughter's son. [p. 375, col. 1.]

First appeal from the decree of the Senior Subordinate Judge, Lahore, dated the 25th October 1915.

Messrs. Govind Das and Jowala Parshad, for the Appellant.

The Hon'ble Pandit Sheo Narain and Mr. Manohar Lal, for the Respondents.

JUDGMENT.—Attra Mal, from whom the property in suit has descended, had five daughters by his first wife, but no son. On the 14th December 1888 he executed a Will wherein he mentioned that Gopi Chand, the son of his daughter Musammal Viro, had been adopted by him and brought up by him as his own son. He did not, however, in this Will nominate his grandson Gopi Chand as his successor, but made a certain disposition of his property which benefited Gopi Chand after the death of Musammal Ganga Devi, the wife of Attra Mal. Subsequently, Attra Mal married again, cancelled his Will of 1888 and made another testament by which he divided all his property between his two wives. On the 16th May 1900, i.e., the date on which the second Will was executed, Gopi Chand executed a deed by which he relinquished all claims upon Attra Mal's property, for consideration and undertook not to bring any claim after the death of Attra Mal, against his widows and daughters. Subsequently, Attra Mal married a third time and a son Kidar Nath was born to him. On the

23rd of January 1909, Attra Mal died and his son Kidar Nath succeeded to him but Kidar Nath himself died on the 2nd of December 1909. A few days later on the 28th of December 1909, Musamma Malan, the mother of Kidar Nath, executed a deed by which she surrendered Kidar Nath's estate in favour of her husband's nephew Rakha Mal in return for an allowance, and the present plaintiff Gopi Chand now comes into Court and prays for a declaration that this agreement of the 28th of December 1909 shall not affect his reversionary rights.

The plaintiff does not claim the succession to Attra Mal; he admits that on the death of Attra Mal, Kidar Nath succeeded to his estate; he also admits that Musammal Malan has a life-interest in the estate, but he contends that as the brother by adoption of Kidar Nath, he is entitled to the reversion on the death of Musammal Malan. The defence was that Gopi Chand plaintiff was never adopted by Attra Mal and that even if a form of adoption was gone through, such an adoption would be invalid under the Hindu Law. It was further contended that even if Gopi Chand had been validly adopted by Attra Mal, by his deed of the 16th May 1900 he had renounced all claims upon Attra Mal's estate.

The Senior Subordinate Judge found, rightly, that though the plaintiff may have been treated by Attra Mal as a son, he was not formally adopted by him; further that if he was formally adopted by Attra Mal, such adoption by Attra Mal of his daughter's son was not countenanced by Hindu Law and had not been shown to be valid by a custom obtaining in the tribe of Aroras of the Lahore District, and he has dismissed the plaintiff's suit.

The plaintiff has appealed to this Court and on his behalf we have heard his Counsel at great length on these points, viz., whether, as a matter of fact, Attra Mal did adopt the plaintiff, and whether such adoption by a grandfather of his daughter's son is valid according to the alleged custom set up by the plaintiff, and we have come to the conclusion that the decision of the Court below must be upheld.

As regards the *factum* of adoption, there is not one single witness out of the 17

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produced by the plaintiff who states that there was a formal giving and taking of the child. We are quite prepared to concede that an elaborate religious ceremony is quite unnecessary, at any rate, in the Punjab for a valid adoption, but we are equally satisfied that there must be a formal giving and taking of the child to be adopted. It is also alleged that Attra Mal on two occasions performed the marriage of the plaintiff, but there is not one iota of documentary evidence in support of this. Not one single *tambol* entry has been produced and yet on the occasions referred to marriage presents must have been given. Again, although in many documents the plaintiff has described himself as the son of his natural father, in not one document has he described himself as the son of his alleged adoptive father. Again, even among the plaintiff's own witnesses' statements there is much discrepancy as to whether he performed the *kirya korm* of Attra Mal. Attra Mal himself, except in his Will of 1888 wherein he says he has adopted the plaintiff and brought him up like a son, has not described him as his son, but in his Will of 1900 he described him as son of Arjan and of his daughter. Now, in 1900 if the plaintiff had been formally adopted by Attra Mal he was the next heir, for at that time Kidar Nath had not been born; in fact, Attra Mal had not yet married Kidar Nath's mother; so that it is difficult to understand why Gopi Chand should have been willing to renounce a portion of his inheritance unless he was conscious that there was some doubt as to either the *factum* or the validity of his adoption.

With regard to the validity of the adoption, we are unable to find on the record anything approaching proof of a special custom at variance both with agricultural custom and with the personal law of the parties. The custom set up by the plaintiff is admittedly in conflict with Hindu Law which prohibits the adoption of a daughter's son; but on behalf of the plaintiff Mr. Gobind Das has contended on the strength of *Sohnun v. Ram Dial* (1), in which it was held that in cases where the right of adoption is admitted or is found to prevail and the parties are not members of an

agricultural tribe, the burden of proof ought to lie on those who deny that a particular kind of adoption, e.g., that of a daughter's or sister's son, cannot be made, that the *onus* lay on defendant in this case. From a perusal of the authority it is quite clear that the foregoing *dictum* does not represent the real meaning of the learned Judges, but that it contains a redundancy of negatives; for "cannot be made," "can be made" should be read. With all respect we are entirely unable to agree with that *dictum*, which appears to us to be opposed both to law and to common sense. The particular adoption propounded by the plaintiff is one which is prohibited by the personal law of the parties; it is one which is opposed to the general agricultural custom of the province, and for those reasons no presumption can be raised in its favour; in fact, the presumption must be entirely against its validity. It is a canon of law that all persons propounding a special custom or usage must prove that custom, and to hold the contrary appears to us to be impossible. Certain old decisions also have been relied upon to prove that among Aroras the adoption of a daughter's son is customary. Those rulings are cited in the margin (foot note*). In all these cases, however, the *onus* was laid upon the persons challenging the adoption and all that was held was that the adoption of a daughter's son, etc., had not been shown to be invalid. Those cases were considered in *Ralla v. Budha* (2), and in that judgment it was held that there was no presumption in favour of the validity of the adoption of daughter's or sister's son. That decision dealt with a case of a tribe of persons governed by agricultural custom; in the present case we are dealing with persons who are not governed by agricultural custom, but by their personal law, and in such a case the lack of a presumption as to the validity of an adoption which is contrary to their personal law is even greater than in the case of persons who follow agricultural custom. In short, we are not prepared to disagree with the

(2) 50 P. R. 1893.

**Ganda Mal v. Musammat Radhi*, 57 P. R. 1886, *Musammat Parmeshri v. Vasdeo*, 35 P. R. 1895 *Uttam Chand v. Bysakhi*, 77 P. R. 1878, *Harri Singh v. Gulaba*, 50 P. R. 1874.

(1) 79 P. R. 1901; 107 P. L. R. 1901.

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finding of the learned Senior Subordinate Judge that it has not been proved that the plaintiff was formally adopted by Attra Mal, and we are entirely in concurrence with his conclusion that no special custom has been proved amongst the Aroras of Lahore which permits an individual to adopt his daughter's son, and we dismiss the appeal with costs.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 35 OF 1917.

March 8, 1918.

Present:—Mr. Kotwal, A. J. C., and Mr. Findley, A. J. C.

HAZARILAL AND OTHERS—PLAINTIFFS—
APPELLANTS

versus

HAR GOVIND—DEFENDANT—RESPONDENT.

Succession—Possession, suit for, by reversioners—Burden of proof—Evidence Act (I of 1872), ss. 32, 64, 65—Book of genealogy, kept by Bhat, entries in, admissibility of—Copy of original which is in existence, whether admissible—Secondary evidence.

In a suit by the reversioners of a deceased proprietor for possession of the property left by the deceased, the onus lies on the plaintiffs not only to prove that they are the reversioners entitled to succeed but that they are the only nearest reversioners; at any rate they must satisfy the Court that to the best of their knowledge there are no nearer heirs. [p. 376, col. 2; p. 377, col. 1.]

In order to prove their relationship with a deceased proprietor the plaintiffs relied on a Bhat's book of genealogy. It was admitted by the Bhat who produced it that the book was largely a copy made by his father from an older book which was then in existence. It was not alleged that the old book was in such a state that it could not be produced or that the entries made therein were indecipherable owing to age or owing to other cause:

Held, that having regard to sections 64 and 65 of the Evidence Act the entries in the book could not be looked upon as independent and original ones, nor could they be admitted as secondary evidence inasmuch as the original entries which were in existence could have, but had not, been produced. [p. 378, col. 1.]

Obiter dictum.—If the book had not been held to be inadmissible under sections 64 and 65 of the Evidence Act, it would have been admissible under section 32, sub-sections (2) and (5) of the Act, inasmuch as it was a recognised duty and pursuit of a Bhat to keep a genealogy of the families he was interested in and he had as a rule special means of knowledge in the matter. [p. 378, col. 2.]

Appeal from the decision of the Sub-Judge, Betul, dated the 29th March 1917.

JUDGMENT.—The plaintiffs-appellants Hazarilal, Beharilal, Misrilal and Dhanrajsued the defendant-respondent Har Govind in the lower Court for possession of a 10 annas 8 pice share in three villages Khandara, Kutarlik and Bodi with proportionate *sir* and *khudkasht* and also for a similar share in two houses and compounds situated in Khandwa and Badnur respectively. Their case was that Hazarilal and Beharilal were, together with one Mehangilal, the nearest reversioners of one Balaram, deceased in 1879, to whom the whole of the above property belonged, but as Mehangilal declined to join in the suit only a two-thirds portion was sued for. It was further alleged that, after Balaram's death, his widow *Musammatt* Jadao remained in possession of the property until her death in 1914 and that thereafter the respondent Har Govind had entered into illegal possession thereof. The plaintiffs-appellants Misrilal and Dhanraj are the purchasers under a registered sale-deed, dated 23rd August 1915, of half the property in suit from the first two plaintiffs-appellants and hence they also joined in the suit. A detailed genealogical table showing the relationship between Hazarilal, Beharilal and Mehangilal was also included in the plaint.

The defendant-respondent Har Govind admitted in the lower Court that Balaram had been the owner of the property in suit; his death, however, was placed by him in 1889, not 1879: it was further admitted that his widow *Musammatt* Jadao held the property until her death in 1914, Balaram having left behind him no lineal heirs. The correctness of the genealogical tree included in the plaint was, however, denied in the defendant-respondent's written statement, dated 20th December 1915, except to the extent that Balaram's wife was *Musammatt* Jadao and his father Ghasiram. Apart from an alleged Will by *Musammatt* Jadao dated 1914 in his favour, Har Govind pleaded that he was, with her deceased

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husband's consent, adopted by *Musammatt Jadao* about 1900. The plaintiffs, on their part, denied the adoption. On these and connected pleadings, the lower Court framed issues and, finally held that the plaintiffs-appellants had failed to prove that Hazarilal and Beharilal were, with Mehangelal, the nearest reversioners of the deceased Balaram. In particular, on the large amount of oral and documentary evidence on record the Subordinate Judge found that Hazarilal's relationship with Balaram as shown in the plaint was established but that Beharilal's was not. The Subordinate Judge further held that the plaintiffs-appellants, apart from the failure to establish Beharilal's alleged relationship, had also failed to establish the fact that there were no other persons who, if alive, would have, as descendants of Balaram, excluded them from inheritance. He found it in these circumstances unnecessary to examine in detail into the defendant-respondent's title to hold the disputed property and accordingly dismissed the suit.

In this appeal the plaintiffs have challenged the lower Court's finding that they had failed to establish Beharilal's relationship with Balaram. In the second place, they contested the lower Court's finding that it was incumbent on them to establish any further than they have attempted to do the fact that there were alive no other nearer or as near reversioners than Hazarilal, Beharilal and Mehangelal, and it was urged in this connection that the onus of proving the existence of any nearer heirs rested on the defendant-respondent Har Govind. These are the two main positions of the appellants. The defendant-respondent, while supporting the lower Court's decree, challenged its finding that Hazarilal in particular had established his relationship with Balaram alleged in the plaint.

The Subordinate Judge has written a careful and well-considered judgment in the case and has examined the large mass of evidence on record in a clear, painstaking manner. We find it convenient to deal first with the second contention raised in appeal, *viz.*—that the Subordinate Judge was wrong in holding that, even assuming that Hazarilal and Beharilal had established their alleged relationship with Balaram, it was incumbent

on the plaintiff-appellant to definitely show further that there were no other possible nearer or as near heirs alive who were entitled to succeed to the inheritance. An attempt has been made by the learned Counsel for the appellants to urge that, in view of the allegation in paragraph 5 of the plaint that Hazarilal, Beharilal and Mehangelal were the nearest heirs of Balaram and of the defendant's reply in paragraph 4 (c) of his written statement, dated 20th December 1915, in which two steps in the descent of Hazarilal and Mehangelal from Radhakishan (*vide* the table in plaint) were challenged, the plaintiffs-appellants had sufficiently discharged the onus of proof which rested on them in this connection and that on the findings of the lower Court on the evidence, a presumption arose that there were no nearer heirs. The Sub-Judge has dealt with this matter in paragraph 53 of his judgment. It has been established, and is indeed admitted by the appellants, that the genealogical tree in the plaint is not complete or exhaustive. They themselves have proved that Radhakishan had, besides the four sons shown in the plaint, two other sons Baijnath and Dinanath, both of whom left issue and had in due course grandsons. There is absolutely no evidence on which we can assume that none of the descendants of Baijnath and Dinanath were alive on the death of *Musammatt Jadao* and it is, in our opinion, clear that the onus of proof rested in this connection on the appellants. They came to Court claiming that they were the nearest reversioners, and it is clear that the defendant-respondent denied their genealogical table except to a specified extent, *vide* paragraph 5 of defendant-respondent's written statement, dated 20th December 1911. In these circumstances the appellants had to establish not only that they were reversioners entitled to succeed on *Musammatt Jadao's* death but that they were the only and nearest reversioners. The case reported as *Rama Row v. Kuttiya Gounden* (1) in reality gives appellants no help: the circumstances there were entirely different and indeed the principle on which we think the question we are considering must be dealt with was there enunciated, *vide* the remarks of Trotter and

(1) 34 Ind. Cas. 294; 30 M. L. J. 514; 3 L. W. 334
19 M. L. T. 275; 40 M. 654.

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Seshagiri Aiyar, J.J., at page 515*, viz. that the appellants in this case were bound to satisfy the Court that to the best of their knowledge there were no nearer heirs. It must further go against the appellants that, in a case like the present, where the utmost exactitude and precision in detail was necessary, they came to Court with a genealogical tree which in the course of the litigation their own evidence has shown to be incorrect and incomplete. We are asked to assume or presume that where the appellants have failed to show any branches of the family, such branches must be extinct. Such an argument, however, begs the whole question at issue and it is impossible to consider it seriously. It does not seem to us possible or necessary to decide whether these omissions were made *bona fide* or otherwise by the plaintiffs when they filed this suit: however made, they seem to us fatal to their case. It is clear in any event that the information as to the existence of branches not shown in the plaint was available to them had they sought it with diligence, for they themselves have in this suit produced much of the evidence on the point and that evidence is largely unfavourable to their contentions in this connection. It is impossible, even on the plaintiffs-appellants' own evidence, to feel satisfied that there are not alive descendants of Chandrabhan, Baijnath or Dinanath who are not as much or more entitled to succeed than the appellants are and it seems unnecessary, therefore, to labour this point further. No grounds have been shown on which we could question the propriety of the finding of the Sub-Judge in paragraph 53 of his judgment and it is, in our opinion, correct.

The learned Counsel for appellants has in this connection raised an incidental point, viz., that if we were unable, as we are, to hold that the onus of showing there were nearer heirs rested on the defendant-respondent, the case was one for remand for a detailed finding on the point involved. We cannot, however, see our way to accept this contention. The plaintiffs came to Court alleging they were the nearest reversioners of Balaram; we have already remarked that their position was directly challenged by the

defendant-respondent in almost every respect, and the first issue framed by the lower Court was broad and explicit enough to cover specifically the matter involved. This particular matter was indeed the pivot of the plaintiffs' case and we can in these circumstances see no reason for granting the prayer for a remand.

Our finding on the point of the appellants' failure to prove the non-existence of nearer or as near heirs necessarily governs this appeal, but it may be of interest to consider shortly the first ground urged in appeal. The contention herein involved is to the effect that Beharilal's connection with Balaram, the last male holder of the estate, as alleged in the plaint has been sufficiently established on the pleadings and evidence and that the Sub-Judge was wrong in taking the contrary view. After a long and exhaustive analysis of the evidence produced, the lower Court has summed up its finding as regards Beharilal in paragraph 50 of its judgment. Everything turns in this connection on the evidential value, if any, which may be attached to the Bhat's book of genealogy (P. W. No. 31) which has been produced by P. W. No. 1 Kesarilal. It is first of all necessary to consider whether this book was admissible in evidence at all, it having been pressed strongly in this Court on behalf of the respondent that this Exhibit was as a matter of fact totally inadmissible. The lower Court has dealt with the question of the admissibility or non-admissibility of this Exhibit in paragraph 8 of the judgment. The book contains the professed genealogical tree of many families including that of Radhakishan, the alleged common ancestor of the family. The first point urged on behalf of the defendant-respondent is that the book produced was not admissible as secondary evidence, in view of the admission by P. W. No. 1 Kesarilal that the present book is merely largely a copy made by his father from an older book of his which is still in existence. The critical portion of the evidence of the witness in this connection is as follows:—

"I have got another book, *potha*, also. It is old.....I do not recollect exactly what that book contains, but it contains all the genealogies which are contained in this

*Page of 30 M. L. J.—Ed.

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present book....This book is new book. My father told me that he made entries in this new book from the old book he had." Now accepting these statements as correct, what is the exact concrete position? It is that there is in existence the original book containing not only the genealogical trees of this family but of many others also. It is not clear, nor does it seem to us material, whether the new book contains any entirely new matter or independent entries concerning other families. Concerning the family involved in this litigation, the position is that the entry we are concerned with is merely a copy—a copy, it is true, made by the original authority himself but still a copy—made long after the original entry made in the original book. This latter, although old, is still in existence and it has not been alleged that it is in such a state that it cannot be produced or that the entries made therein are indecipherable owing to age or other cause. We are of opinion, therefore, that, having regard to sections 64 and 65 of the Indian Evidence Act, the entry in the present book cannot be looked on as an independent and original one, nor can it in the circumstances be admitted as secondary evidence of an original which is in existence and could have, but has not, been produced. So far as the genealogical entry we are considering is concerned, the statement of Kesarilal, if it means anything at all, means that this entry is a copy of the one in the old book. It has not been suggested that the father in compiling this new book added amending or independent matter regarding the old entries. On the contrary the new entries we are concerned with are mere copies of the original ones. The witness P. W. No. 1 is perfectly clear on that point and distinctly says that the new book contains all the genealogies which appeared in the old one and that his father told him he had made the new entries from those in the old one. For these reasons we are constrained to hold that the present Exhibit P-31 was not admissible in evidence; it is clearly not, so far as the genealogy of the present family is concerned, an independent creation by the author but a mere copy of the original, and the fact that this copy was made by the author himself does not materially affect the

legal position [*Of: Surjan Singh v. Sardar Singh* (2)]. In view of this finding we need not discuss the question, whether the book was admissible under section 32, sub-section (2), (5) or (6) of the Evidence Act, but we may say that, had we not been constrained to hold that it was inadmissible as being secondary evidence of an original which could have been and was not produced, the book would probably have been admissible in evidence under section 32, sub-sections (2) and (5), because it is a recognised duty and pursuit of a Bhat to keep the genealogy of the families he is interested in and he has as a rule special means of knowledge in the matter. Whether, however, even if technically admissible, it would have had much evidential value in view of the many difficulties which arise on the evidence in connection with details of the family given therein and more particularly of the fact that the original fountain-head and source, *viz.*, the old book, has not been produced at all, is, of course, entirely another matter which we need not discuss. Ruling out, therefore, as we feel we must do, Exhibit 31 there is, of course, practically no evidence worthy of the name on which we can hold Beharilal's relationship with Balaram established. The oral evidence of the first six witnesses which has been so carefully weighed by the Sub-Judge is demonstrably insufficient to establish the plaintiffs' case on this point. There is, as compared with the question of Hazarilal's relationship with Balaram, a striking and almost total lack of other independent evidence, such as statements or admissions of parties since dead which would support plaintiffs' case, and it is clear that Beharilal's relationship is the weak if not entirely missing link in the chain. These findings necessarily govern the appeal and we find it unnecessary, therefore, to give a finding on the question which has been urged strongly on behalf of defendant-respondent that the Sub-Judge's decision that Hazarilal's relationship with Balaram has been proved on the evidence is unjustifiable. The appellants' failure not only to establish Hazarilal's connection but also to show that there are no other subsisting nearer or as near

(2) 2 Bom. L. R. 942; 23 A. 72; 5 C. W. N. 49; 27 I. A. 183; 7 Sar. P. C. J. 752.

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heirs besides Hazarilal, Beharilal and Mehangelal, necessarily implies the failure of their suit. The appeal is accordingly dismissed with costs on appellants.

Appeal dismissed.

PUNJAB CHIEF COURT.

MISCELLANEOUS SECOND CIVIL APPEAL No. 1524
OF 1917.

April 29, 1918.

Present:—Mr. Justice Chevis.

WARYAM SINGH AND ANOTHER—DEFENDANTS
—APPELLANTS

versus

HARNAM SINGH AND ANOTHER—PLAINTIFFS
—ABDULLA AND OTHERS—DEFENDANTS—

RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, r. 23, O. XLIII, r. 1 (n)—Remand, order of—Appeal—Finding of fact, whether can be disturbed—Punjab Pre-emption Act (I of 1913), s. 15 (c)—Patti, whether sub-division of village—Question of fact.

In an appeal from an order remanding a case under Order XLI, rule 23 of the Civil Procedure Code, the Chief Court can no more go into questions of fact than it can in the case of second appeals.

The question whether the *pattis* of a village are real sub-divisions of the village within the meaning of section 15 (c), *secondly*, of the Punjab Pre-emption Act is a question of fact. For the decision of that question the Court should have regard only to the fact whether the *pattis* are actual sub-divisions of the village, and not for what reason the sub-divisions were made.]

Miscellaneous second appeal from the order of the District Judge, Ludhiana, dated the 10th April 1917.

Mr. *Devi Dayal*, for the Appellant

Mr. *Roshan Lal*, for the Respondents.

JUDGMENT.—Plaintiff's suit to pre-empt based on the ground that he was a proprietor of the *patti* in which the land is situated, was dismissed by the first Court on a finding that it was not proved that there were any sub-divisions in the village. The first Court held that the *pattis* were sub-divisions for purposes of revenue only. The District Judge on appeal held that the *pattis* were real sub-divisions and remanded the case for decision on the merits. The vendees appeal.

The appeal is one from an order remanding the case under Order XLI, rule 23, and not a second appeal, but I can no more go into questions of fact than I could if this were a second appeal [see *Sawan Singh v. Mothu* (1)].

Now it seems to me that the question whether these *pattis* are real sub-divisions of the village is a question of fact. In *Nanni Mal v. Sheo Nath* (2) Plowden, J., held without any doubt that it was a matter of fact whether the town or city comprised sub-divisions, and if this is correct in the case of a town, why should it not be so in the case of a village?

I certainly cannot say that there is no evidence to support the finding of the learned District Judge, seeing that the Revenue Records speak of *pattis*. As to the argument that the *pattis* were only created for convenience of collection of revenue, I take it that the real question is simply whether there are actual sub-divisions of the village, not for what reason were the sub-divisions made.

As I can find no good reason for interfering with what seems to me a finding of fact, I dismiss this appeal. No order as to costs, as I have not gone fully into facts.

Appeal dismissed.

(1) 23 Ind. Cas. 817; 85 P. R. 1914; 162 P. L. R. 1914; 120 P. W. R. 1914.

(2) 64 P. R. 1887.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 957 OF 1917.]

March 15, 1918.

Present:—Mr. Justice Phillips and

Mr. Justice Krishnan.

AGA MAHAMMADALLY BEG SAHIB

—PLAINTIFF—APPELLANT

versus

CHANDRAGIRI VENKATAPAYYA

AND OTHERS—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), ss. 60, 62—Mortgage, usufructuary—Discharge of mortgage by appropriation of usufruct working out for 37 years—Redemption, clog on—Option to redeem before term, whether personal covenant—Failure to exercise option, effect of—Suit to redeem before expiry of original

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term, whether premature—'Payable' in s. 60, meaning of—Tender, failure to make, on due date, effect of.

A postponement of the right to redeem a usufructuary mortgage for a period of 37 years is not a clog on the equity of redemption. Section 62 of the Transfer of Property Act itself recognizes the validity of such covenants. [p. 381, col. 2.]

Sarbdawan Singh v. Bijai Singh, 24 Ind. Cas. 705; 36 A. 551; 12 A. L. J. 927, *Srinivasa Aiyangar v. Radhakrishna Pillai*, 22 Ind. Cas. 54; 38 M. 667; 26 M. L. J. 47; 14 M. L. T. 547; (1914) M. W. N. 81 and *Chakkangal Govinda Menon v. Chakkangal Chathu Menon*, 22 Ind. Cas. 907, distinguished.

Under the terms of a usufructuary mortgage executed in 1902 the property was put in possession of the mortgagees and it was stipulated that the mortgage amount should be worked off by applying the usufruct in discharge, firstly, of the principal, and secondly, of the interest. In that way the mortgage could be discharged after 37 years. There was another stipulation that if payment of what was then due was made on 12th January 1912 the property should be handed over to the mortgagor, but if such payment was not made the mortgagees' possession was to continue on the same terms as before. No payment was made on 12th January 1912 but a suit for redemption was brought in 1916:

Held, that the postponement of redemption for 37 years, which was the necessary result of the mortgage covenant, was not a clog on the equity of redemption. [p. 382, col. 2.]

Held, also, (Krishnan, J., *dubitante*), that the option to redeem on 12th January 1912 was not a personal covenant, but was a provision inserted for the mortgagor's benefit and the option not having been exercised on the due date, the suit for redemption brought before the expiry of the original term was premature. [p. 382, col. 1.]

Per Krishnan, J.—Even assuming that section 60 applies and not section 62 (a) of the Transfer of Property Act, the suit must still fail as no tender was made on that day and as the right to make the tender or to redeem was not subsisting after that date or when the suit was brought. It is a necessary condition under section 60 that, when payment or tender is sought to be made, the mortgagor must have the right to make it, as the section speaks of the payment or tender of the mortgage money "at a proper time." For the time to be proper, the tender or payment must be one validly and properly made; and for that, the person making it must have at the time the legal right to make it. [p. 384, cols 1 & 2.]

The word 'payable' in section 60 seems to refer to the mortgagor's right rather than to his obligation and to imply no more than that the mortgagor should have a right to pay, the mortgagees being under a corresponding obligation to receive. [p. 384, col. 1.]

A covenant may be bad as a clog or it may be bad as an unconscionable bargain. The two are distinct and independent grounds. [p. 383, col. 1.]

Second appeal against the decree of the District Court of Godavari at Rajahmundry, in Appeal Suit No. 232 of 1916, preferred

against the decree of the Court of the Temporary District Munsif, Ramashandrapuram at Cocanada, in Original Suit No. 87 of 1916.

FACTS appear from the judgment.

Mr. B. Narasimha Row, for the Appellant.—The privilege to the mortgagor to redeem in January 1912 is a covenant for payment. The money became payable then within the meaning of section 60 of the Transfer of Property Act. Therefore the mortgagor had the right to redeem after that date. *Chakkangal Govinda Menon v. Chakkangal Chathu Menon* (1).

The provision in the mortgage-deed for discharge of the mortgage by the appropriation of the usufruct amounts to a postponement of the right to redeem for 37 years. That is virtually a clog on the equity of redemption. *Srinivasa Aiyangar v. Radhakrishna Pillai* (2) and *Sarbdawan Singh v. Bijai Singh* (3). The stipulation that the rent is to be taken at Rs. 20 a year shows that the arrangement was an unconscionable one and plaintiff was, therefore, entitled to be relieved against it.

Mr. M. Pataniali Sastri (with him Mr. C. Rama Row), for the Respondents.—The suit is premature: Section 60 of the Transfer of Property Act cannot apply as there was no obligation on the mortgagor to pay in January 1912. The option to pay on that date is not a personal covenant. The right to redeem accrued on that day and, when it was not exercised, it did not subsist afterwards. The mortgagor is bound by the original covenant which, it was expressly stated in the mortgage deed, was to continue in force on default by the mortgagor of the exercise of the option to pay in 1912.

Covenants for redemption after long periods are commonly inserted in mortgage-deeds. They do not amount to a clog. In fact, there is a statutory recognition of the right in section 62 of the Transfer of Property Act.

There was nothing unconscionable in the

(1) 22 Ind. Cas. 907.

(2) 22 Ind. Cas. 54; 38 M. 667; 26 M. L. J. 47; 14 M. L. T. 547; (1914) M. W. N. 81.

(3) 24 Ind. Cas. 705; 36 A. 551; 12 A. L. J. 927.

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stipulation for payment after 37 years. The covenant was express and the mortgagor was given the option to evade the restriction and to terminate the mortgage in 10 years. This he has failed to exercise and he has himself to blame for the consequences.

JUDGMENT.

PHILLIPS, J.—Plaintiff-appellant sued to redeem an usufructuary mortgage executed in 1902 (Exhibit B). Under that document the property was put in possession of the mortgagees, and it was stipulated that the mortgage amount should be worked off by applying the usufruct, Rs. 20 a year, in discharge, firstly, of the principal, and, secondly, of the interest. A calculation shows that the mortgage amount would be discharged in about 37 years. There is another stipulation that if payment of what is then due be made on 12th January 1912 the property should be handed over to the mortgagor, but if such payment were not made the mortgagees' possession was to continue on the same terms as before. The payment was not made on 12th January 1912 and this suit for redemption was brought in 1916 and has been dismissed as premature.

It is contended for appellant that the stipulation for payment in January, 1912 is a covenant for payment and that consequently the mortgagors are entitled to redeem as the time fixed for payment has expired. A perusal of the document shows that there is no personal covenant to pay and that the stipulation as to payment in 1912 is a provision inserted for the benefit of the mortgagors. They failed to avail themselves of the concession allowed and it is expressly stipulated that, in default, the original covenant is to continue in force. On this ground the appellant's contention cannot be supported.

It is next urged that the provision in the deed that the mortgagees are to remain in possession until the mortgage money is worked off is a clog on the equity of redemption, and that effect cannot be given to such a provision. In support of this proposition appellant's Counsel relies on three cases, *Sarbdawan Singh v. Bijai Singh* (3), *Srinivasa Aiyangar v. Radhakrishna Pillai* (2) and *Chakkangal Govinda Menon v. Chakkangal Chathu Menon* (1). The first of these cases laid down that the conditions fettering the

equity of redemption in that particular case could not be enforced, but the learned Judges observed that it is impossible to lay down a hard and fast rule as to what should and what should not be regarded as an improper restraint on the right of redemption. In *Srinivasa Aiyangar v. Radhakrishna Pillai* (2) a stipulation that the mortgage was to work itself out as a sale for the principal amount, if the mortgage amount was not paid on the stipulated date, was held to be unenforceable and that the right of redemption remained. The same two Judges in *Chakkangal Govinda Menon v. Chakkangal Chathu Menon* (1) held that a stipulation that the property should only be redeemed during certain months of each year was unenforceable but in that case also there was a personal covenant to pay and the provisions of section 60 of the Transfer of Property Act (Act IV of 1882) applied. On the other hand, postponement of redemption for long periods has been allowed by the Courts e.g., 23 years in *Rambaran Singh v. Ramker Singh* (4), 58 years in *Ram Prasad v. Jagrup* (5) and 59 years in *Dulari v. Lal Bahadur Singh* (6). Apart from the question of whether the onerous nature of the restriction is such as to justify a Court in refusing to enforce it, there is in this case a further point in respondents' favour, i.e., that a covenant for the mortgage money to be worked out by the usufruct is one that is not uncommon in this country and the validity of such a covenant has been recognised in *Tirugnana Sambandha Pandara Sannadhi v. Nallatambi* (7) and *Gunnam Dorayya v. Vadapalli Ayyamacharyulu* (8). In the latter case, to which one of the Judges in *Srinivasa Aiyangar v. Radhakrishna Pillai* (2) was a party, it was expressly laid down that such a covenant is not illegal according to the Indian Law. In fact such a covenant is expressly recognized in section 62, Transfer of Property Act (IV of 1882). The contention that the provisions

(4) 10 Ind. Cas. 243.

(5) 15 Ind. Cas. 830; 10 A. L. J. 157.

(6) 23 Ind. Cas. 129.

(7) 16 M. 486; 2-M. L. J. 272; 5 Ind. Dec. (N. S.) 1045.

(8) 25 Ind. Cas. 797; 27 M. L. J. 295; 16 M. L. T. 226; (1914) M. W. N. 648.

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of section 60 of that Act must be read apart from section 62 and that the right to redeem accrues when the money has become payable does not help the appellant, for it was held in *Tirugnana Sambandha Pandara Sannadhi v. Nallatambi* (7) that in a mortgage like the present redemption could not be sought before the mortgage was worked out, applying the general principle that the right to redeem and the right to foreclosure are usually co-extensive. It was held in *Husaini Begam v. Collector of Cawnpore* (9) that the principal money only becomes payable when the payment becomes obligatory on the mortgagor. That this construction is right, in so far as the obligation refers to a debt being payable, would appear from the fact that in a mortgage there may be no personal liability on the part of the borrower, although *prima facie* a loan involves a personal liability [*vide Ran Narayan Singh v. Adhindra Nath Mukerji* (10)] and if there is no personal covenant, there is no liability to pay and the money has not become payable. The conditions of the suit contract are such that no personal liability arises, and, therefore, it cannot be said, as contended before us, that the money had become payable as soon as the contract was signed. In this particular case the money cannot become payable as there is no personal covenant to pay; section 62 of the Transfer of Property Act must be applied and the mortgagors are only entitled to recover possession when the money is paid according to the terms of the contract. I may refer also to the decision of the Privy Council in *Bakhtawar Begam v. Husaini Khanam* (11), where it was held that the right to recover possession accrued when the mortgage debt was actually satisfied. I do not think this view of mine is opposed to *Rose Ammal v. Raja-*

rathnam (12), as in that case there was a personal covenant to pay. I would, therefore, hold that the plaintiff's suit is premature.

If it were necessary to decide whether the restriction on redemption is so onerous that effect should not be given to it, I would express my opinion that it is not. The parties entered into the contract with open eyes and the mortgagors were given an opportunity of evading the restriction, but failed to take advantage of it. I can see no reason why they should be given a further equitable relief. I would, therefore, dismiss this second appeal with costs of 1st respondent.

KRISHNAN, J.—I agree with my learned brother that this second appeal fails. The language of the mortgage-deed is too plain to admit of any reasonable doubt that the dominant intention of the parties was that the mortgage amount and interest were to be worked off by the usufruct of the property which was agreed to be taken at Rs. 20 a year, the property being retained in the mortgagees' possession for the requisite number of years to enable that to be done. An option is no doubt given to the mortgagors to pay the amount due on the 12th January 1912, but the document provides that if the money is not so paid, the "discharge is to take place only as aforesaid," that is, by the appropriation of the rent. The mortgagors, having failed to pay under that option, have lost their right to take advantage of it and their suit can succeed only if they have a right to redeem their mortgage by payment, in spite of the special stipulation to let the mortgagees remain in possession till the mortgage amount and interest are worked off by the usufruct. Admittedly the mortgage amount has not been so worked off yet. In fact a calculation shows that it requires $17\frac{1}{2}$ years to pay off the principal which has to be first paid under the terms of the document, and another 18 or 19 years to pay off the accumulated interest.

The learned Advocate for the mortgagors' assignee, who is the appellant before us, urged that, on the construction of the document itself, the mortgagors were

(9) 29 A. 471 at p. 474; 4 A. L. J. 375; A. W. N. (1907) 133.

(10) 38 Ind. Cas. 932; 32 M. L. J. 39; 21 M. L. T. 12; 15 A. L. J. 107; (1917) M. W. N. 94; 25 C. L. J. 121; 21 C. W. N. 383; 19 Bom. L. R. 194; 44 C. 383 (P. C.).

(11) 23 Ind. Cas. 355; 36 A. 195; 26 M. L. J. 474; 15 M. L. T. 389; (1914) M. W. N. 411; 18 C. W. N. 536; 16 Bom. L. R. 344; 12 A. L. J. 473; 19 C. L. J. 477; 1 L. W. 813; 41 I. A. 84 (P. C.).

(12) 23 M. 33; 8 Ind. Dec. (N. S.) 418.

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entitled to re-pay the mortgage amount due at any time after the 12th January 1912 as they pleased. I agree that this contention is untenable on the language of the document. He then argued that the covenant was a clog on the equity of redemption and should be treated as invalid and that it was no hinderance to the mortgagors' claim to redeem. It is impossible to argue that an express covenant between the parties that redemption shall take place only at the end of a given term should be ignored or set aside as a clog on the equity of redemption if that covenant is otherwise valid, in the face of the rulings in *Sri Raja Setrucherla Ramabhadra Raju Bahadur v. Sri Raja Vairicherla Surianarayana Raju Bahadur* (13), *Tirugnana Sambandha Pandara Sanadhi v. Nallatambi* (7), *Rose Ammal v. Rajarathnam* (12) and *Gunnam Dorayya v. Vadapalli Ayyamacharyulu* (8). Section 62 of the Transfer of Property Act itself recognizes the validity of such covenants.

The learned Advocate, however, relied on the rulings in *Srinivasa Aiyangar v. Radhakrishna Pillai* (2) and *Sarbdawan Singh v. Bijai Singh* (3) as authorities in favour of his argument. In the Madras case the covenant was one whose effect was to put an end to the mortgage itself, the property being treated as sold; and clearly that covenant was an absolute clog on the equity of redemption. In the present case we have only a postponement of the right to redeem for a period. In the Allahabad case, it was no doubt ruled that a postponement of the right to redeem may itself be a clog if it amounts to an unconscionable bargain. A covenant may be bad as a clog or it may be bad as an unconscionable bargain; the two are distinct and independent grounds, and it seems to me that it will lead to confusion of thought to mix them up. Assuming that a covenant to postpone redemption may be refused to be enforced if it is an unconscionable bargain, it is of no use to the appellant, as here the question of the nature of the bargain was not raised or discussed in the lower Courts and no evidence seems to have been given

of it. The appellant relies on the facts that the period fixed is about 37 years and that the rent is to be taken at Rs. 20 a year for the whole period, as showing that the arrangement was an unconscionable one. We do not know if the fixing of the rent was not more to the advantage of the mortgagors than that of the mortgagees, as no evidence has been given on the point.

As for the length of the period I am not able to say that it is enough in the present case to justify, by itself, an inference that the bargain was an unconscionable one. My learned brother has referred to cases where periods ranging from 28 to 59 years have been allowed. Furthermore, the mortgagors had the option to terminate the period in 10 years and their failure to do so is their own fault. The covenant in this case cannot, therefore, be set aside on the ground of its being an unconscionable one.

The last argument urged by the learned Advocate was that under section 60 of the Transfer of Property Act, if during the continuance of a mortgage the mortgage money becomes payable even for a day, the mortgagor at once got a right to redeem, which he could enforce at any time thereafter even though there was a covenant against it. He cited the case of *Chakkangal Govinda Menon v. Chakkangal Chathu Menon* (1) as an authority for this proposition, which he contended was applicable to the present case as the mortgage money was payable at any rate on 12th January 1912, if not afterwards. This argument seems to me to be very curious. It is based on the words "at any time after the principal money has become payable" in section 60 of the Act. The respondents' Vakil has tried to meet this argument by urging that the word "payable" in the section applies only when there is an obligation on the mortgagor to pay, which the mortgagee can enforce against him; although I think it is not necessary for me to decide the point as, in my view, the appellant's argument fails on another ground as stated below, I wish to guard myself against being understood as adopting this view. It seems to me to be opposed to the view expressed in *Rose Ammal v. Rajarathanam* (12), where

(13) 2 M. 314; 4 Ind. Jur. 500; 1 Ind. Dec. (N. S.) 489.

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Mr. Justice Shephard held that money might become payable by the mortgagor even though payment could not be enforced by the mortgagee. The reasons given in that case seem to me to have considerable force. Where a mortgagor stipulates with the mortgagee that, though he should not be called upon for payment for a given time, he should have the option to pay and redeem the mortgage during that time, it appears to me to be difficult to apply the doctrine of the co-extensiveness of the right to redeem and right to foreclose to this case and to refuse to him the very right to redeem that he has stipulated for, on the ground that the mortgagee could not sue him for money seems unreasonable; and a construction of section 60 of the Transfer of Property Act, which leads to that result seems to be of doubtful correctness. If, in this very case, for example the mortgage money had been tendered on the 12th January 1912 and had been refused by the mortgagee, the mortgagor's suit to compel acceptance and to redeem could hardly have been rejected and yet the view put forward will necessitate that result. The word 'payable' in section 60 seems to refer to the mortgagor's right rather than to his obligation and to imply no more than that the mortgagor should have a right to pay, the mortgagee being under a corresponding obligation to receive; the existence of a right in the mortgagee to enforce payment does not appear to me to be really necessary to make the word applicable. I do not, however, wish to pursue the matter further or give a final opinion on it, for I consider that even assuming section 60 applies and not section 62, clause (a), and that money was payable on the 12th January 1912, the appellant must still fail as no tender was made on that day and as the right to do so and redeem was not subsisting after that date or when the suit was brought. I think that it is a necessary condition under section 60 that when payment or tender is sought to be made the mortgagor must have the right to make it, as the section speaks of the payment or tender of the mortgage money "at a proper time." For the time to be proper, the tender or payment must

be one validly and properly made; and for that, the person making it must have at the time the legal right to make it.

I do not consider the ruling in *Ohankkangal Govinda Menon v. Ohakkangal Chathu Menon* (1) to be against this view. That decision seems to have proceeded on the ground that after the due date in 1899 the mortgage money was always payable, the arrangement referred to therein apparently not affecting it or the right to sue but only fixing a time for redemption and delivery of possession. It is, therefore, clearly distinguishable. I do not regard it as an authority for the proposition the appellant contends for.

As the appellant's arguments have all failed, his second appeal must be dismissed with costs of 1st respondent.

M. C. P.

Appeal dismissed.

PUNJAB CHIEF COURT.

MISCELLANEOUS FIRST CIVIL APPEAL No. 1099 OF 1917.

May 7, 1918.

Present:—Mr. Justice Shah Din and
Mr. Justice Chevis.JIWAN DAS—PLAINTIFF—APPELLANT
versusPIRAN DITTA AND OTHERS—DEFENDANTS—
RESPONDENTS.

Punjab Land Revenue Act (XVII of 1887), ss. 48, 158 (1)—Jurisdiction of Civil and Revenue Courts—Jagirdar, suit by, for declaration that he is entitled to receive land revenue in kind, maintainability of.

The plaintiff, a jagirdar or assignee of the land revenue of a village, sued the proprietors and tenants of the village for a declaration that he was entitled to recover one-fourth share of every kind of produce of the lands in the village and Rs. 2 per annum per well as *malikana* from the tenants and that the proprietors were only entitled to a one-fifth share out of it and had no right to interfere with the realisation by the plaintiff of the said share of the produce:

Held, that the suit as laid involved the question whether in the village in dispute land revenue should be paid to the jagirdar in cash or in kind, and that, therefore, it was not cognisable by a Civil Court, the matter being one which under section 48 of the Punjab Land Revenue Act only the Local Government could decide. [p. 385, col. 2.]

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Miscellaneous first appeal from the order of the Senior Subordinate Judge, Gujranwala, dated the 16th February 1917.

Mr. Moti Lal, for the Appellant.

Mr. Abdur Rashid and Sheikh Gulab Din, for the Respondents.

JUDGMENT.—The sole question for decision in this first appeal is whether the plaintiff's suit is cognizable by a Civil Court or not. The Subordinate Judge has answered this question in the negative, and has dismissed the suit on the ground of want of jurisdiction. The plaintiff has appealed to this Court.

The substance of the plaint, which is very prolix, has been given in the judgment of the Subordinate Judge. The plaintiff, who is *mahant* of a *dharamsala* in Sheikhpura, claims to be *jagirdar* or assignee of land revenue of a neighbouring village called Qilla Sahib Singh, the *jagir* being created in Sikh times for the maintenance of the above mentioned *dharamsala*. The *jagir* was granted in perpetuity "to enjoy the revenue thereof for the time being" conditional upon the good behaviour of the *mahant*. In this suit the plaintiff has impleaded as defendants 29 proprietors of the village and about 47 tenants, and he alleges, *inter alia*, that he has always been realising direct from the tenants one-fourth of the produce of the village lands out of which he has been giving one-fifth to the proprietors; and he has brought the present suit for a declaration that he as *adna malik* and *jagirdar* of Qilla Sahib Singh is entitled to recover one-fourth share of every kind of produce of the lands in the village and Rs. 2 per anrum per well as *malikana* from the tenants and that the proprietors are only entitled to one-fifth share out of it and have no right to interfere with the realization by the plaintiff of the said share of the produce.

It is clear from the allegations in the plaint that there is no dispute between the plaintiff and such of the defendants as are proprietors in the village regarding the status of the plaintiff; in other words, no question arises in this case as to whether the plaintiff is an *adna malik* or not. The gist of his claim is for a declaration that he as *jagirdar* or assignee of land revenue is entitled to receive the revenue in kind out of the landlords' share of the produce which has to be paid by the tenants to

the proprietors but which, as a matter of fact, has always been paid to him by the cultivators in the shape of one-fourth of the produce. Out of this he has been paying one-fifth share to the proprietors and has been appropriating the rest in his capacity of assignee of land revenue. The suit as laid, therefore, involves the question as to whether in the village of Qilla Sahib Singh land revenue should be paid to the *jagirdar* in cash or in kind; and under section 48 of the Land Revenue Act, this matter is one which only the Local Government can decide, and under section 158 (1) of the Act no Civil Court can exercise jurisdiction in respect of it. The Subordinate Judge was, therefore, right in holding that the suit as laid was not cognizable by a Civil Court.

But it has been urged by the plaintiff-appellant's Pleader, on the strength of *Rahmun v. Hasham* (1), that since the suit is one for a declaration under section 45 of the Punjab Land Revenue Act, it is exclusively cognizable by a Civil Court. The decision cited is a Single Bench decision and is opposed to an earlier decision of Mr. Justice Rivaz in *Bahadur Khan v. Sardar* (2) and also to a Division Bench ruling of this Court in a case printed as a footnote to 95 P. R. 1907 [*Shahya v. Karmi Khan* (3)]. In the last mentioned case the learned Judges of this Court approved of *Bahadur Khan v. Sardar* (2) and said: "It does not follow that because a Civil Court can entertain a declaratory suit in regard to title as entered in the Record of Rights, it will, therefore, have jurisdiction in declaratory suits of a different nature, covering matters specifically referred to in section 17 of the Tenancy Act." We entirely approve of this ruling, and hold that although the suit is one for a declaration, in view of the nature of the relief asked for by the plaintiff, it is excepted from the jurisdiction of the Civil Courts by reason of the provisions of the Land Revenue Act above referred to.

The appeal fails and is dismissed with costs.

Appeal dismissed.

(1) 7 Ind. Cas. 717; 73 P. R. 1910; 103 P. W. R. 1910; 144 P. L. R. 1910.

(2) 89 P. R. 1895.

(3) 95 P. R. 1907 (Foot-note); 120 P. L. R. 1908 note; 142 P. W. R. 1907.

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QUDH JUDICIAL COMMISSIONER'S
COURT.

EXECUTION OF DECREE APPEAL No. 44 of
1917.

April 23, 1918.

Present:—Mr. Lindsay, J. C.

PARMESHAR DIN—APPLICANT—

APPELLANT

versus

DEBI PRASAD—DECREE-HOLDER—

RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 11, O. XXI, rr. 55, 58, 60, 63—Res judicata—Finding not necessary for decision of suit, whether res judicata—Execution of decree—Attachment, withdrawal and revival of—Objection allowed—Declaration, suit for, by decree-holder, decree in, effect of—Decree reversed in appeal, but restored in second appeal—Attachment, whether revived.

Where it appears from the judgment of a Court that the real ground of decision is a particular finding which alone is sufficient for the disposal of the case, and that it has given other findings as well which are not necessary for the decision of the suit, the former finding is the only finding which operates as *res judicata*, especially when it is found that the judgment has been appealed from and that the Appellate Court has taken into consideration that finding alone. [p. 388, col. 1.]

Where an execution Court allowed an objection under Order XXI, rule 58, Civil Procedure Code, and referred the unsuccessful decree-holder to a regular suit, but did not pass any order under Order XXI, rule 60, of the Code raising the attachment, and the decree-holder thereafter filed a declaratory suit and obtained a decree in his favour:

Held, that in view of the provisions of Order XXI, rule 63, Civil Procedure Code, the result of the decree passed in the declaratory suit was to revive the attachment which had been previously carried out, even if it be assumed that the legal effect of allowing the objection had been to raise the attachment. [p. 388, cols. 1 & 2.]

Where the decree of a Court of first instance is reversed in first appeal but restored in second appeal, the result of the decision in second appeal is to revive the attachment which, under the provisions of Order, XXI, rule 55, Civil Procedure Code, is deemed to have been withdrawn in consequence of the decision in first appeal. [p. 388, col. 2.]

Appeal from the decree of the District Judge, Gonda, dated the 16th September 1917, upholding that of the Subordinate Judge, Bahraich, dated the 27th July 1917.

Chaudhri Ram Bharios Lal holding brief of Babu Bisheshwar Nath Srivastava, for the Appellant.

Mr. A. P. Sen, for the Respondent.

JUDGMENT.—The question for decision in this appeal is whether or not an application for execution of a decree made by the decree-holder respondent on the

30th of August 1916 is maintainable and whether it is barred by the rule of limitation.

The facts of the case must be set out at some little length. In the year 1904 a mortgage of a share of 1 anna in a village called Dahua was executed by one Sheo Narain in favour of the present respondent Debi Prasad. Sheo Narain was the brother of the present appellant Parmeshar Din and died in the year 1910.

After the mortgage had been executed, a suit was brought by other members of the family of Sheo Narain for cancellation of the deed of mortgage on the ground that the property mortgaged was joint family property which Sheo Narain had no power to encumber. This suit was decreed in February 1905. The decision was upheld in appeal. Subsequently Debi Prasad brought a suit against Sheo Narain for return of the mortgage money and obtained a simple money decree against him on the 18th of January 1909 for a sum of Rs. 1,680 odd. It is this decree which Debi Prasad is now attempting to execute.

Having got this money-decree, Debi Prasad proceeded to attach a 2-annas share in Mauza Dahua for the purpose of obtaining satisfaction in the execution department; and it is admitted that an attachment of this share was actually made at the end of May 1909. An objection was thereupon made to the attachment by two persons, namely, the present appellant Parmeshar Din and his uncle Gaya Prasad. They alleged that the 2-annas share attached was no longer the property of the judgment debtor. It was stated that a 1-anna 4-pie share had been relinquished by Sheo Narain in favour of Gaya Prasad. As regards the balance of an 8-pies share the case set up was that another brother of the judgment debtor, named Sitla Din, had made an oral bequest of this share in favour of Parmeshar Din. These objections were allowed on the 19th of June 1909 and by an order of the executing Court the decree-holder was referred to a regular suit. No order was passed at the time raising the attachment which had already been carried out.

The declaratory suit having been filed, a decree was passed in favour of Debi Prasad in April 1910 declaring that the 2-annas share which had been attached was liable

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to be taken in execution of the money decree. The Court held that the deed of relinquishment set up by Gaya Prasad and the oral bequest which was put forward by Parmeshar Din were not established. The opinion of the Court was that these transactions were wholly fictitious and collusive transactions, and that the property had never in fact passed out of Sheo Narain's hands. This decree was upheld in appeal by the learned District Judge of Gonda on the 1st of June 1910 and his judgment was allowed to become final.

Meantime the decree of January 1909 which was passed in favour of Debi Prasad against Sheo Narain was reversed in appeal by the District Judge of Gonda in the month of May 1910. Subsequently in an appeal made to this Court the decree of the first Court was restored by a judgment dated the 24th of August 1911. On the 22nd of August 1914 the decree-holder having got his money decree affirmed by the decision of this Court made an application for execution, a copy of which is Exhibit A-7. In this the whole of the facts were set out. The decree-holder informed the Court that his money-decree had been affirmed. He also mentioned in his application that the declaratory suit regarding the liability of the 2-annas share (which had been attached) to be taken in execution had been decided in his favour. He requested the Court to issue a notice under Order XXI, rule 22, to *Musammam Ram Dei* as being the widow and legal representative of Sheo Narain who had died meantime. A further prayer was that after the notice had been issued an order for sale should be made with reference to the provisions of Order XXI, rule 66. This application remained pending for a considerable time and was dismissed on the 6th of February 1915 for want of prosecution on the part of the decree-holder.

Another application was made on the 14th of June 1915, in which the decree-holder again asked for sale of the 2 annas share. In this application it was mentioned that the share was still under attachment, no order having been passed declaring that the attachment had been raised.

It was prayed, however, that, if for any reason the Court were of opinion that the previous attachment was not still subsisting, an order for attachment might be made preliminary to the order for sale. On the 13th of June 1916 this application was consigned to records on a joint application of the parties. It was represented to the Court that the parties were about to enter into a compromise.

Finally we come to the present application which, as I have already stated, is dated the 30th of August 1916. *Musammam Ram Dei* having died meanwhile, the present appellant Parmeshar Din has been impleaded as her legal representative on the allegation that the property which Sheo Narain held and which came to his widow for the period of her life has passed by inheritance to Parmeshar Din. I may also mention here that the decree of this Court dated the 24th of August 1911 was amended on the 19th of March 1915, it being declared that Debi Prasad would only be entitled to take out execution against such of the assets of Sheo Narain as had come to the hands of his legal representative *Musammam Ram Dei*, who was at that time alive.

Now that the present application for execution has been made, it has been resisted on a variety of grounds by the present appellant. Both the Courts below have dismissed his objections and held that the execution of the decree can proceed. The first plea taken by Parmeshar Din was that as a matter of fact he and Sheo Narain had continued to be members of a joint family until the time of the latter's death. Upon this point both the Courts below have decided against the objector. They have held, and there is, in my opinion, ample evidence to support the finding, that at the time of Sheo Narain's death he was separate in estate from his brothers. It has been sought to be argued here that this finding of the Court below is wrong in law, the ground taken being that in the declaratory suit which was decided finally by the order of the District Judge dated the 1st of June 1910 it was held that Sheo Narain and his brothers were at that time members of a joint Hindu family. There is indeed in the judgment of the first Court which dealt with that suit a

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statement to this effect. It appears, however, from the judgment that the real ground of decision was that the transfers which were pleaded in that suit both by Gaya Prasad and Parmeshar Din were held to be fictitious and fraudulent. That finding was sufficient for the disposal of the case; and it seems to me that any statement or finding in the Subordinate Judge's judgment to the effect that the family was joint was not necessary for the decision of the suit and consequently cannot operate now as *res judicata*. In this connection it is further to be observed that the judgment which must be looked to for this purpose, is not the judgment of the Subordinate Judge but the judgment of the District Judge, which was delivered on the 1st of June 1910. There the learned Judge came to a distinct finding that the transfers pleaded by Gaya Prasad and Parmeshar Din were fictitious; and it was upon this ground that it was held that the 2-annas share was liable to be taken in execution of Debi Prasad's decree. This point, however, is really one of minor importance. The principal matter to be decided now is whether or not the attachment of this 2-annas share, which was made in the month of May 1909, ceased at any time to subsist between the date upon which it was made and the 22nd of August 1914 when an application was made for execution. If it be found that the attachment was never removed, then it does not matter whether Sheo Narain died as a member of the joint family or whether he was separate in estate at the time of his death.

To come now to this principal question, the first argument which has been addressed to me in this connection is that the attachment ceased to remain in force when the objections of Gaya Prasad and Parmeshar Din to the execution were allowed on the 19th of June 1909. I have already stated that when these objections were accepted no order was passed removing the attachment. The appellant, however, relies upon the provisions of Order XXI, rule 60, and contends that the effect in law of allowing the objections was to release the property from attachment. This argument cannot, I think, be accepted, for it appears to me from the provisions of Order XXI, rule 63, that any order which could have

been passed under rule 60 for the release from attachment would have been subject to the result of the declaratory suit which was brought thereafter. In my opinion as soon as the decree-holder Debi Prasad obtained a declaration in his favour that the property was liable to be taken in execution, the attachment which had been previously carried out was revived. If any authority is needed for this opinion it will be found in the case reported as *Ram Chandra Marwari v. Mudeswar Singh* (1).

The next point argued is with reference to the provisions of Order XXI, rule 55. This rule lays down that where the decree is set aside or reversed, the attachment shall be deemed to be withdrawn. It also provides for a proclamation announcing the withdrawal of the attachment being made on application made by the judgment-debtor. No such application appears to have been made in the present case. I have already mentioned that the money-decree which Debi Prasad obtained on the 18th of January 1909 was reversed on the first appeal on the 18th of May 1910, and it may be argued on the language of rule 55 that the result of this decree was that the attachment made in the year 1909 must be deemed to have been withdrawn. The further fact remains, however, that the decree of the District Judge which produced this effect was in its turn reversed by a decree of this Court; and it is, therefore, to be considered what was the result of the lower Appellate Court's decree having been reversed in second appeal. There is no direct provision of the law on this subject laying down that the result of such a reversal would be the revival of the attachment which, under the provisions of the rule, is deemed to have been withdrawn. But upon principle it appears to me that there is no reason why such a result should not ensue when the decree of an Appellate Court is reversed by this Court. I may refer here to the provisions of section 144 of the Code of Civil Procedure, which lays down the principle that the result of a variation or reversal of a decree of the first Court is to place the parties in the *status ante quo*, and the section provides that an order for restitution can be made by

(1) 33 C. 1158.

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the Court of first instance on an application made for that purpose by the party entitled. It could not, I think, be denied that if, after this Court by its decree dated the 24th of August 1911 had restored the decree of the Court of first instance, the decree-holder had made an application to the first Court for restoration of the attachment, that application must necessarily have been allowed. There is not in terms any application to that effect made by Debi Prasad; but I have pointed out that in his application for execution dated the 22nd of August 1914, the decree-holder represented all the facts to the Court; and so far as I can see, the Court proceeded with that application on the footing that the attachment was still subsisting. I think that in the circumstances I am entitled to treat this application of the 22nd of August 1914 as being tantamount to an application to the Court to hold that the attachment previously made was still in existence. I hold, therefore, that the appellant is not entitled to succeed upon the plea based upon the provisions of Order XXI, rule 55. The consequence is that if it be held that the attachment still subsisted on the 22nd of August 1914, it must be taken as having been still subsisting when the present application of the 30th of August 1916 was made; for in the interval there has been no order of a competent Court to declare that the attachment has been raised. The Courts below were of the same opinion and I agree with them in thinking that the appellant is not entitled to succeed on the ground that the present application for sale of the property is not maintainable on the ground that no attachment was subsisting at the time the application was presented.

It has been conceded that if the Court holds that the attachment continued to remain in force from May 1909 till the date of the present application, then the appellant is not in a position to contend that, even if it were shown that Sheo Narain died as a member of a joint family, the attachment would not take effect and prevail over the passing of the property to the appellant by the rule of survivorship.

Lastly there is the question of limitation. The appellant seeks to defeat the present application by pleading that it has been

made more than three years after the date upon which the obstacle in the way of the decree-holder's proceeding with execution was removed. For this purpose the learned Counsel for the appellant relies upon the judgment of the District Judge dated the 1st of June 1910, in which it was held that Debi Prasad was entitled to bring this 2-annas share to execution for the purpose of satisfying his decree. Obviously this argument is not sustainable for, as has been pointed out, there was another obstacle in the way of the decree-holder, namely, that his simple money decree which he obtained in January 1909 had been reversed in appeal in May 1910. It was not till the 24th of August 1911, when this Court delivered its judgment, that Debi Prasad's right to this money decree was finally established; and so, although in June 1910 the right of Debi Prasad to bring this property to sale in execution was declared, the declaration availed him nothing so long as the money decree which he had obtained and which he was seeking to execute continued to be set aside by virtue of the appellate order of the 18th May 1916. It was only when this Court after reversing the lower Appellate Court's decree finally decided that Debi Prasad was entitled to this money that the last obstacle to the execution was removed from his path. If, as the learned Counsel for the appellant argues, limitation for an application in execution is to run from the date when the obstacle to execution of the decree is removed, then it is clear that Debi Prasad had three years from the 24th of August 1911 to apply to the executing Court. It is admitted that he made his application on the 22nd of August 1914 within three years from that date.

I have now dealt with all the questions which are raised in the memorandum of second appeal. In my opinion the pleas which are raised on behalf of the appellant must fail and I decide them against him. The result is that the appeal fails and is dismissed with costs.

Appeal dismissed.

UTTAM CHAND V. JANJI RAM.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 3009 OF 1917.

April 6, 1918.

Present:—Mr. Justice Shah Din.

UTTAM CHAND—PLAINTIFF—

APPELLANT

versus

-JANJI RAM AND OTHERS—DEFENDANTS—

-RESPONDENTS.

Registration Act (XVI of 1908), ss. 17, 50—Vendee claiming under unregistered deed, position of—Vendee under subsequent registered deed, whether can eject prior vendee.

The possession of a vendee who claims title under a sale-deed which for want of registration is inadmissible in evidence, is that of a trespasser, and until such possession matures into ownership by prescription, such vendee is liable to be ejected from the property by a subsequent vendee under a registered deed of sale.

Second appeal from the decree of the District Judge, Jhang, at Sargodha, dated the 4th August 1917.

Messrs. Oertel, Brij Lal and Devi Dayal, for the Appellant.

Messrs. Morton and Anant Ram, for the Respondents.

JUDGMENT.—The facts of this case are very fully given in the judgment of the learned District Judge and it is unnecessary for me to repeat them here. The District Judge was inclined to hold that the writing, dated the 5th April 1910, contained in Janji Ram's *bahi* amounted to a written contract of sale of the house in dispute for Rs. 250 and was, therefore, compulsorily registrable, and being unregistered was inadmissible in evidence. But he did not feel called upon to decide this point finally, as he was of opinion that Janji Ram's possession at the time of the sale on which the plaintiff relied had not been proved to be wrongful and that the plaintiff had failed to show that his title to the house, which was alleged to be derived from the original owner Fattah Sher, was better than that of Janji Ram. Upon that ground alone, the District Judge has dismissed the plaintiff's suit.

I am of opinion that the view taken by the District Judge is erroneous and his judgment and decree must be set aside. Janji Ram in his written statement clearly relied upon the sale of the house by Fattah Sher to him on the 5th of April 1910 for Rs. 250 as the origin of his title to the same; that title he is unable to substantiate

because the writing embodying the contract of sale on which he relied cannot be admitted in evidence, and no oral evidence can be given by him to prove the alleged sale in his favour. But it does not follow that because Janji Ram is now in possession of the house, his possession must be presumed to be that of an owner with a title superior to that of the plaintiff to whom the house was admittedly sold in December 1914 by Fattah Sher, who is also admittedly the vendor of Janji Ram. As noted above, Janji Ram's title originated in the alleged sale to him by Fattah Sher in April 1910; the origin of his title being thus definitely known, it cannot be presumed that because he, is now in possession of the house it originated otherwise than in the said sale. As he is unable to prove his title because of the non-registration of the writing on which he relies as evidence of the sale in his favour, his possession is clearly that of a trespasser [*Mangalasamy Devar v. Subbiah Pillay* (1) and *Uttam Singh v. Basanta* (2)]; and since his possession has lasted for a period of about four years only, it has not matured into ownership by prescription, and he cannot, therefore, resist the suit of the plaintiff who rightfully claims, as is admitted by the original owner Fattah Sher, under the latter. I accept the appeal and setting aside the judgment and the decree of the District Judge restore that of the Munsif with costs throughout.

Appeal accepted.

(1) 6 Ind. Cas. 504; 34 M. 64; 20 M. L. J. 983; (1910) M. W. N. 263; 8 M. L. T. 91.

(2) 19 Ind. Cas. 236; 203 P. L. R. 1913; 155 P. W. R. 1913.

PARAMANANDA DAS V. KRIPASINDHU ROY.

PRIVY COUNCIL.

APPEAL FROM THE CALCUTTA HIGH COURT.

July 26, 1918.

Present:—Lord Shaw, Sir John Edge,
Mr. Ameer Ali and Sir Walter
Phillimore, Bart.

Mohant PARAMANANDA DAS
GOSWAMI AND OTHERS—PLAINTIFFS—
APPELLANTS

versus

KRIPASINDHU ROY AND OTHERS

—DEFENDANTS—RESPONDENTS.

Orissa Land Law—Khurdah Estate—Sarbarakars—
Sarbarakari jagirs, whether heritable and transferable.

Sarbarakars of the Khurdah Estate in Orissa have no heritable or transferable right in the office of sarbarakar or in the jagirs held by them as sarbarakars. They are liable to be dismissed for misconduct, and on such dismissal lose all right to occupy the sarbarakari jagirs. On the termination of a settlement they are bound to enter into a fresh engagement with Government (or with the grantee, when Government has made a grant), otherwise they lose their office. [p. 394, col. 2; p. 395, col. 1.]

In 1861 Government granted certain Mouzas in Khurdah revenue-free, but subject to the engagement of the then sarbarakar (defendant's father) with themselves for the settlement period then current. On the completion of a fresh settlement in 1893 the defendant, who had succeeded his father as sarbarakar, was called on by the grantee to execute the usual *ekrarnama*, but refused to do so. He set up a claim that he was a tenure-holder, and misappropriated the rents which he collected. Plaintiffs thereupon dismissed him and brought a suit to recover the sarbarakari *chakran* lands in his possession:

Held, that defendant was not a tenure-holder, that his position under the grantee was the same as that of a sarbarakar under Government, that he had been rightly dismissed, and that plaintiffs were entitled to eject him from the sarbarakari jagirs. [p. 395, col. 1.]

Appeal from two decrees of the Calcutta High Court, dated the 4th June 1913, reported as 22 Ind. Cas. 359, modifying a decree of the Subordinate Judge, Cuttack, dated the 22nd March 1909.

FACTS—Plaintiffs-appellants sued on the allegations that they were proprietors of certain Mouzas in Orissa formerly part of the Khurdah Khas Mahals, which were granted them in 1861 subject to the engagement with Government of the then Sarbarakar: that defendant No. 1, who had succeeded to his father as Sarbarakar since that date, was merely an office-holder and was liable to dismissal for misconduct during the currency of a settlement and had no right of renewal of his appointment at the end of a settlement; that in 1899, when a new

settlement was made, he refused to comply with their demand to execute a *Kabuliyat* as Sarbarakar, that they dismissed him, but that he claimed to be a tenure-holder and collected rents from the tenants and misappropriated them. They prayed that he be ejected.

First defendant contended that he and his ancestors were tenure-holders not liable to dismissal or summary ejectment.

The Subordinate Judge held that plaintiffs were proprietors of the villages in suit, that first defendant was not a tenure-holder and was liable to dismissal and had been rightly dismissed. He decreed the suit. On appeal the Calcutta High Court (Chitty and Teunon, JJ.) reversed this decision and dismissed the suit, holding that first defendant was a tenure-holder. Hence this appeal.

Messrs. De Gruyther, K. C., and Parikh, for the Appellants.—There are concurrent findings that plaintiffs are owners of the villages in suit. The onus lies on defendant No. 1 to prove he is a tenure-holder thereof. In the Record of Rights prepared during the last settlement he is not shown as a tenure-holder. He admits he knew this, and says he applied to be recorded as a tenure-holder but never learnt the result. The presumption is that he is not a tenure-holder: Bengal Tenancy Act, 1885 (Act VIII of 1885), sections 101, 102, 103, 103A. He is a Sarbarakar and his position is the same as that of a Sarbarakar in the Khas Mahal. He was liable to dismissal for misconduct and was bound to execute a fresh *Kabuliyat* on completion of the last settlement in 1899. He was not entitled as of right to a renewal of his appointment, nor was he entitled to collect rents from the tenants. The plaintiffs were justified in dismissing him. (Reference was made to the "Selections from the correspondence on the Settlement of the Khurdah Estate in the District of Puri", Volumes I and II.)

Mr. H. N. Sen, for Respondent No. 1.—Sarbarakari tenures in Cuttack are permanent, hereditary, and transferable: *Saddananda Maiti v. Nowrattan Maiti* (1).

He referred to Hunter's Orissa, Volume II, pages 63, 68, 222, 228, 258, 261, 263; Toynbee's History of Orissa from 1803 to 1828, (1) 8 B. L. R. 280; 16 W. R. 289.

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page 24 and Appendix pages 100 and 169: Baden Powell's Land Revenue in British India, page 173: and the Orissa Tenancy Act, 1913 (Act II of 1913), section 15 (1).

Mr. De Gruyther, K. C., replied.

JUDGMENT.

SIR JOHN ELGE.—This is an appeal against two decrees, dated the 4th June 1913, of the High Court at Calcutta, which modified a decree, dated the 22nd March 1909, of the Court of the Subordinate Judge of Cuttack.

The suit in which this appeal has arisen was brought in the Court of the Subordinate Judge of Cuttack by the appellants on the 5th October 1907.

The plaintiffs, who are the appellants here, claim to be, with the defendants Lakimani Ama and Bhagabat Deb Thakur, proprietors of revenue-free lands in Orissa. Kripasindhu Roy, who will be in this judgment referred to as the first defendant, is the principal defendant. The plaintiffs claim a declaration that the lands in dispute in this suit are their free *behali* lands held and enjoyed by the plaintiffs and the defendants Lakimani Ama and Bhagabat Deb Thakur; a declaration that except the share of 11 *gandas* 3 *karas* 7 *dantis* 10 *biswas* 9 *gandas* 1 *kara* of the Darpanarayan Math purchased by the first defendant, he has no right to the share of 15 *annas* 8 *gandas* 1 *danti* 5 *biswas* 10 *gandas* 3 *karas* of the lands in dispute; a declaration that 57.892 acres of land mentioned in schedule (Kha) of the plaint is the Sarbarakari Chakran Jagir land appertaining to the properties in suit, and that the first defendant has no right of occupancy in 30.045 acres of land mentioned in schedule (Kha); a decree of ejectment against him from the disputed lands mentioned in schedules (Ka) and (Kha); mesne profits; an account of moneys received by him as Sarbarakar from 1306 to 1308 Fasli; and any other relief to which the plaintiffs might be found to be entitled.

It was alleged in the plaint that the first defendant held the lands from which it was sought to eject him by virtue of his office as a Sarbarakar in the service of the plaintiffs and their co-sharers, who are Mathdharis, to whom or their predecessors the Government had granted in

1861 five Mouzahs of Garh Atiri in Khurda revenue free, in lieu of an annual allowance of salt theretofore made by the Government to the Mathdharis. The five Mouzahs were Bande, Koranga, Sardhapore, Atiri and Chutipalang. It was alleged by the plaintiffs that it was the duty of the first defendant as Sarbarakar to collect the rents due from occupiers of lands of the plaintiffs, to account for moneys received by him as the Mathdharis' Sarbarakar and for disbursements, and that he was liable to dismissal from his office for misconduct. It was also alleged by the plaintiffs that the first defendant, in right of his office of Sarbarakar, was entitled to apply to his own use 20 per cent. of the rents received by him from the lands of the Mathdharis, and to hold certain revenue-free grants of land known as Sarbarakari Jagirs. Some of the Sarbarakari Jagir lands which were held by the first defendant as a Sarbarakar of the Mathdharis were in Mouzah Bande, which had been granted to the Mathdharis by the Government in 1861, other Sarbarakari Jagir lands which were held by him as Sarbarakar of the Mathdharis were in Mouzah Panasabasta, which had not been granted to the Mathdharis. It was alleged in the plaint that after the Settlement which was completed in 1899 the first defendant, having been called upon by the Mathdharis to execute an Ekrarnama as Sarbarakar and directed by the Mathdharis to collect as their Sarbarakar the newly assessed rents of their lands, and to pay the same to the Mathdharis, did not execute the customary Ekrarnama and assuming to be himself the proprietor of the Mathdhari lands collected rents from the tenants of those lands and misappropriated the same, and that in consequence of such misconduct the Mathdharis dismissed him from his office of Sarbarakar. It was also alleged in the plaint that the first defendant had dispossessed the plaintiffs.

By his written statement the first defendant denied all the material averments contained in the plaint; he denied the title of the plaintiffs, and alleged that the plaintiffs' claim was false and fraudulent, and that he was a tenure-holder of the lands of the Mouzahs from which the plaintiffs sought to eject him and held the Jagir lands in his own right,

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and denied that he was liable to dismissal from his office of Sarbarakar.

The Subordinate Judge of Cuttack found on the evidence that the first defendant was not a tenure-holder of the Mouzabs in suit; that he was a Sarbarakar liable to be dismissed from his office for misconduct, and that by his acts he had dispossessed the Mathdharis, and had been dismissed from his office of Sarbarakar; that 30'045 acres of the 57'892 acres mentioned in schedule (Ga) of the plaint were Raiyati lands, and that 27'847 acres, remainder of the 57'892 acres, were Sarbarakari Jagir lands which were liable to resumption on the dismissal of the first defendant from his office of Sarbarakar. The Subordinate Judge found that 19'677 acres of the 27'847 acres were in Mouzah Panasabasta. He dismissed the claim for an account as time-barred; he reserved the ascertainment of mesne profits; and he found that the plaintiffs were entitled to a declaration of their revenue-fee title to the Mouzabs in dispute. The Subordinate Judge gave the plaintiffs a decree declaring their proprietary right to the share which they claimed in the Mouzabs in dispute; decreed that the plaintiffs and the defendants on whose behalf they claimed should be jointly put in Khas possession of those Mouzabs, with the exception of 30'045 acres, which he had found were Raiyati land, "if the defendant No. 1 (the first defendant) as a Sarbarakar, as found in the judgment, do not in two months execute a Kabuliyat in their favour, agreeing to pay annually the sum total of the rents assessed on tenants as per *khatians* prepared during the last Settlement, deducting 20 per cent. thereon, minus the rent payable in respect of the Jagir land in his possession, for a term expiring with that of the present Settlement.....If the defendant No. 1 execute the Kabuliyat within the time allowed to him, the plaintiffs will not have Khas possession of the Mouzabs in suit."

From that decree the plaintiffs and the first defendant respectively appealed to the High Court at Calcutta.

As stated in the judgment of the High Court, the case of the plaintiffs as argued on the appeal was that the first defendant,

his father and grandfather before him, were mere officers or servants, first of the Government, then of the Mathdharis, liable to dismissal for misconduct during the currency of a Settlement, and having no right to any renewal of their appointments at the close thereof.

"They, therefore, sued for the ejectment of defendant No. 1 (the first defendant) from the 2½ Mouzabs in suit and also from the Jagir lands recorded in villages Bande and Panasabasta."

As stated in that judgment the first defendant—"on the other hand, contends that he and his ancestors were and are tenure-holders, not liable to dismissal or summary ejectment, and that he held the Jagir lands in Bande and Panasabasta as Dalabehara, and not as Sarbarakar."

The learned Judges on the appeals considered historically the position of Sarbarakars in Khurdah, from the insurrection in 1817 of Jagabandhu Mahapatra, the hereditary Bukshi or commander of the forces to the Raja of Khurdah, down to the present time, and relied mainly for the information on which they acted on the "Selections from the correspondence on the Settlement of the Khurdah Estate, in the District of Puri" (Volume I published in 1879, Volume II published in 1881).

The Mouzabs which were in 1861 granted revenue free to the Mathdharis were in and prior to 1813 and thence until 1861 Khas Mahals in proprietary possession of the Government, by whom the Sarbarakars were appointed. It is not necessary for their Lordships to refer to all the reports and papers contained in the "Selections" to which their attention has been drawn at the hearing of this appeal. They will refer to those of them only which they consider to be the most important.

Mr. Forrester, who was the Deputy Collector in special charge of Khurdah in his report of the 17th October 1819, on the then Settlement, stated that he had in general admitted as Sarbarakars the persons who had entered into engagements, at the preceding Settlements, and had reverted to the rates fixed for the different classes of land in the different

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villages by Gholam Kadir in 1803, that the Sarbarakars were bound by their engagements to adhere to those rates, and not to charge more than 4 annas per man on new cultivation, and they had no proprietary right in their villages. ("Selections," Volume I, page 105.) Mr. Forrester also in his report referred to the general resumption of Jagir lands after the rebellion of Raja Mukunda Deo and his followers. The Governor-General in Council confirmed Mr. Forrester's Settlement, which was for a term of years.

Mr. Wilkinson, who had succeeded Mr. Forrester in charge of Khurdah, in a report of the 24th October 1833, on a Settlement which he had made, stated that he had — "taken from the old Sarbarakars engagements for the payment of the aggregate of the Raiyati rents, less 20 per cent. in lands and money, and that in this 20 per cent. he had included the assessed or estimated rents of the Jagirs reserved for Delabeharas and Dalais by Government order."

He added that the Delabeharas were removable for misconduct and claimed no proprietary rights ("Selections," Volume I, page 123). On the 22nd August 1837, the Government confirmed that Settlement of Mr. Wilkinson, and stated its agreement with Mr. Halliday, then member of the Board of Revenue — "that neither the engagements (of the Sarbarakars) with Government nor, of course, the lands by which the service rendered is remunerated, should be matters of inheritance and liable to subdivision among heirs." ("Selections," Volume I, page 136.)

The orders of the Government were on the 15th September 1837 forwarded by the Board of Revenue to the Commissioner with the following instructions: —

"You will cause it to be distinctly notified to the Sarbarakars that at the expiration of the present Settlement Government will select its own engager, wherever they may choose to exercise the right so to do, and that the present incumbents will be held liable to dismissal for default or bad behaviour satisfactorily proved before the local authorities. It is very desirable that in all future cases individuals only should

be acknowledged and allowed to treat as Sarbarakars." ("Selections," Volume I, page 133.)

In his report to the Board of Revenue of the 5th October 1880 Mr. Metcalfe, then Commissioner of Orissa, stated in relation to Khurdah:—

"The Government revenue of Khurdah has hitherto been collected by (1) Sarbarakars proper, (2) by Pursethis, and (3) by Reportdars.

"The first enjoy Jagir lands, and enjoy rents of lands brought under cultivation during the period the Settlement runs.

"The second are Sarbarakars of homestead lands, who, as a rule, do not enjoy Jagir lands.

* * * * *

"No one of the three clauses has any proprietary or hereditary rights." ("Selections," Volume II, page 258.)

The reports and papers in the "Selections" from the correspondence relating to the Settlements in Khurdah have satisfied their Lordships that Sarbarakars in Khurdah had under the Government no heritable or transferable right in their office of Sarbarakar or in the Sarbarakari Jagirs; that they were liable to be dismissed for misconduct, and that on dismissal they lost all right to occupy any Sarbarakari Jagirs; and that on the termination of a Settlement they were bound to enter into a fresh engagement with the Government if they wished to be continued in the office of Sarbarakar. When the Government in 1861 granted the Mouzah revenue free to the Mathdharis a Settlement had in 1857 been made, and the Sarbarakars, including the first defendant's father, Brindaban, had entered into engagements by Kabuliyats with the Government for the period of the Settlement, and the grant to the Mathdharis was subject to those engagements of the Sarbarakars. That Settlement terminated in 1880. Brindaban died in 1889. The statements in the suits in which Brindaban was concerned, which are referred to in the judgment of the High Court, do not alter the conclusions as to the position of Sarbarakars in Khurdah which are to be drawn from the reports and papers in the "Selections."

The High Court came to the conclusion that it was clear that from 1818 onwards

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the tendency of the Government and of the majority of its officers was to regard the Sarbarakars in Khurda as mere office holders, and that in practice their position was hereditary. The High Court held that the first defendant was a tenure-holder, and by its decree in the appeal in which the plaintiffs were the appellants dismissed their appeal. In the appeal in which the first defendant was the appellant the High Court by its decree affirmed the decree of the Subordinate Judge, in so far as it declared the plaintiffs' title as proprietors of the two and half Mouzahs in suit; declared that the first defendant was a tenure-holder; and in other respects set aside the decree of the Subordinate Judge and dismissed the suit.

On the hearing of this appeal Counsel for the first defendant contended that the decision in 1871 of the High Court at Calcutta in *Saddanando Maiti v. Nourattam Ma'iti* (1) was an authority which showed that Sarbarakari tenures in Cuttack are permanent, hereditary, and transferable. Apparently that decision was not brought to the attention of the Subordinate Judge or of the High Court in this case, possibly because it does not appear that the lands the rent of which was in that case sought to be enhanced were situate in Khurda; possibly because it does not appear on what finding of the Court of first appeal or on what evidence, if there was any, as to the position of Sarbarakars in Cuttack the High Court came to the conclusion that Sarbarakari tenures in Cuttack were permanent, hereditary, and transferable. That case before the High Court was a second appeal.

Their Lordships agree with the Subordinate Judge that the first defendant was not a tenure-holder: that he was liable to be dismissed for misconduct from his office of Sarbarakar; that he was rightly dismissed from that office; and that on his dismissal he ceased to be entitled to hold the Sarbarakari lands in Mouzah Bande; and that except as to the Sarbarakari lands in Mouzah Panasabasta, the plaintiffs were entitled to the decree in ejectment and for possession, and to the declaration of title which the Subordinate Judge by his decree gave to them.

The plaintiffs have failed to prove any title in them to the Jagir lands in Mouzah Panasabasta.

Their Lordships will humbly advise His Majesty that this appeal should be allowed; that the decree of the High Court in the appeal in which the plaintiffs were the appellants should be set aside with costs; that the decree of the High Court in the appeal in which the first defendant was the appellant, except in so far as it affirmed the declaration of the Subordinate Judge, of the title of the plaintiffs as proprietors of the $2\frac{1}{2}$ Mouzahs in suit, should be set aside with costs; and that the decree of the Subordinate Judge should be affirmed so far as it declared the proprietary title of the plaintiffs to the $2\frac{1}{2}$ Mouzahs in suit; that it should be varied by decreeing the ejectment of the first defendant from possession of the Jagir lands in Mouzah Bande, but not from the Jagir lands in Mouzah Panasabasta, by decreeing mesne profits to be ascertained in the Court of the Subordinate Judge; and by striking out of that decree the clause giving to the first defendant an opportunity of executing a *kabuliyat* in favour of the plaintiffs; and by giving the plaintiffs the costs of the suit as against the first defendant. The costs, if any, of ascertaining the amount of mesne profits should be in the discretion of the Court of the Subordinate Judge. The first defendant must pay the costs of this appeal.

Appeal allowed.

Solicitor for the Appellants.—Mr. E. Dalgado.

Solicitors for the Respondents.—Messrs. G. & W. Webb.

PUNJAB CHIEF COURT.
CIVIL REVISION No. 834 OF 1917.
April 10, 1918.

Present:—Mr. Justice Shah Din.

CHARTA RAM—PLAINTIFF—

PETITIONER

versus

SAJAN MAL AND ANOTHER—DEFENDANTS—
RESPONDENTS.

Civil Procedure Code (Act V of 1908), Sch. II,

LACHHMAN PRASAD v. BALDEO PRASAD.

paras. 2, 5—Arbitrator refusing to act—Appointment of new arbitrator—Procedure—Arbitration Act (IX of 1899), s. 8.

The provisions of paragraph 5 of the Second Schedule to the Civil Procedure Code relating to the appointment of an arbitrator by a party in the event of the arbitrator previously appointed refusing to act must be read with the provisions embodied in paragraph 2 of the same Schedule, so that both parties must concur in appointing an arbitrator in place of the one who has refused to act, and the appointment does not rest solely with the party who has been served with a written notice by his opponent.

Revision of the order of the Subordinate Judge, 2nd Class, Ferozepore, dated the 8th August 1917.

The Hon'ble Pandit Sheo Narain and Mr. Kanshi Ram, for the Petitioner.

The Hon'ble Mr. Muhammad Shafi and Dr. Gokal Chand Narang, for the Respondents.

JUDGMENT.—The facts of this case are very fully given in the judgment of the learned Subordinate Judge, and the only question for decision in this revision is whether the interpretation placed by him on the concluding portion of paragraph 5 (1) and on paragraph 5 (2) of the Second Schedule to the Civil Procedure Code is correct or not. The Subordinate Judge has held that the provisions of paragraphs 5 (1) and (2) relating to the appointment of an arbitrator by a party, in the event of the arbitrator previously appointed refusing to act, must be read with the provisions embodied in paragraph 2 of the same Schedule and that reading the two paragraphs together, it is clear that the new arbitrator must be appointed by both the parties and not solely by the party who has been served with a written notice under the concluding portion of paragraph 5 (1) by his opponent.

After hearing Pandit Sheo Narain and without calling on the respondents' Counsel, I am clearly of opinion that the view taken by the Subordinate Judge is perfectly sound, as the construction contended for by Pandit Sheo Narain would lead to absurd consequences. The intention of the Legislature in enacting paragraphs 5 (1) and (2) of the Second Schedule to the Civil Procedure Code appears to me to have been the same as that underlying section 8 of the Indian Arbitration Act, IX of 1899. The concluding portion of the said section 8 (1) shows

that both the parties should concur in appointing an arbitrator in place of the one who has refused to act and that the appointment does not rest solely with the party who has been served with a written notice by his opponent.

I maintain the decree of the lower Court and dismiss this revision with costs.

Revision dismissed.

OUDD JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 37 OF 1916.

June 27, 1918.

Present:—Pandit Kanbaiya Lal, J. C., and Mr. Daniels, A. J. C.

LACHHMAN PRASAD—DEFENDANT—
APPELLANT

versus

BALDEO PRASAD—PLAINTIFF,
JADUNATH SINGH AND ANOTHER—
DEFENDANTS—RESPONDENTS.

Execution of document, proof of—Deed filed for collateral purpose—Construction of document—Gift, deed of, interpretation of—Possession postponed till death of donor—Interest of donee, nature of—Transfer of Property Act (IV of 1882), s. 6 (a)—Transfer of vested interest, validity of.

Where a deed is filed merely for a collateral purpose, it need not be proved with the same formalities as when it is sought to enforce its provisions in a suit. [p. 397, col. 2.]

Where a deed of gift provided that the donee would not take possession of a portion of the gifted property until after the deaths of the donor and his wife, and the donee transferred this portion of the gifted property after the death of the donor but in the lifetime of his widow:

Held, that the gift must, so far as it related to the said portion of the gifted property, be regarded as a Will, that the donee was given a vested interest in the same subject only to a life-interest in favour of the donor's widow, and that, therefore, its transfer by the donee was not forbidden under section 6 (a) of the Transfer of Property Act. [p. 397, col. 2; p. 398, 1.]

Shiam Sundar v. Dilganjan Singh, 39 Ind. Cas. 540; 20 O. C. 155; 4 O. L. J. 380, distinguished from.

Appeal from the decree of the Subordinate Judge, Hardoi, dated 1st February 1916.

Babu Daya Kishan Seth, for the Appellant.

The Hon'ble Pandit Gokaran Nath Misra, for Respondent No. 1.

LACHHMAN PRASAD v. BALDEO PRASAD.

JUDGMENT.—This appeal arises out of a suit for sale on a mortgage and two deeds of further charge executed by one Jadunath Singh in favour of the plaintiff-respondent Baldeo Prasad. The defendant-appellant Lachhman Prasad was impleaded as a subsequent transferee of the rights of Jadunath Singh. He, however, claims priority in respect of a previous mortgage of 15th January 1897 in favour of one Chaudhri Fatch Ali, which he redeemed. The learned Subordinate Judge has disallowed his claim on the ground that 29 *bighas* 16 *biswas* covered by this mortgage never passed into the possession of Chaudhri Fatch Ali under the prior deed, and the correctness of this finding is one of the two issues which have been contested in appeal.

The other and main issue is whether the plaintiff obtained any title in virtue of the deed of 5th March 1900 in his favour. It is common ground between the parties that the plaintiff's mortgagor, Jadunath Singh, obtained the property in suit under a deed of gift from his maternal grandfather Subba Singh, comprising in all a share of 4 annas 8 pies. The 29 *bighas* 16 *biswas* which are the subject of the plaintiff's mortgage form part of 44 *bighas* 12 *biswas* 6 *biswansis* of *sir* land out of the share of Subba Singh, of which the donee was not to obtain possession until after the deaths of Subba Singh and his wife. The question at issue between the parties is, whether Jadunath Singh obtained under the deed of gift a vested interest in this property which was capable of transfer or merely an expectancy of succession; a transfer of which was forbidden under section 6 (a) of the Transfer of Property Act.

The deed of gift has been admitted by the appellant Lachhman Prasad in the previous suit, the plaint in which is Exhibit 20 on this record. The learned Subordinate Judge based his finding on this admission and on the provisions of the deed as stated in the judgment in that case, Exhibit 23. The actual deed was filed in another record and was not put in. As both parties are fighting as to the nature of the interest admittedly acquired under this deed, we considered that it was impossible for us to decide

the issue satisfactorily without seeing the actual deed, and we accordingly directed the respondent to get it back from the Court in which it was filed and file it with an affidavit in order to enable us to pronounce judgment on the issue. The appellant who has been disposed throughout to stand on technical objections has not admitted the deed. But there can be no question that this is the deed in dispute and we accept the affidavit filed by the respondent read with the admission of Lachhman Prasad in the previous suit, Exhibit 20, as sufficient proof of it for the purposes of this case. It is well established that where a deed is not in suit but is merely filed for a collateral purpose, it need not be proved with the same formalities as when it is sought to enforce its provisions in a suit. Although, however, the appellant objected to the production of the deed, he at the same time contends that if properly construed it is in his favour. The terms of the deed, so far as they affect this case, are as follows:—

"And inasmuch as out of this deed of gift 25 plots of *sir* land amounting to 44 *bighas* 12 *biswas* 6 *biswansis* are excepted after my death and that of my wife he (the donee) shall take possession of these plots also."

The mortgage in favour of the respondent was executed after the death of Subba Singh but in the lifetime of his widow, *Musammatt Munna Bibi*. The contention of the appellant is that the effect of this clause was to confer on the latter a widow's estate under Hindu Law with the power to represent the estate and the limited power of alienation which such an estate confers, and that the donee acquired no interest in these plots until her death. We can find nothing in the deed to indicate any such intention. On the contrary the donee was to take the land on the same footing as the rest of the share, though his possession was to be postponed till the widow's death. Inasmuch as this part of the instrument was not to take effect till after the testator's death it must, in our opinion, be regarded as a Will so far as these plots of *sir* land are concerned, and under this testamentary disposition Jadunath Singh was given a vested interest

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in the land subject only to a life-interest in favour of the widow. In this view of the deed section 6 (a) of the Transfer of Property Act has no application. From the date of the testator's death Jadunath Singh had a subsisting interest in the land which was capable of being transferred. The positions of the executant and his widow under the deed are not parallel. The executant was the owner of the land prior to the deed and retained the power of alienation unless he deprived himself of it under the terms of the deed. The widow's rights on the other hand were derived solely from the deed and were limited by its terms.

The case of *Shiam Sundur v. Dilganjan Singh* (1) relied on by the appellant is clearly distinguishable. There the person in possession held an ordinary widow's estate and the transferor neither had nor professed to have anything more than a mere expectancy of succession.

The appellant himself has understood the deed in the same sense and indeed has obtained possession of these very plots on the very ground which he now repudiates, namely, that *Musammat Munna Bibi* had only a life interest. He purchased from Jadunath Singh on 19th January 1901 a 2-annas 6 1/4-pies share in the gifted property but did not obtain actual possession of 24 *bighas* 4 *biswas*, the proportionate area of the reserved *sir* land, because *Musammat Munna Bibi* was at that time alive and in possession of it. After her death, however, he sued Jadunath Singh for possession and obtained a decree. It is needless to say that if the mortgage to the plaintiff was invalid in respect of this land, the sale-deed in favour of the defendant was equally invalid and indeed one of the issues was whether this land passed under the sale-deed. The plaint in the suit is Exhibit 20 on the record and the judgment is Exhibit 23.

Under these circumstances it is unnecessary for the respondent to fall back on section 43 of the Transfer of Property Act, though if it were necessary to do so, we should be prepared to hold that Jadunath Singh did in good faith purport to transfer the full proprietary right. It is argued

that the transferee could not in good faith have believed that Jadunath Singh was authorised to transfer the proprietary right, because he could have obtained a copy of the deed of gift which was registered. This argument comes with a very bad grace from the appellant, who himself read the deed as conveying such a right, and obtained a decree on the basis of that interpretation.

On the question of priority we think that the 24 *bighas* 4 *biswas* must be deemed to have been included in the mortgage in favour of Chaudhri Fateh Ali which the appellant redeemed and that he is, therefore, entitled to priority in respect of that mortgage. But as Lachhman Prasad has purchased the whole of the property mortgaged with Chaudhri Fateh Ali, he is entitled to claim priority only to the extent of the mortgage money payable by that portion of the said property which was subsequently re-mortgaged with the plaintiff. The Counsel for the parties agree that the 24 *bighas* 4 *biswas* of the *sir* land in question may be deemed to be worth about one-third of the value of the entire share mortgaged. Lachhman Prasad will, therefore, be declared entitled to claim priority in respect of one-third of Rs. 5,000.

The appeal is, therefore, allowed only in so far that the sale of 24 *bighas* 4 *biswas* of the *sir* land in dispute out of 29 *bighas* 16 *biswas* mortgaged will be subject to a prior right of Lachhman Prasad to the extent of one-third of Rs. 5,000 in respect of the mortgage made by Jadunath Singh in favour of Chaudhri Fateh Ali, dated the 15th January 1897, which he redeemed. The parties will in the circumstances bear their own costs of this appeal.

Appeal partly allowed.

(1) 39 Ind. Cas. 540; 20 O. C. 155; 4 O. L. J. 380.

HIRA SINGH v. GHULAM QADIR.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 392 OF 1917.

April 12, 1918.

Present:—Mr. Justice Chevis.

HIRA SINGH AND OTHERS—DEFENDANTS

—APPELLANTS

versus

GHULAM QADIR—PLAINTIFF, QADIR

BAKHSH—DEFENDANT—RESPONDENTS.

Minor not properly represented in suit—Decree, validity of—Execution sale—Suit by minor to set aside sale—Limitation applicable—Limitation Act (IX of 1908), Sch. I, Arts. 12, 144.

Where a minor defendant is not properly represented in a suit, a decree passed against him is a nullity, and the Court has no power to sell the minor's property in execution of the decree. Where such sale takes place, the minor can recover the property from the auction-purchaser even if he is a stranger, and the Article applicable to such a suit by the minor is Article 144 and not Article 12 of Schedule I of the Limitation Act. [p. 400, cols. 1 & 2.]

Second appeal from the decree of the District Judge, Gujranwala, dated the 12th December 1916.

Mr. Ganpat Rai, for the Appellants.

Mr. Niaz Ali, for the Respondents.

JUDGMENT.—In 1903 Zulfikar Khan, father of defendant No. 1, obtained an *ex parte* decree against Ghulam Kadir, and in execution of that decree the house now in suit was put to auction and knocked down for Rs. 505 to the father of defendants Nos. 2 and 3 and defendant No. 4, who got possession in April 1905. Ghulam Kadir was a minor and not properly represented in the suit. He has now attained his majority and sues to recover possession.

The lower Courts have held that the suit is within limitation and have decreed the claim, holding that as the minor was not properly represented the decree is null and void. The auction-purchasers appeal.

The lower Courts have considered Articles 91, 95 and 96 of the Schedule to the Limitation Act, and setting them aside as inapplicable have applied Article 144. If that Article applies the suit is within time, having been brought within 12 years from the date of the auction. But the question of Article 12 being applicable seems to have been overlooked entirely. If Article 12 applies the period of limitation is only one year from date of confirmation of sale, and plaintiff gets only one year from the date of his attaining his majority. That

he was over 19 at date of institution of suit is not denied; so the suit is time-barred if Article 12 applies.

On behalf of the auction-purchasers it is also urged that apart from limitation, a purchase by a person not a party to the suit in execution of a decree cannot be upset, and here reliance is placed on *Krishna (Narendra) Chandra Mandal v. Jogendra Narain Roy* (1). In that judgment I find that the distinction between a purchaser who is a party to the suit and a purchaser who is a stranger is clearly defined. So too in the Privy Council ruling in *Zain-ul-Abdin Khan v. Muhammad Asghar Ali Khan* (2). But all that the latter ruling lays down is that when a sale has taken place in execution of a decree which is in force at the time, it cannot be upset in the case of the purchaser being a stranger to the suit merely because the decree is afterwards reversed by an Appellate Court. But the question here is whether there was any valid decree in force at the time of the sale. If there was, then the purchaser was not bound to enquire into the correctness of the order for execution, any more than into the correctness of the judgment on which the execution proceeded: [See *Rewa Mahton v. Ram Kishen Singh* (3).]

For the plaintiff-respondent it is urged that when the minor is not properly represented, a decree against him is a nullity and the Court has no jurisdiction to sell and he can recover the property sold even from a stranger. In *Narsingh Narain v. Jaki Mistry* (4), where a married woman was appointed as the guardian of the minor contrary to the provisions of section 457 of the old Civil Procedure Code, the learned Judges (Mukerjee and Tennon, JJ.) held that the proceedings were a nullity so far as the minor was concerned. In *Dinabandhu Nandi v. Mashudu Khatun* (5), where the minors were not represented, the learned Judges (Mukerjee and Holm-

(1) 27 Ind. Cas. 139; 20 C. L. J. 469; 19 C. W. N. 537.

(2) 10 A. 166; 15 I. A. 12; 5 Sar. P. C. J. 129; 6 Ind. Dec. (N. S.) 112 (P. C.).

(3) 14 C. 18; 13 I. A. 106; 10 Ind. Jur. 428; 4 Sar. P. C. J. 746; 7 Ind. Dec. (N. S.) 13 (P. C.).

(4) 13 Ind. Cas. 414; 15 C. L. J. 2.

(5) 17 Ind. Cas. 263; 10 C. L. J. 318.

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wood, J.J.) held that the decree as against them was "absolutely null and void"

In the face of these two rulings I find it hard to suppose that in *Narendra Chandra Mandal v. Jogendra Narain* (1), in which the judgment was delivered by Mukerjee, J., anything different was intended. In fact I note that on page 472 it is laid down: "The position consequently was that the infants were not properly before the Court and are in no way bound by the decrees of the 15th December 1905. The sale held under these circumstances did not pass the right, title and interest of the infants. It is consequently indisputable that every one of the purchasers at the execution sale held on 4th February 1907 has failed to acquire the right, title and interest of the infants-defendants in the mortgaged properties. Such purchasers may have imagined that the infants were bound by the decree and may have paid the purchase money on the assumption that they were acquiring the interest of all the mortgagors. But that clearly cannot affect the position of the infants, who are bound neither by the decree nor by the sale consequent thereon." And, higher up on the same page: "It is plain that the two infants-defendants have not been affected in any way by the sale held on the 4th February 1907, because there was at the time no valid and operative decree in force against them."

But joined with the infant defendants was an adult defendant, and so it became necessary for the learned Judges to go on and distinguish between the case of purchasers who were strangers to the suit and purchases made by the decree-holders. I gather that the protection given to the stranger purchasers was limited to the adult defendant's share. So I am of opinion that this judgment does not help the appellants in the present case.

It seems to me that there was no valid decree, and that the Court had no jurisdiction to sell, and that the appellant is not protected by the fact that he was not a party to the suit but a stranger. I do not consider Article 12 applicable to such a case. I think the plaintiff is entitled to ignore the sale. I may here quote

Uttam Singh v. Barkat Ali (6), though the Article there discussed is 41, and not 12. I think Article 144 is the Article applicable, and I hold that the suit is within time.

As to the suggestion that the appellants should recover their purchase-money, this is a new suggestion, not raised in the lower Courts. I certainly do not think the plaintiff can be compelled to reimburse him, and as to the decree-holder I note that he was not made a respondent in the lower Appellate Court.

The appeal is dismissed with costs.

Appeal dismissed.

(6) 19 Ind. Cas. 235; 307 P. W. R. 1912; 15 P. R. 1913; 202 P. L. R. 1913.

ODDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 37 OF 1917.

September 11, 1918.

Present:—Mr. Stuart, A. J. C., and Pandit Kanhaiya Lal, A. J. C.

HAR BAHADUR LAL—DEFENDANT

No. 1—APPELLANT

versus

CHAND RAJ BAHADUR—PLAINTIFF,

Musammât CHANDRAJ KUNWAR—

DEFENDANT No. 2—RESPONDENTS.

Evidence, admissibility in—Horoscope, whether admissible—Hindu Law—Marriage—Kayasth, sub-castes of, whether can intermarry—Issue of two sub-castes, assimilation of, to one sub-caste, effect of.

Where a full horoscope prepared from a short horoscope was produced in evidence and the person who had prepared it was examined as a witness:

Held, that so far as the date of birth and the parentage were concerned, the horoscope represented what had been stated to the witness who prepared it before the present dispute had arisen and could be used both as corroborative or rebutting evidence and for the purpose of refreshing memory. [p. 402, col. 1.]

Ordinarily a Kayasth belonging to one sub-division does not marry into another sub-division, but no such restriction is recognised by the Hindu Law. [p. 404, col. 2.]

Where a Kayasth whose parents belonged to different sub-castes is assimilated into one of those sub-castes, his marriage with a girl of such sub-caste is not open to objection. [p. 404, col. 2.]

HAR BAHADUR LAL V. CHANDRAJ BAHADUR.

Appeal from the decree of the Additional Subordinate Judge, Lucknow, dated 17th February 1917.

Mr. John Jackson and Chaudhri Ram Bharose Lal, for the Appellant.

The Hon'ble Pandit Gokaran Nath Misra, for Respondent No. 1.

Babus Rup Narain and Ram Ohandra, for Respondent No. 2.

JUDGMENT.—This appeal arises out of a suit for partition, brought by the plaintiff-respondent who claims to be the son of the defendant-appellant. He sued for the partition of a half share out of what he described to be the ancestral property of the family, asserting that his mother, who was defendant No. 2, was entitled only to maintenance. The suit was resisted by the defendant-appellant on various grounds. He denied that the plaintiff was his son or that the property in dispute was his ancestral property. His version was that he was married to the sister of defendant No. 2, that instead of her defendant No. 2 was sent with him after the marriage by fraud, that the fraud was discovered when the defendant No. 2 reached his house and that it was further found that she was pregnant. It was also stated that the defendant-appellant and his mother lodged her in a separate house and gave her maintenance to avoid a public scandal and that she gave birth to the present plaintiff five months after her arrival. It was moreover contended that the defendant-appellant was a Kayasth of the Mathur sub-division and could not have been lawfully married to defendant No. 2, who belonged by birth to a Srivastava family and that the defendant-appellant was a minor on the date of his marriage and on the date on which the plaintiff-respondent was born and was impotent and unable to beget a child. Defendant No. 2 supported the claim of the plaintiff-respondent, except to this extent that she claimed a one-third share in the disputed property.

The learned Subordinate Judge found that defendant No. 2 was lawfully married to the defendant-appellant and that the plaintiff-respondent was their legitimate son. He accordingly decreed the claim for the partition of a one third share in the

disputed property, which he found to be the ancestral or joint family property of the plaintiff-respondent and the defendant-appellant.

The grounds of appeal traverse the entire ground taken in the Court below, but the only points to which the learned Counsel for the defendant-appellant has addressed himself are (1) that defendant No. 2 was pregnant at the time of her marriage—her son, the plaintiff-respondent, having been born five months later; and (2) that there could not have been a lawful marriage between her and the defendant-appellant according to law and custom. He does not contest the finding that the defendant-appellant was married to defendant No. 2 and concedes that he is unable to substantiate the plea of fraud set up in the Court below.

There is no satisfactory evidence to show that defendant No. 2 was pregnant at the time of her marriage or that the plaintiff was born 5 months after it. The statement of defendant No. 1 on this point is entirely unreliable. He says that he was married in the month of Asarh 1954 Sambat, i.e., between the 15th June 1897 and the 14th July 1897. But in the application made by him to the Commissioner of the Fyzabad Division on the 2nd June 1897 (Exhibit 19), wherein he asked that his estate might be released from the Court of Wards on the ground that he was already 21 years old, he distinctly admitted that he had been married prior to that date. This application was sent by post and both from the postal seal on the envelope showing that the application reached Fyzabad on the 8th June 1897 and the date borne by the application, there can be no room for doubt that defendant No. 1 was married some time before the 2nd June 1897. Defendant No. 2 and the witnesses produced by the plaintiff depose that the marriage of defendant No. 1 with defendant No. 2 took place in Baisakh 1954 Sambat, which lasted from the 18th April 1897 to the 16th May 1897. Musammāt Mahadei (P. W. No. 2), the elder sister of defendant No. 2, for instance, states that the marriage of defendant No. 2 with defendant No. 1 took place in the beginning of Baisakh. Musammāt Ramdei (P. W. No. 11), the sister of

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the mother of the plaintiff, says the same. They are corroborated by Mata Prasad, (P. W. No. 5), the brother of defendant No. 2, and Munnu (P. W. No. 7), who was one of the priests who officiated at the marriage ceremony. The evidence produced by defendant No. 1 to the contrary is unreliable. The defendant-appellant has also failed to establish that the plaintiff was born in the month of Katik 1954 Sambat or five months after the marriage and that defendant No. 2 was pregnant at the time she was married. *Musammāt Gurdei* (D. W. No. 7) has been produced to supply direct evidence of the fact that defendant No. 2 was pregnant at the time of her marriage; but she is a rent-free tenant and *ryot* of the defendant-appellant and one of her sons is in his service, and her statement cannot, therefore, be trusted. The defendant-appellant alleges that when defendant No. 2 was discovered to be pregnant she was made to live in a separate house and given maintenance; but in his statement before Mr. Ajudhia Pershad, Deputy Magistrate, in a case under section 107 of the Code of Criminal Procedure, he admitted that defendant No. 2 lived with him for 20 or 22 years. His allegation that the plaintiff was born in Katik is not borne out by any reliable evidence. Defendant No. 2 deposes that he was born in Phagun and her statement is corroborated by the horoscopes produced (Exhibits 17 and 18). Munnu (P. W. No. 7) has given evidence in support of what he called the *ishtkal* or short horoscope prepared by him when the plaintiff was born. Mahadeo Prasad (P. W. No. 13) deposes that he prepared a full horoscope of the plaintiff in Sanskrit and Urdu in 1903 and that the *teva* or *ishtkal* showing the time of birth was given to him by the defendant-appellant, who had sent for him to prepare his and his son's horoscopes. The defendant-appellant has taken objection to the admission of these horoscopes in evidence, but so far as the date of birth and the parentage are concerned these horoscopes represent what was stated to the witnesses who prepared the horoscopes before the present dispute had arisen, and they can be used both as corroborative or rebutting evidence and for the purpose of refreshing the memory.

It has also been pointed out that the time of birth mentioned in the *teva* or *ishtkal* prepared by Munnu is 24 *gharis* after dawn, and that prepared by Mahadeo Prasad is 48 minutes after midday or 16 *gharis* 6 *pals* from sunrise. This variation may be due to the nature of the information supplied by the defendant-appellant at the time when the bigger horoscope was prepared and is rather a proof of its genuineness than of its having been concocted during the progress of the suit. Defendant No. 2 tells us that the plaintiff was born about two hours after midday. She deposes that her *simant* or seventh month of pregnancy ceremony was performed in Pus and that the plaintiff was born in Phagun. She is corroborated by her sister, *Musammāt Mahadei*, who was examined by Commissioner, and by her brother Mata Prasad (P. W. No. 5). Behari Lal (P. W. No. 6), who attended the *barha* ceremony of the plaintiff which took place on the 12th day after his birth, and *Musammāt Maharaja* (P. W. No. 8), and *Musammāt Ramdei* (P. W. No. 11), who were present in the house of the defendant-appellant at the time of the birth of the plaintiff, bear testimony to the birth of the plaintiff in Phagun, 11 months after the marriage of defendant No. 2 with the defendant-appellant. *Musammāt Maharaja* is the niece of the mother of the defendant-appellant. Lalta Prasad (D. W. No. 5), who has been examined on behalf of the defendant-appellant, admits that *Musammāt Maharaja* used to live with *Musammāt Raghuraj Kuar*, the mother of the defendant-appellant, in Keolapur. Both *Musammāt Maharaja* and *Musammāt Ramdei* depose that the statement that defendant No. 2 was pregnant when she came to the house of the defendant-appellant after her marriage is untrue.

The tonsure or *mundan* ceremony of the plaintiff took place in the third year of his birth. It was attended by Mata Pershad, Bihari Lal, *Musammāt Maharaja*, *Musammāt Ramdei* and other relations. The estate of the defendant-appellant was then in charge of the Court of Wards. The account books of the Court of Wards show that on the 3rd October 1901 the defendant-appellant took Rs. 200 from the Court of Wards, saying that he required

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the same on account of the tonsure ceremony of his son (Exhibit 20). The defendant-appellant tries to explain this entry by stating that he required the money for the purchase of a horse and that he referred to the tonsure ceremony of his son as a pretence for taking it. But the account-books show that another item of Rs. 50 was taken on the 27th May 1901 for the purchase of a horse. The learned Subordinate Judge was thoroughly justified in the face of the above facts in discrediting the evidence adduced by the defendant-appellant.

It is argued on behalf of the defendant-appellant that the marriage of defendant No. 2 was celebrated in a more or less private manner, that even some of the nearest relations of the bride were not invited and that after her marriage she did not visit the house of her parents for 8 or 9 years and was granted by her husband a separate residence and an allowance for her maintenance. It is admitted that Raja Bahadur, the husband of *Musammât Naraindei*, a sister of defendant No. 2, attended the marriage. There might have been good reasons, not ascertainable at this distance of time, why the other relations were not able to join the marriage. Mata Prasad states that defendant No. 2 visited his house on the occasion of the marriage of *Musammât Gaura*, his younger sister, and thereafter on other occasions too. There is nothing to show that the defendant-appellant lived separately from defendant No. 2 till about 10 years prior to the suit, when possibly on account of some quarrel or other cause he made a separate provision for her maintenance, giving her later on an allowance of Rs. 10 per mensem in addition to the *sir* land assigned to her.

Had defendant No. 2 been found pregnant a day after she was brought to the house of the defendant-appellant and a son born to her five months later, it is hardly likely that the defendant-appellant would have described that boy as his son when he obtained Rs. 200 from the Court of Wards for the expenses of his tonsure ceremony. It is still more unlikely, when disputes arose between the plaintiff and the defendant-appellant in consequence of the former having given evidence for

Abdul Ghafur Khan in his suit against the latter, that the defendant-appellant should have described the plaintiff as his son in his deposition before the arbitrator to whom the said suit was referred for decision (Exhibit 14). The evidence of Nawab Ali, an old Pleader of Bara Banki, shows that the defendant-appellant had entrusted the plaintiff to his guardianship for 3 or 4 years in order that the plaintiff might stay at Bara Banki and receive his education there. The defendant-appellant used to supply the expenses of his education and maintenance, while he was studying in the High School at Bara Banki. Nawab Ali states that the defendant-appellant told him that the plaintiff was his son and used to send the pay of the cook and the *kahar* who attended him and the expenses of his maintenance to Abdul Ghafur Khan, clerk. The suit filed by Abdul Ghafur Khan related to money which he claimed to have expended in excess of what he had received from the defendant-appellant and was decreed by the arbitrator to whom it was referred (Exhibit 15). The defendant-appellant did not then repudiate his liability as the father of the plaintiff. In a suit filed by the defendant-appellant against Sumer Singh for damages for malicious prosecution it was expressly admitted by the defendant-appellant that the plaintiff was his son, born of lawful wedlock (Exhibit 16). These admissions, read with the other evidence adduced in the case, strengthen the presumption raised by section 112 of the Evidence Act (I of 1872) in favour of the legitimacy of the plaintiff, and the fact that defendant No. 2 was receiving a separate allowance from ten years prior to the suit is insufficient to rebut it.

It was contended in the Court below on behalf of the defendant-appellant that he was born impotent and was incapable of begetting issue. But as the learned Subordinate Judge has pointed out, no evidence of any value has been produced by him on that point and the learned Counsel who appears for him has made no attempt to support that contention here. There is also no satisfactory proof that it was impossible for the defendant-appellant to have access to defendant No. 2 at the time when the plaintiff could have been

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begotten. Defendant No. 2 swears that after the birth of the plaintiff another daughter was born of her who died shortly afterwards and though that fact is denied by the defendant-appellant, it is hardly likely that her statement on that point could be incorrect. From the time the plaintiff gave evidence for Abdul Ghafur Khan in support of his suit against the defendant-appellant the plaintiff and the defendant-appellant have been at loggerheads. The story told by the defendant-appellant is inconsistent with his previous conduct during that litigation and prior to it and cannot be accepted.

The next point for consideration is whether the defendant-appellant could have been lawfully married to the mother of the plaintiff. The grandfather of the defendant-appellant was a person named Naubat Rai, who was a Mathur Kayasth. On the death of his first wife he took into his keeping the widow of a Srivastava Kayasth and had a son, Bachchu Lal, born of her. He possessed certain landed property and was anxious that his property should devolve on Bachchu Lal after his death. But he was conscious that the mother of Bachchu Lal stood in no better position than that of a concubine and that Bachchu Lal was his illegitimate son. At the first Regular Settlement Naubat Rai tried to have it recorded in the *wajib-ul-arz* that where a person had no children by his lawfully married wife, the son born of a woman not lawfully married would get possession of the entire property left by his father, but the other co-sharers of the village objected. Eventually an order was passed that the wishes of Naubat Rai should be recorded so far as his interest in the village was concerned, and this was actually done (Exhibit A-8). It is noticeable, however, that Bachchu Lal was then admitted by Naubat Rai to have been born of a woman who was not lawfully married and who was of a different family. There is also evidence to show that that woman was a Srivastava Kayasth by birth, that Bachchu Lal got married in a Srivastava family and that his daughter was similarly married to Behari Lal (P. W. No. 6), who was a Srivastava Kayasth. It is clear, therefore, that although Bachchu Lal was of illegitimate birth, he was treated and accepted by Srivastava Kayasths as a

member of their community; and as pointed out in *Daryai Singh v. Narpat Singh* (1) and *Ram Kumari, In the matter of* (2), the assimilation of such a person into a particular caste renders his marriage with a girl of such a caste open to no objection. The Kayasth community is divided into 12 sub-castes; but Bachchu Lal, the father of the defendant-appellant, was not of pure descent. His mother was a Srivastava and his father was a Mathur. Ordinarily a Kayasth of one sub-division does not marry in another sub-division, but no such restriction is recognised by the Hindu Law. Assuming, however, that there is such a custom, the evidence about which is not very clear, it cannot apply to persons born of mixed descent. They are treated as belonging to the sub-division which accepts and assimilates them, and the marriage of the defendant-appellant with defendant No. 2 cannot, therefore, be treated as invalid.

It is not disputed that Bachchu Lal was lawfully married, and if Bachchu Lal was lawfully married to a Srivastava girl, though he was illegitimate, as the evidence shows he was so married, the marriage of the defendant-appellant with the mother of the plaintiff cannot be regarded as invalid.

The appeal fails and is dismissed with costs.

Appeal dismissed.

(1) 9 Ind. Cas. 71; 13 O. C. 375.

(2) 18 C. 264; 9 Ind. Dec. (N. S.) 176.

PRIVY COUNCIL.

APPEALS FROM THE BOMBAY HIGH COURT.

July 26, 1918.

Present:—Lord Shaw, Sir John Edge,

Mr. Ameer Ali and Sir Walter

Phillimore, Bart.

RATANLAL CHOONILAL PANALAL—

APPELLANT

versus

THE MUNICIPAL COMMISSIONER
FOR THE CITY OF BOMBAY AND OTHERS—
RESPONDENTS.

City of Bombay Improvement Act (IV Bom. of 1898), ss. 31, 41, 42, 45—City of Bombay Municipal Act (III Bom. of 1898), ss. 297, 300, 301—Compulsory expropriation and

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impropriation of owners of land adjoining streets—Owner, whether bound to pay for compulsory impropriation—"Street to be formed," meaning of—Vendor and purchaser—Unpaid purchase-money—Interest, when begins to run.

The main object of the City of Bombay Improvement Act, 1898, by which the Bombay Improvement Trust was constituted, was to set up with sufficient powers a street-making authority, and when its function as such was expired, to have the street which had been re-constructed or made by the Trust thereupon handed back to the Corporation. [p. 412 col. 2.]

Section 41 and section 45 of the Act are correlative. They both refer to that site which is used as a street and for the purposes thereof and to no other. The "street to be formed" which vests in the Trust under section 41 of the Act is identical with the formed street which re-vests in the Corporation under section 45. [p. 413, col. 1.]

Where, therefore, the "regular line of a street" was altered and the owner of adjacent land was required to set forward his building on part of the old street:

Held, (1) that the strip of old street which was never formed into the new street had never vested in the Improvement Trust; that it remained the property of the Municipal Corporation; and that when such owner of adjacent land was ordered by the Commissioner to set forward his building upon it, it became his property in virtue of section 301 (3) of the City of Bombay Municipal Act; [p. 413, col. 2.]

(2) that as the Act made no provision for payment by such owner, no price was payable by him for the projection on which he was required or allowed to build [p. 413, col. 2.]

In the case of a sale or acquisition of land, in the absence of a contract to the contrary, interest on the unpaid price runs from the date when the new owner enters into possession. [p. 414, cols. 1 & 2.]

Consolidated appeals from two decrees of the Bombay High Court (Sir Basil Scott, C. J., and Batchelor, J.), dated the 16th April 1916, confirming those of the same Court in its original jurisdiction.

FACTS of the case will sufficiently appear from their Lordships' judgment. The appellant, when he applied to re-build his premises, had been required to set back in one place and set forward in another: it was admitted he was entitled to compensation for the set-back, but as he refused to pay anything for the set-forward, the Bombay Improvement Trust withheld payment of the compensation for the set-back, the amount of which had been provisionally agreed. Appellant sued to recover this compensation. This suit is hereafter alluded to as "the first suit." In "the second suit" the Trust sought to eject appellant from the set-forward land, on which he had built. They claimed that the said land had vested in them under section 41 of the Improvement Trust Act,

Davar, J., decreed both suits. As to the second, referring to the set-forward land he held:—

"This piece of land by virtue of a notification under section 41 of the Improvement Trust Act and by reason of the provisions thereof became vested in the Improvement Trust in the year 1905, and from that day to this it has remained so vested in the Trust. It has never been handed back to the Municipality and has not been re-vested in that body. The plaintiffs, therefore, are the legal owners of this piece of land. They have never given the defendant or his mother any permission, leave or license to build on their land. The Municipality were under a misapprehension when they sanctioned and ordered the defendant to set forward his building on this land. The defendant's Engineers made no enquiries into the title of this land, but they shared in the mistake of the Municipality. The Improvement Trust are not bound by anything that the Municipality has done in this matter and their rights in the land and in the ownership thereof are not in the slightest degree affected by any action on the part of the Municipal authorities.

The next question to consider is, whether the plaintiffs are estopped from now reclaiming possession of this piece of land. Mr. Setalwad said that the plaintiffs had stood by and allowed the defendant to build without correcting his misimpression, and, therefore, they could not now eject him from the land. It seems to me that no question whatever of estoppel against the plaintiffs arises in this suit. The Improvement Trust left the questions of set-forwards and set-backs to be enforced by the Municipality, as building plans went to the Municipal Authorities and not to the Improvement Trust. The defendant never suggested, during the whole time that his building was under construction, that he was not bound to pay for the set forward land. He led the Municipal Commissioner to believe that he was going to pay for the set forward land. The Improvement Trust took it for granted that the set-forward was enforced by the Municipality in the ordinary way and on the usual terms. There was, there-

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fore, no reason to stop the defendant from building or to correct any misimpressions. The Municipal Commissioner has gone so far as to offer by an arrangement with the Improvement Trust to give the defendant a good title to this land if he paid for it. Far from there being any question of estoppel against the plaintiffs, it seems to me that if this had been a suit to enforce payment for the set-forward land, it would have been a difficult position for the defendant to maintain that he was not estopped from denying his liability to pay for the same. The defendant asked to be permitted to build on the set-forward land; that permission was given to him and a formal order for set forward was made as desired by him. He took possession of that land, and built his house five storeys high thereon and during the whole time he kept up the pretence that he was going to pay for such land. Five years afterwards, for the first time he disputed his liability to pay. Throughout all this time he had been masquerading under false pretences. He carried on long correspondence through his Solicitors, which on his side is by no means distinguished by candour or straightforwardness. Correspondence such as was carried on, on the defendant's behalf, does not help or advance his cause.

The defendant's conduct throughout has been conspicuously unscrupulous and transparently dishonest. Though the defendant is a minor, he is very near the full age limit, and is apparently able to decide for himself. The well-meant efforts of Mr. Setalwad, which I am glad to acknowledge here with appreciation, failed to move him or his mother and next friend to reconsider their position and to adopt a reasonable and honest attitude. He persisted throughout in maintaining the position which his Solicitors took up in their letter of the 7th of September 1911. Every effort to save money and obtain an unfair advantage has been made by the defendant throughout the trial of this case. After all these long years at the hearing for the first time he attempted to dispute the area of the set-forward land. He called an Engineer in support of this contention. The less said about the evidence of that witness

the better. Mr. Sanjana, who had actually measured the land in conjunction with the Municipal Officer, Harkissandas, and had initialled the measurements in token of their correctness, was called by the defendant, but Mr. Setalwad deliberately refrained from asking him any questions on this point. The attempt was abandoned, because it was both hopeless and dishonest. This is the man who asks the Court to exercise its equitable jurisdiction in his favour and compel the bare trustee, as he calls the Improvement Trust Board, to convey to him what the beneficiaries, as he calls the Municipality, gave him. In other words, having obtained other people's land by false pretences, he asks the Court to help him to retain the same. He asks, in the alternative and in the event of all the devices on his part failing to be allowed, to retain the land on payment. I refuse to give him any such relief. The Municipal Commissioner has treated this man with conspicuous fairness. He has always offered to accept reasonable payment for the land and procure for him a good title. The defendant has deliberately chosen to fight the case to the last, with the knowledge that the Court regarded his conduct as dishonest and he had no answer to the charge except that he had been advised that the law allowed him to take up the position he had done. He has taken his chances and he must take the consequences. His last prayer that he may be granted compensation in the event of his being ejected, is a prayer which in its effrontery is only equalled by the consistent dishonesty of the conduct throughout of Mr. Ratanlal Chhunilal Panalal. In my opinion he is not entitled to any consideration or help from the Court. He is found to be in possession of the plaintiffs' land without their leave or license and without a title thereto. Under the circumstances of the present case, the plaintiffs have, in my opinion, acted quite properly in filing this suit and are justified in re-claiming possession of their land."

With regard to the suit brought by appellant to recover compensation for the set back land, Davar, J., observed:—

"I have pronounced decree in favour of the plaintiff Ratanlal in the first suit. The amount decreed in his favour will not

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carry any interest. The moneys were always at his disposal. He could have taken those moneys at any time if he had chosen to act with common honesty. His refusal to pay for the set-forward land and his efforts to retain possession of that land without paying for it have necessitated the whole of this litigation. Although I give him 'a decree in the first suit, that decree will not carry interest on the amount decreed nor will it carry any costs. I have carefully considered the question of costs in the first suit. Having regard to the plaintiff's conduct throughout, I seriously considered whether I ought not to make him pay the defendant's costs of the first suit even though he obtains his decree. On a fuller consideration, however, I have come to the conclusion that the proper order in the first case is to leave both parties to bear their own costs. The defendant Ratanlal in the second case will pay the plaintiffs' costs of that suit. Such costs to include all costs occasioned by third party notice. The defendant must also pay the costs of the defendant in the first suit (the Municipal Commissioner) occasioned by third party notice in the second suit."

Davar, J.'s decision was upheld on appeal by the Appellate Bench of the Bombay High Court (Basil Scott, C. J., and Batchelor, J.). Hence the present appeals.

Messrs. P. O. Lawrence, K. C., and E. B. Raikes, for the Appellants, submitted that there was no power to make appellant pay for the set-forward land. That land was compulsorily vested in him and it would be strange that he should have to pay for it. The provisions as to compensation are to be found in the Bombay Municipal Act, (Bombay Act III of 1888) sections 289 (1), (2) and (3), 297, 298 (1) and (3), 300, and 301 (2) and (3). If the Corporation require us to set forward, it has to pay compensation for any damage thereby caused to us, but there is no provision for payment by the owner for land which he is compelled to occupy.

We say the land was ours already: we were entitled *usque ad medium filum* at any rate, and directly public rights ended the land vested in us absolutely. The notice which the Municipality gave us, intimating under section 346 of the Bombay Municipal Act their disapproval

of our plans for re-building, and giving us permission to re-build only if we set forward, operated under section 301 (3) to convey the land to us: or rather the surface right which is all the Corporation ever had.

[LORD SHAW.—No "terms and conditions" are set forth. If they wanted to make them they should have inserted them].

Whether or not the land is ours, the Trust cannot maintain this suit. They have no title themselves: at all events no title which will support an action for ejectment. They claim to have got the land under section 41 of Bombay Act IV of 1898. They say it did not re-vest in the Corporation under section 45 (2), because on account of their own alteration of the line of the street the whole width of Lohar Chawl was not taken and the set-forward land was not included in the new street. We say that they had no right under section 41 to acquire public land unless they were going to make it into a street: but in any case they were only bare trustees.

[SIR W. PHILLIMORE.—If they take too much land does not the surplus re-vest with the other?]

The superficial interest anyhow re-vested.

[LORD SHAW.—Under the notification the land was acquired only for the purposes of the street scheme.]

The Trust was merely a street-making authority, the land only vested in them in that capacity. Before we began to build they altered the scheme and their interest in the surface, which was all they ever had, ceased. A vesting claim must be construed according to the purpose for which the vesting is to take place, and operates during the time for which the land is required for that purpose and no longer.

Rolls v. St. George, Southwork Vestry (1) judgment of James, L. J., at page 797.

Land Tax Commissioners v. Central London Railway (2).

Even if the Trust had a title, they cannot eject us: for we were authorized to

(1) (1880) 14 Ch. D. 735; 49 L. J. Ch. 691; 43 L. T. 14; 23 W. R. 387; 44 J. P. 630

(2) (1913) A. C. 314 at p. 379, 83 L. J. Ch. 274; 103 L. T. 690, 77 J. P. 233; 11 L. G. R. 693; 57 S. J. 403; 29 T. L. R. 395.

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re build by the Municipal Commissioner. The two bodies—the Trust and the Corporation—worked hand in glove: they combined to make us build under penalties. The Trust had no power to make us build up to the new line. The machinery was supplied by the Municipal Commissioner. We were authorised to build by him, and whether he authorised us on his own behalf or as agent of the Trust is immaterial. It may be that an irregular procedure was adopted in giving us the order to re build: but neither the Trust nor the Corporation can be heard to say that: they are estopped. It is not true that the Corporation assented to the building under a mistake as to the ownership of the land: but even if they did it is immaterial.

The land on which we set forward was our own land, subject only to a vesting of the surface for street purposes in the Corporation: it cannot, therefore, be inferred that there was a right in the Corporation or in the Trust to claim payment. If it be looked upon as a case of one requiring their permission to build on this land, they could have made the payment a condition of such permission under section 301 (3): this was never done. It would be strange law if there were compulsory vesting *plus* an obligation to pay.

In the first suit we want interest, which we have been refused merely because we declined to pay what was not due for something else. We were entitled to interest as part of the compensation. It is not competent to respondents to object that only the Small Cause Court could deal with the question of compensation. They did not appeal and the suit is now *res judicata*.

[SIR W. PHILLIMORE.—It is not really a question of jurisdiction, but whether in the circumstances there was a right of action.]

The Hon'ble Mr. F. Russell, K. C., and Mr. Sheldon, for the Respondents.—This is the first time it has been suggested that the Corporation were aware, when they authorised the building on the set-forward land, that such land was vested in the Trust. It is also the first time it has been suggested that the strip of set-forward land belonged to appellant.

As to the first suit we do not take any point as to jurisdiction, but we contend he is not entitled to interest. Interest can only be recovered in one of three ways: 1. By the law merchant; 2. by Statute; 3. as damages. Section 301 of Bombay Act III of 1888 gives no right to damages.

[SIR W. PHILLIMORE.—Does not "compensation" imply either payment down, or payment later with interest?]

All they are entitled to is compensation for the value of the land: the Statute does not say, "and damages for delay in paying." Sub-section (4) of section 301 gives the owner power to go to the Small Cause Court to get the compensation assessed. When the transaction is in the nature of a sale and purchase, arbitrators may have power to award interest, but if there has been a long delay between the date when the money was payable and the proceedings, interest will not be awarded unless that delay is due to the fault of the persons sought to be charged: *Caledonian Ry. v. Carmichael* (3).

There was no sum ascertained until the judgment of the trial Judge: no debt, till the sum was awarded or an offer assented to. It was their own fault they did not get their money long ago.

[Mr. P. O. Lawrence.—The House of Lords has settled that interest is only payable from the date when possession is taken. (*Vide* also section 34 of the Civil Procedure Code, 1908.)]

As to the second suit, there was no compulsory appropriation. Section 300 of Act III of 1888 gives no power to anyone to make people build. It only applies when the initial request comes from the owner. The Municipal Commissioners cannot force a man to carry his building up to the "regular line of the street" unless he is re-building. Appellant was permitted, not required, to build upon the set-forward land. In substance what was done was done at his request and for his benefit. If he had said: "I want to build upon the street and I won't pay for it," the Corporation could have imposed a payment as a condition to their consent. We say the

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purchase-money is a term or condition of the conveyance under section 301 (3).

As to title, the strip of land became vested in the Improvement Trust under section 41 of Act IV of 1908 as part of their property, being land which under section 31 they thought was required for the scheme. Under section 45 (2) the land constituting Princess Street re-vested in the Corporation, leaving this strip vested in the Trust, which is a permanent body with power to hold lands. Nothing has ever taken away this strip from the Trust.

[LORD SHAW.—The policy of the Statute is to transfer to the Trust the soil of the street, and when the street is made to re-vest it in the Municipality. It would be inconvenient to have these little strips all over Bombay belonging neither to the inhabitants nor to the Municipality.]

There is no clashing of jurisdictions. The duty of the Municipality is to maintain the street. The whole thing is worked out in section 63, where powers to hold land are given not to the Corporation, but to the Board, *vide* also section 64.

[MR. AMERU ALI.—It is suggested that the Trust only holds land for a specific purpose. The Statute says, "for the purposes of the Act.]"

Those purposes are numerous. The strip vested in the Trust under the Act, and the Act does not say it vested only for a particular purpose.

[LORD SHAW.—But section 41 is limited. This strip has never been included in a street.]

When the notification was issued the strip was part of a street "to be formed." The words "the part required" do not mean *de facto* required: when the street is formed the Corporation gets the formed street and nothing else: the rest remains vested in the Trust.

[SIR W. PHILLIMORE.—I suggest that sections 41 and 45 stand together. It is not contemplated there shall be any extra strip: you are to have only the land actually required for the street. I don't see how the Trust can be heard to say that this is land which they have taken under section 41, but which does not go to the Corporation under section 45.]

It was land which the Trust thought they would want—*vide* section 31.

[SIR W. PHILLIMORE.—That does not affect section 41. A short method is provided of acquiring, by a mere notice, certain lands, but you get that land only if it is really wanted.]

The method is confined to land which you require as part of the street: if you don't require it as that, you may get possession but you don't get property.]

Section 31 provides the scheme. "Included" in section 41 means included in the scheme— included in the site of a street to be formed at the date of the notice. Everything turns on the *bona fide* inclusion of the site in the original scheme. Section 41 deals with a street to be formed: section 45 with a street actually formed: they are not correlative.

There is no general rule that a vesting clause vests property only *sub modo*: it is a question of the construction of the particular Act. In *Rolls v. St. George Southwork Vestry* (1), the words construed were "streets, being highways." Here the Act vests the land in the Corporation absolutely. Section 289 may leave the matter doubtful, but section 290 is clear.

[Mr. P. O. Lawrence, referred to *Municipal Corporation of Bombay v. G. I. P. Railway Co.* (4).]

That case was decided on totally different grounds. What Lord Haldane said on the point as to vesting is ambiguous and anyhow was only *obiter dictum*.

Mr. Sheldon, followed: The City of Bombay Improvement Board was constituted in 1898 for purposes set out in the preamble of Act IV of 1898. They are accountable as a public body for this strip of land: if they let it go to the Municipal Corporation they would be surcharged by the Auditor-General.

Mr. P. O. Lawrence replied.

JUDGMENT.

LORD SHAW.—These are consolidated appeals from two decrees of the High Court of Judicature at Bombay, dated the 16th April 1916, confirming decrees which are dated the 15th October 1914 in two suits which were instituted in its original jurisdiction.

The object of the suit by the respondents, the Trustees for the Improvement (4) 38 Ind Cas 923; 43 I. A. 310; 21 M. L. T. 1; 19 Bom. L. R. 48; 15 A. L. J. 63; (1917) M. W. N. 83; 21 C. W. N. 447; 25 C. L. J. 209; 41 B. 291 (P. C.).

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of the City of Bombay, against the appellant, is for a declaration of the plaintiffs' property in a certain piece of land, and for the ejectment therefrom of the defendant, the present appellant, and for delivery forthwith by him of possession thereof. The land has been built over. The issue raised is serious, affecting as it may do many other frontage sites in Bombay.

The position of the block of property (of which the piece just mentioned forms a part) is as follows. It is a corner site having one frontage to the east—Kalbadevi Road, the other frontage to the north—to Princess Street, in the City of Bombay. Princess Street is made on the site of what was formerly Lohar Chawl Street. The piece of land from which the appellant is sought to be ejected faces Princess Street. The primary question for the consideration of the Board is,—who owns that piece of land?

The plaintiff, Ratanlal Choonilal Panalal, is the proprietor of the corner block of ground. In the year 1906 his mother and natural guardian, he being then an infant of 9 years of age, wished to develop the property by erecting certain new buildings thereon. Steps were accordingly taken to give the notices required in the circumstances to the Corporation. No question arises as to the regularity of these proceedings. Building lines had been drawn up for the streets of Bombay by the Municipal Authorities under statutory powers, and in the course of disposing of the application to put down the new buildings on the corner block in question orders or requirements were issued that these lines should be conformed to.

With regard to the east frontage, namely, that to Kalbadevi Road, the order required that the line of new buildings to be erected should be set back. This was done. This involved the sacrifice to the owner of 28'41 square yards of site. It is admitted by the respondents that the Corporation must pay for this ground under the Bombay Act No. III of 1888.

With regard to the frontage to Princess Street formerly Lohar Chawl Street, it was required of the plaintiff not that he should set back his building line, but that that line should be carried forward. This

also was done and the buildings were erected, according, in all respects, to the requirements made and to plans which were submitted to and sanctioned by both the authorities, namely, the Corporation and the Improvement Trust. Details of these points need not be given: the real facts are admitted.

The attitude of the Corporation appears to be that the one of these transactions is a legitimate set-off in law against the other. In this, they are supported by the Bombay Improvement Trust, which puts forward the claim that it, under its Act of constitution, is the owner of that projecting piece of ground facing Princess Street, which had to be so to speak absorbed into the block so as to comply with the throwing forward of the building line. This would seem to be an answer to the plea of set-off, as the debt due by the Corporation could not be compensated in respect of a claim by the Improvement Trust. But these two authorities are hand and glove, and this not improperly. It is in the public interest that they should work together, if this can be done in conformity with the various Statutes. The mode of co-operation adopted in the present case was somewhat unusual. The Corporation, claiming as owner, made a demand to be paid a price for the site fronting Princess Street over which the appellant had been forced to throw his building forward so as to conform with the required buildingline. At first there was an inclination to consider that demand; but differences, delays, and further enquiry ensued, and finally the plaintiff refused this demand. Thereupon the Trust instituted their suit, craving *inter alia* ejectment of the plaintiff. This, if decreed, would of course mean the total destruction of a large and important section of the plaintiff's buildings, all erected according to plan and by the sanction and with the knowledge of the Corporation and Trust as stated.

This situation involves an investigation as to the important and fundamental question already stated, namely, who owns this piece of ground? Unless the Improvement Trust can establish its ownership of the site of the projection in question, namely, that facing Princess Street, it

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cannot, of course, have any title to eject the plaintiff therefrom.

By the City of Bombay Improvement Act, IV of 1898, the respondents as a Board of Trustees were constituted. Among its powers are those of making street schemes, and by section 1 it is provided that the street scheme "shall within the limits of the area comprised in the scheme provide for (a) the acquisition of any land which will in the opinion of the Board be necessary for or affected by the execution of the scheme; (b) relaying out all or any land including the construction of buildings and the formation and alteration of streets."

It is admitted that Lohar Chawl Street was in 1905 vested in the Corporation. The Trust state in their plaint that on the 17th January 1905 they intimated to the Corporation that that street so vested in it was required by the plaintiff to form part of Princess Street, a street which was then about to be formed by the Trust under a scheme to be carried out by it as provided for by the City of Bombay Improvement Act. The meaning of this is that, to begin with, the Trust took over Lohar Chawl Street just as it found it.

This was two years before the appellant began to build. In point of fact, he began in February 1907; and he began upon lines prescribed by the Corporation, and known and approved by the Trust as so prescribed. His building line did *de facto* project over the old line of Lohar Chawl Street and come forward to a new line arranged by the authorities as that upon which Princess Street was to run.

How had this change from the old frontage of Lohar Chawl Street to a new frontage for Princess Street occurred? It had occurred for the simplest of all reasons, namely, that between 1905 and 1907 the Trust, in working out its scheme of reconstruction, discovered that it would be more advantageous to run the line of Princess Street so as to carry it forward at certain portions, of which the bit of site in question is one, and to carry it back at other portions. The Trust accordingly communicated that new Princess Street line to the Corporation, sending a plan showing exactly the new and forward

regular building line. To that line the Corporation officers duly worked, and to that line the appellant was ordered, most properly, to conform. And, most properly, he did so. In obedience to this requirement the buildings were erected, and they conformed exactly with the forward frontage demanded. As Mr. Delves, the Trust's deputy land manager, testifies—

"The Trust officers knew that the defendant's building was being constructed on this set-forward land. . . . The Trust took no objection to the construction of the defendant's building while the building work was going on. . . . The Trust never claimed nor thought of claiming the set-forward land back from the defendant till the Municipality asked us to do so."

It was in these circumstances that the suit for ejectment of the plaintiff was brought by the Trust, upon the averment that in 1907 his mother "unlawfully entered into and took possession thereof." This is how the matter stands in fact. How it stands in law depends upon the claim which the Trust puts forward and asks to be judicially declared, that the piece of land "is the property of and vested in it." This claim in law will now be examined.

As stated, the history of the buildings has been that they have been erected to conform to requirement, upon the new and forward Princess Street line and not upon the old Lohar Chawl Street line. The question is, what is the fate of the property between these two lines? The Trust maintains that when it gave its original intimation to acquire up to the Lohar Chawl Street line the effect of that was to vest in the Trust all the ground so embraced, that is to say, not only the ground on which Princess Street was in fact formed, but also the strips on which it was not formed. The Municipality for the purposes of this litigation appears to acquiesce in this view, and the learned Judges in the Courts below agree. In the opinion of the Board this is a mistake.

The effect of the mistake would be to produce in the City of Bombay an extraordinary situation. Many properties fronting ordinary streets belonging to the Corporation would find themselves frontaging property belonging to the Trust by virtue, it is contended, of the mere intimation that

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the Trust required the old street for making the new. But when the new street came to be constructed, it would be within the power of the Trust to throw the new and actual building line forward with the result that not only would it become the owner of the street as ultimately formed, but it would also become *de facto* the owner of all the strips between the line of the old street and the line of the new. All the frontagers so situated in Bombay would consequently and *de jure* be put into the position of owning hinterland instead of frontage land and be subject to the disadvantages for commercial and other purposes of all that this implies. It was contended by the learned Counsel for the respondents that legally and logically the Trust being the owner of these strips it could do with them what it liked with the assent of the Corporation, that is to say, it could let them or build upon them as its own property, thus "blinding" all the old frontagers' sites and buildings.

It is accordingly necessary to see what actually is the true extent of the powers of the Trust on this topic. These are contained in the City of Bombay Municipal Act No. III of 1882, which gave certain powers to the Corporation, which powers were by section 42 of Act IV of 1898 declared to "apply to streets or parts thereof which may become vested in the Board under this Act during such period as the same shall respectively remain so vested and for the purposes of this Act." The language of this section reflects pretty clearly the main object of the Statute, which was to set up with sufficient powers a street-making authority, and, when its function as such was expired, to have the street which had been re-constructed or made by the Trust thereupon handed back to the Corporation.

By section 41 it was provided as follows:—

"Whenever under any improvement or street scheme the whole or any part of an existing public street or other land vested in the Corporation is included in the site of any part of a street to be formed, altered, widened, diverted, raised, re-arranged, or re-constructed by the Board, the Board shall give notice to the Commissioner that the whole, or a part as the case may be, of such existing street or other land (here-

inafter called the 'part required') is required by them as part of a street to be dealt with as aforesaid, and the part required shall thereupon, subject to the provisions of sub-section (2) of section 45, be vested in the Board; provided that nothing in this section contained shall be deemed to affect the rights or powers of any Municipal Authority under Chapters IX and X respectively of the Municipal Act in or over any Municipal drain or water-work."

By section 45 (2) it was provided that "the Commissioner shall on being satisfied that any street formed by the Board has been duly levelled, paved," etc., and drained and lighted, and, in short, thoroughly completed and the work of the Trust as a street making authority finished, then "such street shall thereupon vest or re vest, as the case may be, in the Corporation, and the Corporation shall thenceforward maintain, keep in repair, light, and cleanse such street."

Not a word is said in these sections to indicate either (1) that the building line of the street must, once indicated, remain by reason of that original indication, and not be open to change or putting forward should experience suggest this to be for the best; nor (2) is anything said to indicate that the street taken over "to be formed" is anything different in dimensions from the street to be handed back when formed.

Upon the first point the Bombay Act No. III, and no doubt the practice of the Municipality thereunder confute it. The section referred to is as follows:—

"297.—(1.) The Commissioner may—

(a.) Prescribe a line on each side of any public street; .

(b.) From time to time, but subject in each case to his receiving the authority of the Corporation in that behalf, prescribe a fresh line in substitution for any line so prescribed, or for any part thereof.

* * * * *

"(2.) The line for the time being prescribed shall be called 'the regular line of the street.'"

It cannot be suggested that the Trust were, as compared with the Municipality, prohibited from "prescribing a fresh line."

As to the second point, their Lordships are clearly of opinion that these two sec-

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tions, the one as to taking over a street "to be formed," and the other as to handing the formed street back are correlative to each other. The section does not mean merely "intended to be formed" when a notice is made, but it refers to that ground and no other which is used as a street and for the purposes thereof, and that no transfer from the Municipality is effected to the Trust of anything else. If, therefore, a line originally indicated is changed, the line of the street to be formed is changed and the whole transaction is modified in this sensible and practical manner. It is only in this way that the word "re-vest" in the Corporation becomes intelligible. What is to re-vest in the Municipality is just that which when formed as a street had been the subject of that interim divestiture to the Trust as the street forming authority. And the whole theory of the Trust's case, namely, that in virtue of a notice taking over from the Municipality a certain street of Bombay to be formed as a new street by the Trust, thereby vested the whole of the old street in it, although a strip of the old street never was formed as a new street, falls to the ground.

The Trust's action was—in conjunction with that of the officers of the Municipality—much more reasonable, namely, that when the line of the new street was made the frontager was required to put forward his building to conform to it. And this, in the opinion of the Board, was not only reasonable in practice but was correct in law and in accordance with a sound construction of the Statutes.

What then happened to the strip of old street which was never "formed" into the new street? The answer is that nothing happened to it. It remained under the jurisdiction, and in all respects as before the property of the Municipality. To it as such accordingly, when the frontager was required to put forward his buildings over it, the third sub section of section 301 of the Municipal Act of 1888 expressly applies. It is as follows:—

"(3). If the additional land which will be included in the premises of any person required or permitted under the last preceding section to set forward a building belongs to the Corporation, the order or

permission of the Commissioner to set forward the building shall be a sufficient conveyance to the said owner of the said land; and the terms and conditions of the conveyance shall be set forth in the said order or permission."

The result is plain: the projection, that is to say, the site between the old street line and the new, *ex adverso*, of the appellant's property, became his in ownership. It is his now. The title of the Trust to it fails, and with it fails the suit, whether for declaration or ejectment.

There remains to be dealt with the suit by the appellant for the price of the ground taken from him as the result of the compulsory throwing back of his line of building facing Kalbadevi Road and the absorption into that road by the Municipality of a portion of appellant's ground. Payment for this has been decreed and the decree in this respect will stand.

But two further questions arise in regard to that suit, *viz.*, as to costs and as to interest on the price.

Costs were refused on account of the view entertained in the Courts below as to the conduct of the appellant in refusing to set off against that price a price for the Princess Street projection. The question of whether a price is exigible for that projection does not arise directly as matter of suit; but it is necessary to express an opinion upon it because a determination upon it will govern the questions both of costs and of interest.

In the opinion of the Board while the Act makes provision for the compulsory expropriation of an owner, it makes no provision whatever for a payment by the owner in respect of what may be termed compulsory impropropriation. Some reasons occur for the view that it might have been so, and some occur for an opposite view. These were for the Legislature. What the Legislature has done, and all that it has done upon that subject, is contained in section 301 (2) of the Municipal Act. It is as follows:—

"(2). If, in consequence of any order to set forward a building made by the Commissioner, . . . the owner of such building sustains any loss or damage, compensation shall be paid to him by the Commissioner for such loss or damage."

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Such loss or damage may be easily figured: the compulsory projection may involve most serious cost; the whole foundations of the old building may be rendered useless, and the costs of new may be heavy; alterations of plans, levels, elevations, and the like might all be involved in particular cases, and, in short, the Legislature has recognised, not a price to be paid by the owner for compulsory impropration, but damages to the owner if such can be qualified in consequence thereof. Their Lordships in these circumstances cannot look upon the suggested right in the Trust or the Municipality to receive a compulsory price for the Princess Street proprietors to be justified by the Statute. Accordingly, the alleged right or duty of set-off fails.

In these circumstances the plaintiff and his advisers were, of course, entirely warranted in refusing to concede the set-off claimed. It was not, in the opinion of the Board, justified by law. This renders it unnecessary to deal in detail with certain derogatory observations, more particularly by Davar, J., culminating in his assertion that the appellant's conduct "has been conspicuously unscrupulous and transparently dishonest." When it is remembered that in all the most important of these transactions the appellant was an infant of 9 years of age, the suggestion of such precocity in wickedness in Bombay seems sufficiently answered. But it may suffice to say that, hard to bear as these accusations must have been, they do not appear to their Lordships to have been in any respect warranted by the facts or by the law of either case. In the opinion of the Board the position taken up by the appellant in these suits has been completely justified, and was throughout in accordance with law. Costs will accordingly follow the event.

On the point of interest, on the price payable by the Municipality, two matters were agreed at the Bar. In the first place, the rate of interest, should it be allowed, was arranged at 6 per cent. In the second place, it was agreed that the Municipality has been in possession of the ground since the 30th June 1909.

The Board is of opinion that the right to interest depends upon the following broad and clear consideration. Unless there be something in the contract of parties

which necessarily imports the opposite, the date when one party enters into possession of the property of another is the proper date from which interest on the unpaid price should run. On the one hand, the new owner has possession, use, and fruits; on the other, the former owner, parting with these, has interest on the price. This is sound in principle, and authority fully warrants it. See especially Sir W. Grant's judgment in *Fludyer v. Cocker* (5), and also see *Greenock Harbour Trustees v. G. & S. W. Railway* (6), in which the judgment of Lord Cowan in *Re Stirling and Dunfermline Railway Company* (7) is adopted. Also *Birch v. Joy* (8) in the judgment of Lord St. Leonards at page 590.

Their Lordships will humbly advise His Majesty that the appeals be allowed, and that in the first suit the decrees appealed from be varied, and that a decree passed in favour of the appellant for the sum of Rs. 5,682 brought out in the judgment of date the 15th October 1914, with interest thereon at the rate of 6 per cent. per annum from the 30th June 1909 until payment; and that further in the second suit the judgment and decree be recalled, and that that suit stand dismissed; the appellant to have his costs in both suits, here and in the Courts below.

Appeals allowed.

Solicitors for the Appellant.—Messrs. T. L. Wilson & Co.

Solicitors for the Respondent.—Messrs. Cameron Kemm & Co.

(5) 12 Ves. (Jun.) 25; 8 R. R. 275; 33 E. R. 10.

(6) (1909) Sess. Cases 50.

(7) 19 D. 596.

(8) (1852) 3 H. L. C. 565; 10 E. R. 222.

KESWA SURENDRA SAHI v. MALUKRANI KUER.

PATNA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL No. 64 OF 1918.

November 1, 1918.

Present:—Mr. Justice Roe and
Mr. Justice Coutts.

KESWA SURENDRA SAHI

—APPELLANT

versus

Musammat MALUKRANI KUER

—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 182 cl. (5)—Execution of decree—Application against minor judgment-debtor without application for appointment of guardian, whether step-in-aid of execution—Application in accordance with law.

An application for execution of a decree made against a minor judgment-debtor represented by his mother, without any application to the Court for an order appointing the mother guardian *ad litem* of the minor, is in accordance with law and operates to save limitation.

Appeal from a decision of the Subordinate Judge, Saran.

Messrs. Syed Hasan Imam, Rajendra Prasad and Ambika Prasad, for the Appellant.

Mr. Rai Tribhuannath Sahay, for the Respondent.

JUDGMENT.—In this case the appellant is aggrieved by an order of the Subordinate Judge of Saran disallowing his objection to the execution of a decree. That objection was made on the ground that the decree was now extinct under the Law of Limitation, no step-in aid of execution having been taken in accordance with law within three years prior to the present application. It is conceded that an application was made to execute the decree in 1916. But it is urged that this application was not in accordance with law by reason of the fact that the judgment-debtor was then a minor, and the application was made as against the minor represented by his mother without any application to the Court for an order appointing the mother as guardian *ad litem*. We are of opinion that the application must be held to have been a step-in-aid of execution taken in accordance with law, for it was open to the decree-holder either to include in his application for execution an application for a formal order appointing a guardian or to make that application as a separate application. The first step-in-aid of execution was obviously to pursue the property

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of the minor, stating that he was a minor and naming the person who would be his natural guardian. The appointment of the guardian by the Court would not be the first step but the second step-in-aid of execution. Therefore, clearly the application itself was a first step made in execution of the decree and was in accordance with law. Even if it were not so, I should be loath to hold otherwise than was held in *Gopal Chunder Mannu v. Gosain Das Kalay* (1) by the Full Bench, *Kalka Dube v. Bisheshar Patak* (2) and *Hari v. Narayan* (3). A decree does not become time-barred by reason of a trivial defect in the form in which the former application was made. I would dismiss this appeal with costs.

Appeal dismissed.

(1) 25 C. 594 (F. B.); 2 C. W. N. 556; 18 Ind. Dec. (N. s.) 392.

(2) 23 A. 162; A. W. N. (1901) 31.

(3) 12 B. 427; 6 Ind. Dec. (N. s.) 770.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 47 OF 1918.

June 23, 1918.

Present:—Sir Henry Drake-Brookman, J. C.

GULAM AND ANOTHER—DEFENDANTS

NOS. 3 AND 4—APPLICANTS

versus

SHEODIN RAM AND OTHERS—PLAINTIFF AND DEFENDANTS NOS. 1 AND 2—NON-APPLICANTS.

Specific Relief Act (I of 1877), s. 9—Possession, suit for—Constructive possession, whether sufficient—Civil Procedure Code (Act V of 1908), s. 115—Revision—Erroneous decision of law, whether ground for interference—Remedy, other, open to aggrieved party, effect of.

In suits under section 9 of the Specific Relief Act the ordinary rule of possession going with title should be followed in deciding whether a person has been dispossessed within six months of the date of the suit. In order to bring this section into operation it is not necessary that the possession which is lost should be the actual physical occupation of the property. Constructive possession which goes with title would suffice for the purposes of the section. [p. 416, col. 2.]

Dinkarsha v. Anantsha, 16 C. P. L. R. 154, distinguished.

An erroneous decision of law cannot be regarded

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as an exercise of jurisdiction with which the Court was not vested by law and does not, therefore, furnish a ground for interference in revision. [p. 416, col. 2.]

It is not the practice of the High Court to interfere in revision when another remedy is open to the aggrieved party, and when no great injustice or inconvenience would follow from the refusal to interfere. [p. 417, col. 1.]

Ram Kishen Das v. Jai Kishen Das, 11 Ind. Cas. 814; 33 A. 647; 8 A. L. J. 191; *Chidambaram Chetty v. Nagappa Chetty*, 16 Ind. Cas. 820; 38 M. 15; 24 M. L. J. 73; *Kashinath Sakharan Kulkarni v. Nana*, 21 B. 731; 11 Ind. Dec. (N. S.) 492; *Balram Misar v. Bairagi Mali*, 12 C. P. L. R. 52; *Fadu Jhala v. Gour Mohun Jhala*, 19 C. 544; 9 Ind. Dec. (N. S.) 806 (F. B.) and *Shyama Churn Ghosh v. Mahomed Ali*, 3 Ind. Cas. 466; 13 C. W. N. 835; 10 C. L. J. 30, followed.

Application for revision of the decree of the Sub-Judge, Jubbulpur, dated the 29th November 1917.

Dr. H. S. Gour and Mr. J. C. Ghosh, for the Applicant.

Mr. M. Gupta, for the Non-Applicant.

ORDER.—This is an application to revise a decree passed by the Sub-Judge, Jubbulpur, under section 9 of the Specific Relief Act, directing the defendant Lachman to put the plaintiff in possession of a certain *kotha* in the town of Jubbulpur and ordering that the plaintiff's costs should be paid by all the four defendants.

For the purposes of this application the facts may thus be stated. The applicants are Lachman and another defendant, the remaining defendants having been joined as non-applicants. The *kotha* in question belongs to one Sakharan, who let it along with two others to the plaintiff Sheodin Ram for four years by a registered lease dated the 3rd May 1913. The plaintiff sublet the *kotha* to Behari and Nathu on the 23rd May 1914 for one year. The sub-lessees held on after the expiry of the term and Behari died of plague in January 1917. Many of the residents of Jubbulpur had left the town owing to plague. Among them were the plaintiff and Nathu, who met at Gadawara sometime in February where Nathu informed the plaintiff that Behari's property had been removed and that he himself no longer required the *kotha*. On the 15th March 1917 the defendant Gulam took possession and let the *kotha* to the defendants Nanhulal and Baldeo Prasad, who thereupon put the defendant Lachhu into possession.

The Sub Judge has held that although the plaintiff admittedly did not return to Jubbulpur between the final abandonment of the *kotha* by Nathu and the 15th March 1917, he was still in possession for the purposes of section 9, Specific Relief Act, and had, therefore, a right to sue under that section.

In this Court it is urged on the authority of *Dinkarsha v. Anantsha* (1) that the possession which must be lost to bring that section into operation must be an actual physical occupation of the property and that the mere constructive possession which goes with title cannot suffice.

The facts in the case cited are distinguishable from those now under consideration, in that there a tenant with a subsisting right of tenancy was in actual physical possession, when the ouster complained of by the landlord took place. The decision goes no further than to lay down that in such circumstances the landlord cannot sue in his own name. To accept the view contended for by the applicants would be tantamount to holding that no suit could be brought under section 9 by any one. The plaintiff was admittedly entitled to have physical possession of the *kotha* as soon as it was finally abandoned by Nathu, and in the circumstances I consider that the ordinary rule by which possession is taken to go with title should be followed.

I am further very doubtful whether an erroneous finding upon the question of what constitutes dispossession can properly be regarded as an exercise of jurisdiction with which the Judge was not vested by law. The Sub-Judge had jurisdiction to try the case and he decreed the claim in the view that the plaintiff was in possession and was dispossessed by the entry of the defendants. If the Judge was in error, the error was not one of jurisdiction but of law. It is true that this Court interfered in its decision above cited, but the point whether it had the power to do so was apparently not raised. In *Fadu Jhala v. Gour Mohun Jhala* (2) O'Kinealy, J., held that the decision complained of

(1) 16 C. P. L. R. 154.

(2) 19 C. 544 at p. 561; 9 Ind. Dec. (N. S.) 806 (F. B.).

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was not subject to revision. There the Munsif had dismissed a suit brought for possession of a right to fish in a certain *khal* the soil of which did not belong to the plaintiff, holding that such a suit did not fall within the purview of section 9. A similar view was taken by Sharfuddin and Coxe, JJ., in *Shyama Churn Ghosh v. Mahomed Ali* (3). Authority in the opposite direction may be found in *Collector of Vizagapatam v. Abdul Karim Sahib* (4) and *Brajabala Devi v. Gurudas Mundle* (5), but in neither of those cases was any reference made to the decision of the Privy Council in *Amir Hassan Khan v. Sheo Baksh Singh* (6).

There is, moreover, another principle on which I consider this Court should decline to interfere. It is open to the applicants to bring a suit to establish their title, and it is not the practice of this Court to interfere in revision where another remedy is open to the approved party and where no great injustice or inconvenience would follow from the refusal to act. This principle has been acted upon by all the High Courts. See for example *Ram Kishen Das v. Jai Kishen Das* (7), *Chidambaram Chetty v. Nagappa Chetty* (8) and *Kashinath Sakharan Kulkarni v. Nana* (9). The same principle was applied by this Court in *Balram Misar v. Bairagi Mali* (10), in which a suit under section 9, Specific Relief Act, had been wrongly dismissed.

From the defence filed it does not appear that any of the defendants has any show of title or that the entry upon the *kotha* was effected otherwise than by way of pure trespass. Having regard to all the circumstances, I decline to interfere in revision. The application is dismissed and the applicants will pay the non-applicant-plaintiff's costs in this Court. I allow Rs. 16 for the hearing.

Application dismissed.

- (3) 8 Ind. Cas. 486; 13 O. W. N. 835; 10 C. L. J. 30.
- (4) 21 M. 113; 6 M. L. J. 4; 7 Ind. Dec. (N. s.) 438.
- (5) 38 C. 487 at p. 497; 3 O. L. J. 293.
- (6) 11 O. 6; 11 I. A. 237; 4 Sar. P. O. J. 559; Rafique & Jackson's P.O.No. 83; 5 Ind. Dec. (N. s.) 760 (P. C.).
- (7) 11 Ind. Cas. 814; 33 A. 647; 8 A. L. J. 791.
- (8) 16 Ind. Cas. 820; 38 M. 15; 24 M. L. J. 73.
- (9) 21 B. 731; 11 Ind. Dec. (N. s.) 492.
- (10) 12 C. P. L. R. 52.

ODDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 373 OF 1917.

June 11, 1918.

Present:—Pandit Kanhaiya Lal, A. J. C.
DURGA PRASAD AND OTHERS—DEFENDANTS—APPELLANTS

versus

RAM CHARAN—PLAINTIFF—RESPONDENT.
Oudh Rent Act (XXII of 1886), s 3 (10)—Grove-holder not paying rent, whether tenant—Ejectment—Notice to eject, validity of.

A person to whom land is granted for the purpose of planting a grove without any contract to pay rent is not a tenant within the meaning of the Oudh Rent Act. He is a grove-holder and is entitled to hold possession so long as the land retains the character of a grove. The mere fact that the land is liable to resumption or assessment of rent, if brought under cultivation after the grove ceases to exist, does not make the grove-holder a tenant so as to render him liable to ejectment by notice at will so long as the grove exists. [p. 418, cols. 1 & 2.]

Appeal from the decree of the District Judge, Hardoi, dated the 6th June 1917, upholding the order of the Munsif, Shahabad, dated the 25th July 1916.

Mr. A. P. Sen and Babu Har Gobind Das, for the Appellants.

Pandit Harkaran Nath Misra, for the Respondent.

JUDGMENT—The dispute in this case relates to plot No. 539/1 *khassra* measuring 7 *biswas*, which is occupied by a grove planted by the plaintiff. The defendants are the proprietors of the land on which the grove stands. They took proceedings against the plaintiff in the Revenue Court for his ejectment from the said land, treating him as a tenant paying rent. The plaintiff contested the notice of ejectment but was unsuccessful. The finding of the Board of Revenue, which directed his ejectment, was that there were some very young trees in No. 589/1 and that the said land was not held rent-free under a grove-tenure (Exhibit A-7).

The present suit was filed by the plaintiff for a declaration that he was the grove-holder of the said plot and had a right to maintain his possession as such and that the defendants were not entitled to eject him from the same. His allegation was that the grove in question was planted by him 16 or 17 years ago with the permission of Dargahi Lal, the father of the defendants, that he built a *pacca* well over

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the land and that no rent was ever paid by him to the plaintiffs. In other words, he denied that he was a tenant of the defendants and set up his right to maintain the grove so long as the grove existed. The defendants pleaded that the land in dispute was cultivated by the plaintiff at a rental of 8 annas per annum, that there were 8 trees on the said land, some of which were planted by the plaintiff 3 or 4 years ago without the consent or permission of the defendants, and the rest had sprung up spontaneously, that the well, standing in the land, was constructed by the plaintiff without the consent or permission of the defendants during the pendency of the ejectment proceeding, and that the suit was not cognizable by the Civil Court. They further stated that in the survey which took place in 1302 Fasli the number of the plot in dispute was changed from 589, 1 to 389/2.

The Courts below held that the land in dispute was given by Dargahi Lal, the father of the defendants, to the plaintiff for planting a grove about 16 or 17 years ago, that the trees standing thereon were planted by the plaintiff and that no rent was paid by him for its occupation. In regard to the question of jurisdiction, the opinion of the Court of first instance was that the plaintiff was not a tenant but a grove-holder and as such he was not liable to ejectment by notice, but before the lower Appellate Court that question was not pressed.

A tenant is defined in the Oudh Rent Act (XXII of 1885) as a person liable to pay rent. A person to whom land is granted for the purpose of planting a grove without any contract to pay rent is not a tenant within the meaning of that Act. He is a grove-holder and is entitled to hold possession so long as the land retains the character of a grove [*Mehdi Ali Khan v. Gurdin* (1)]. He is really a licensee and no rent can be assessed on the land contrary to the original license or grant, much less can the land be resumed, so long as the grove exists.

As pointed out in *Raghubar v. Raja Rampal Singh* (2), the Revenue Courts

have exclusive jurisdiction to decide, where a tenancy is admitted, what the nature of the tenancy is; but when the existence of the relation of landlord and tenant is denied, they have no exclusive jurisdiction to decide as to the existence of such relation. The mere fact that the land is liable to resumption or assessment of rent, if brought under cultivation after the grove ceases to exist, does not make the grove-holder a tenant so as to render him liable to ejectment by notice at will so long as the grove exists. On the findings arrived at in this case, which are conclusive, the proceedings taken in ejectment against the plaintiff in the Revenue Court were without jurisdiction.

The appeal fails and is dismissed with costs.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 471 OF 1914.

May 9, 1918.

Present:—Mr. Justice Shah Din and Mr. Justice Chevis.

LEKHU AND ANOTHER—DEFENDANTS—
APPELLANTS

versus

HANWANTA—PLAINTIFF—RESPONDENT.

Shamilat—Proprietor building over part of *shamilat*—*Suit by another proprietor for removal of building, maintainability of—Special damage, proof of.*

Where one of the proprietors of a village sues another proprietor for the removal of buildings erected by the latter on a part of the village *shamilat*, whether within the *abadi* or not, and it is found that the defendant has not taken more than the share which would fall to him on partition and that no special damage has been caused to the plaintiff, the suit is liable to be dismissed. [p. 419, col. 1.]

Second appeal from the decrees of the Divisional Judge, Ferozepur, dated the 12th February, 1914.

Messrs. Oertel and Balwant Rai, for the Appellants.

Messrs. Obbard and Lal Chand, for the Respondent.

JUDGMENT.—The plaintiff sues for the demolition of houses marked red on the plan, which he says the defendants have

(1) 2 O. C. 73.

(2) 3 O. C. 365.

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erected within the *abadi* of the village on a part of the *sath*.

The buildings in suit have been erected partly by Kheman who built those to the right of the plan and partly by Lekhu who built those to the left. The first Court decreed the claim. Lekhu and his mother *Musammāt* Lachhmi appealed. Kheman did not appeal. The District Judge dismissed the appeal, holding that whether the site in dispute was part of the *sath* or only an annex or entry to it was immaterial since the buildings either lessened the area of the *sath* or narrowed the entrance to it and damage was done which could not be remedied by partition.

Lekhu and his mother appeal to this Court, and the first question to consider is whether in such a case it is necessary for plaintiff to prove any special damage.

In the case of obstruction of a highway, open to all the world, it is beyond dispute that any individual must prove special damage, and for the appellants it is contended that the same is the rule when the obstruction takes the form of a building on a part of the *shamilat deh*, whether within the *abadi* or not. Here reliance is placed on *Ram v. Pir Bakhsh* (1) and *Majji v. Teja Singh* (2). The principle laid down is that where the trespasser has not taken more than the share which would fall to him on partition and the plaintiff has failed to prove any special damage, the Courts will not give a decree.

But the learned Counsel for the respondents urges that the rule of special damage applies only to obstructions of highways, and not to encroachments on pieces of village *shamilat*.

He relies on *Fatehyab Khan v. Muhammad Yusuf* (3). But that was not a case of village *shamilat* at all, but a case of a courtyard common only to a few individuals, in other words, it was a case of "interference with a private easement." Counsel then relies on *Achhar Singh v. Badhawa Singh* (4), which certainly is in

his favour, but the learned Judge who delivered this judgment seems to have overlooked the fact that the two rulings on which he relies, *viz.*, *Ghan Singh v. Sadda Singh* (5) and *Chuhar Singh v. Dhaunkal Singh* (6), are cases in which the whole remaining proprietary body of the village sued those who had made the obstruction. In such a case the whole body have obviously no need to prove "special damage." For special damage means damage experienced by one or more persons in particular, and when all the persons damaged join in the claim they can all sue even though no one person may be damaged more than the rest. So too in the case of a highway open to all the world, if all the world could be joined in the claim against the obstructor, there would be no need to prove special damage. But when one only of the persons aggrieved brings the suit he must prove that he in particular has been damaged.

Here we can find no special damage, for the plaintiff has his house well to the north of the obstruction, and the *sath* or that part of the *sath* which is just adjoining his own house is quite large enough for all purposes. His way to other parts of the village has not been cut off; it has been narrowed no doubt, but so has everybody else's way. Nor has it been shown to us that the defendant has taken more than his own share of what would fall to him on partition.

We accept the appeal and reversing the decision of the lower Courts so far as the present appellants are concerned, we dismiss the suit as against them but we leave them to bear their own costs in all Courts, as they certainly have trespassed on the common land. The decree will, of course, stand as against defendants other than the appellants.

Appeal accepted.

(5) 73 P. R. 1882.

(6) 74 P. R. 1885.

(1) 33 P. R. 1901; 71 P. L. R. 1901.

(2) 44 Ind. Cas. 844; 29 P. R. 1918; 114 P. W. R. 1918.

(3) 9 A. 434; A. W. N. (1897) 82; 5 Ind. Dec. (N. S.) 725.

(4) 11 Ind. Cas. 404; 9 P. R. 1912; 84 P. W. R. 1911.

RAM HARAKH V. AMBIKA DATT RAM.

OUDEH JUDICIAL COMMISSIONER'S
COURT.

SECOND CIVIL APPEAL No. 107 OF 1918.

June 4, 1918.

Present:—Mr. Lindsay, J. C., and Mr.

Daniels, A. J. C.

RAM HARAKH—DEFENDANT—APPELLANT

versus

Bhaiya AMBIKA DATT RAM—

PLAINTIFF—RESPONDENT.

*Landlord and tenant—Tenant occupying house in
abadi—Tenancy, determination of—Ejection from
house—Presumption.*

Where a tenant is found in occupation of a house in the *abadi* of an agricultural village, the village site being the landlord's property, there is a presumption that he holds the site as appurtenant to his tenancy and has no right to retain it against the wish of the landlord on ceasing to be a tenant in the village. [p. 420, col. 2.]

Shohrat Singh v. Jhagru, 30 Ind. Cas. 782; 13 A. L. J. 745, followed.

Where a landlord sues to eject a tenant from a house in the *abadi* of an agricultural village, he must establish his right to eject the latter by showing that the latter has ceased to retain any interest in the village entitling him to retain the site. [p. 421, col. 2.]

Appeal from the decree of the District Judge, Gonda, dated the 23rd January 1918, confirming that of the Munsif, Gonda, dated the 20th December 1917.

The Hon'ble Pandit Gokaran Nath Misra, Babu Ishwari Prasad and Pandit Harkaran Nath Misra, for the Appellant.

Babu Puttoo Lal, for the Respondent.

JUDGMENT.—This was a suit for the ejection of the defendant from the site of a *kachcha* house and a cattle shed in the village of Kuncha, Kasimpur with permission to remove the materials. The plaintiff, the Taluqdar of Singha Chanda, is the proprietor of the entire village while the defendant-appellant was a tenant in the village. The plaintiff's allegation was that the defendant was allowed to occupy the house in the capacity of the plaintiff's tenant, that the defendant has now been ejected from his entire holding, that he was asked by the plaintiff to vacate the site of the house and remove the materials but did not do so, and that he was liable to ejection. The defendant replied that he and his predecessors had occupied the house and cattle-shed for several generations, that it was not appurtenant to the tenancy, and that while it was true that he had been ejected from his cultivatory

holding he still held some grove-land in the village and some further land as sub-tenant for all these reasons he was not liable to ejection.

On the case coming into Court neither party produced any evidence. The learned Munsif, following the law as laid down by Sir George Knox in the well-known case of *Shohrat Singh v. Jhagru* (1), held that there is in cases like this, where a tenant is found in occupation of a house in the *abadi* of an agricultural village, the village site being the landlord's property, a presumption that he holds the site as appurtenant to his tenancy and has no right to retain it against the wish of the landlord on ceasing to be a tenant in the village. The learned Munsif placed on defendant the burden of proving that he still retained any interest in the village sufficient to enable him to resist ejection and, as no evidence was produced, decided against him. The learned Munsif accordingly decreed the suit allowing three months' time for removal of the materials. This decision was upheld in appeal by the learned District Judge.

In second appeal the defendant contends, as he contended in the Court below,

first, that the decision in *Shohrat Singh v. Jhagru* (1) is wrong and should not be followed, but that the plaintiff should be required to prove by definite evidence that the site was originally occupied as appurtenant to the holding,

second, that it certainly lay on the plaintiff to show that the defendant had become liable to ejection by ceasing to have any status in the village and that the Courts below were wrong in placing the burden of proof on this point on the defendant.

He asked us that issues might be remitted on both these matters.

On the first issue we see no reason to differ from the law as laid down in *Shohrat Singh v. Jhagru* (1) by a Judge whose knowledge of the conditions of agricultural life in these provinces is probably unequalled. On the contrary we think that this ruling represents the generally accepted law alike in Agra and in Oudh,

(1) 30 Ind. Cas. 782, 13 A. L. J. 745.

RAM HARAKH v. AMBIKA DATT

and the reason that the case-law on the subject is so scanty is mainly that the law is so well understood that it has rarely occurred to any one to dispute it. We have been treated to a disquisition on the origin of Zemindari rights and it has been pressed on us that Zemindars were in most cases originally mere farmers of revenue. Historically this may be true, but in the present day there is no question that the Zemindar's position is that of proprietor subject only to his liability to pay Government revenue, and that his proprietorship extends just as fully to the village site as to any other portion of the village area. No person can occupy any part of the village site except by his permission or acquiescence, and such permission is normally only given either to a tenant or to a person having some definite position or duty in the village; and in the case of a tenant it is an implied condition of the permission that the right of occupation is co-extensive with the continuance of the tenancy. The presumption made by Sir George Knox is simply the presumption of section 114 of the Evidence Act, that the usual course of conduct has been followed in a particular instance. In this view of the law, even if the tenant be regarded as a licensee section 60 of the Easements Act, which has been pleaded before us, ceases to have any application. The licensee was a limited licensee and ceases to be in force in accordance with section 62 (c) as soon as the licensee ceases to be a tenant.

Shohrat Singh v. Jhagru (1) - has been followed by Sir Edward Chamier, another Judge of exceptional experience, in *Musamat Phul Bibi v. Zahur Ali* (2). It has also been followed by the senior member of this Bench in Second Civil Appeal No. 259 of 1917 decided on 3rd January 1918 [*Ghirrao v. Sardar Karam Singh* (3)]. A very similar view was taken by Stanley, C. J., and Burkitt J., in an earlier case, *Nazir Hasan v. Shihba* (4). The learned Judges say: "It is admitted, and appears to be undoubtedly the rule in these provinces, that a tenant is given a room or house in the *abadi* to live in during the

existence of 'his tenancy.' In the particular case before them their Lordships dismissed the suit on the ground that either the defendants had acquired title by adverse possession or they held the house or room in dispute as appurtenant to their tenancy, which at the time of the suit was still subsisting. This ruling was subsequently followed in *Dubri Lal v. Dholu Rai* (5). In *Net Ram v. Tej Ram* (6) a piece of land in the *abadi* used for cattle and for storing manure was held to be an appurtenance to the tenancy. In none of these cases was the plaintiff required to prove the fact by direct evidence. To require him to do so would be obviously in most cases to throw on him an impossible burden.

On the second issue we think that the appellant is right. It was for the plaintiff to establish his right to eject the defendant by showing that the latter had ceased to retain any interest in the village entitling him to retain the site of his house. Mere cultivation as sub-tenant would not we think be such an interest, but a groveholder is a *quasi-tenant* who is by custom ordinarily not liable to eviction so long as the land he occupies retains the character of a grove. As the plaintiff was misled by the form in which the issue was framed we remit an issue under Order XLI, rule 25,—

Does the defendant retain any grove land in the village and, if so, of whom does he hold it and on what terms?

On receipt of the findings which should be submitted within six weeks, ten days will be allowed for objections.

Issue remitted.

FINAL ORDER.

LINDSAY, J. C., AND KANHAIYA LAL, A. J. C., (September 13, 1918).—By an order of a Bench of this Court dated the 4th of June last, an issue was remitted to the Court of the District Judge, the object being to ascertain whether or not the defendant-appellant here retained any grove-land in the village and whether, if he did so, he was liable to be ejected from his house. The suit as brought was a suit for the ejectment of the defendant-appellant from his house in the village

(2) 28 Ind. Cas. 849.

(3) 47 Ind. Cas. 645; 5 O. L. J. 453

(4) 27 A. 81; 1 A. L. J. 479; A. W. N. (1904) 169,

(5) 3 A. L. J. 619; A. W. N. (1903), 243.

(6) 20 Ind. Cas. 260; 11 A. L. J. 445,

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on the ground that he had been ejected from his holding and had no longer any connection with the village. The learned Judge after remand received evidence on both sides and came to the conclusion that the defendant-appellant failed to prove that he still had in his possession any grove-land in the village. The case came up before us a few days ago and, as then appeared that the learned District Judge had misread one of the entries in the village papers, we thought it desirable to allow the defendant-appellant an opportunity of putting in another piece of documentary evidence in order to explain the entry which had been misconstrued. Mr. Dewhurst, seeing the figures 1306 in one of the entries, seems to have been of opinion that these related to the date of the defendant-appellant's occupation of the particular plot described, whereas it appeared to us that the No. 1306 refers back to an earlier number in the Settlement Khasra. We have now had a copy of the entry relating to No. 1306 of the Settlement Khasra placed before us. The result of the documentary evidence on the record appears to us to be this. At the time of the last Settlement this defendant-appellant was in possession of a holding in this village. It is admitted that he has been ejected by a notice which was issued for the year 1324 Fasli. It is admitted that when the notice of ejectment was issued it did not relate to a plot No. 1373/3. According to the Khasra of the year 1323 Fasli, the defendant-appellant is still in possession of this plot which is shown as a grove; and it is further to be noticed that this number seems to have been a part of the agricultural holding as it stood at the time of the last Settlement. It seems to us, therefore, that the situation is this, namely, that the defendant-appellant has converted a portion of his holding into a grove and that the landlord, when he took ejectment proceedings against the appellant, either negligently or designedly abstained from issuing a notice of ejectment with regard to this plot now described as a grove and the result, therefore, is that the defendant-appellant is shown by the evidence on the record to be in possession of a grove-plot. If he is in there either through the negligence

of the Taluqdar to eject him or because the Taluqdar has not thought fit to eject him, then it seems to us that the Taluqdar is not in a position to say that this man Ram Harakh has lost all connection with the village and is, therefore, liable to be turned out of his house. The result, therefore, is that we hold that it is not shown that the defendant-appellant ceased to have any connection with the village, and consequently he is not liable to be turned out of his house.

We allow the appeal, set aside the decree of the lower Appellate Court and dismiss the plaintiff's claim with costs to the defendant appellant in all three Courts.

Appeal allowed.

ALLAHABAD HIGH COURT.
FIRST APPEAL FROM ORDER No. 50 OF 1918.
July 30, 1918.

Present:—Sir Henry Richards, Kt.,
Chief Justice, and Mr. Justice Tudball.
MUNNA SINGH—PLAINTIFF—APPELLANT
versus

AUSAN SINGH AND OTHERS—DEFENDANTS—
RESPONDENTS.

Specific Relief Act (I of 1877), s. 9—Decree for possession of land and crops—Crops cut and removed by defendant—Damages, suit for, maintainability of.

Plaintiff obtained a decree under section 9 of the Specific Relief Act for the possession of a piece of land and the crops growing thereon, but before the decree could be executed the defendant cut and removed the crops. Thereupon the plaintiff brought a suit to recover the value of the crops.

Held, that the defendant could not by cutting and removing the crops annul the effect of the possessory decree, and that, therefore, the plaintiff was entitled to the value of the crops, although the question of title had not been decided in the previous suit [p. 423, col. 1.]

First appeal from an order of the Judge of the Court of Small Causes, exercising the powers of a Subordinate Judge, Cawnpore

Mr. Peary Lal Banerji, for the Appellant

Mr. Narayan Prasad Asthana, for the Respondents.

JUDGMENT.—This and the connected appeal arise under the following circum-

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stances. The plaintiff brought a suit against the defendants, alleging that he was in separate possession of certain land situate in a Mahal in which both he and the defendants were co sharers, that there was a crop growing on this land which belonged to him and that he had been dispossessed by the defendants. He claimed possession of the land with the crops growing. His suit was under section 9 of the Specific Relief Act. The Court, finding that the plaintiff was in possession, granted him a decree under that section granting him possession of both the crops and land. Before the decree could be executed, the defendants took possession of the crops and cut and removed them. Thereupon the plaintiff brought the suit out of which this and the connected appeal arise. In this he claimed that he was entitled to damages for the crops. It seems to us to make no difference whether he called it damages or asked for the price of the crops which had been taken and removed, as he alleged. The Court of first instance granted the plaintiff a decree, giving him Rs. 386 instead of Rs. 700 odd which he claimed. The first Court was of opinion that it could not go behind the possessory decree given in the previous litigation, and this applied both to the crops and the land. Both parties appealed; the plaintiff contended that he should have got the amount claimed in respect of the crops, and the defendant that he should not get a decree at all and raising, *inter alia*, the question of title to the land. The lower Appellate Court remanded the case to the Court of first instance, being of opinion that the defendant was entitled to have the question of title tried. We think that this view was entirely wrong. We are clearly of opinion that the defendants could not by cutting and removing the crops annul the effect of the possessory decree. If the defendants are entitled to the land, they should assert that right by proper legal proceedings. It appears that some of the defendants actually did so but did not press their claim. The plaintiff sooner than prolong the litigation is ready to waive his right to have his appeal against the amount decreed him disposed of by the Court below. We have read from the judgment of the Court of first instance the

manner in which it arrived at the conclusion as to the value of the crops and we are inclined to think that the first Court took a very moderate view of the amount to which the plaintiff was entitled. We allow the appeal, set aside the order of the Court below and restore the decree of the Court of first instance with costs in all Courts.

Appeal allowed.

ODDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 126 OF 1914.

March 29, 1916.

Present:—Mr. Lindsay, J. C.

TULSHI RAM AND ANOTHER—PLAINTIFFS—
APPELLANTS.

versus.

GUR DAYAL AND ANOTHER—DEFENDANTS—
RESPONDENTS.

Negotiable Instruments Act (XXVI of 1881), s. 83, applicability of—Hundi, presentation of, for payment—Retention of hundi by drawee for more than twenty-four hours, effect of.

Section 83 of the Negotiable Instruments Act does not apply where a *hundi* is presented, not for the purpose of acceptance, but for the purpose of payment. [p. 424, col. 1.]

Appeal from the decree of the District Judge, Hardoi, dated the 14th March 1914, reversing that of the Munsif, Sandila, dated the 27th October 1913.

The Hon'ble Pandit Gokaran Nath Misra, for the Appellants.

JUDGMENT.—This second appeal has arisen out of a suit brought upon a Hundi which was drawn on the 29th of December 1912. The facts of the case may be shortly stated as follows. One Sheo Prasad, who is the agent of a Cawnpore firm named Ganeshi Lal Ramai Lal, drew a Hundi for Rs. 1, 00 on the date above mentioned in favour of a firm named Rup Chand-Bal Kishan which carries on business at place called Kachehauna in the Hardoi district. On this same date Rup Chand-Bal Kishan endorsed the Hundi to the plaintiff firm in this case, that is to say, the firm of Tulshi Ram Badri Prasad. It appears that at the time the Hundi was endorsed to the plaintiffs, the

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endorsers owed the plaintiff firm a sum of Rs. 852. The balance making up the total of Rs. 1,000 was paid to the defendants by the plaintiffs on the 31st of December. The Hundi was taken to Cawnpore on the 29th of December and made over to the agents of the plaintiff firm in Cawnpore, these agents being the proprietors of a firm named Ganga Prasad-Auseri Lal. The document was endorsed to this firm as agents for the purpose of presentation. A presentation was made accordingly and on the findings of the Court below it must be taken that successive presentations for payment were made until finally payment was refused on or about the 10th of January 1913. On the first date on which presentation was made for payment, a note was made by the drawee to the effect that the Hundi had been presented, "dekhi." Immediately after the dishonour of the bill the agents of the plaintiffs communicated with the plaintiffs at Kachchauna. They at once made a demand for the money from the defendant firm. They were put off for several days and finally on the 13th of January 1913 the payment was refused, and this suit was eventually brought on the 18th January 1913. The first Court decreed the claim, holding that the defendants were in the circumstances just set out liable to the plaintiffs. The lower Appellate Court has dismissed the plaintiffs' claim, apparently on the ground that the plaintiffs did not give the defendants reasonable notice of dishonour. The learned Judge applied the provisions of section 83 of the Negotiable Instruments Act to the case. The section lays down that if the holder of a bill of exchange allows the drawee more than 24 hours, exclusive of public holidays, to consider whether he will accept the same, all previous parties not consenting to such an allowance are thereby discharged from liability to such holder. The learned Judge did not perceive apparently that section 83 could have no application to the facts of this case, for the presentation of the Hundi was not for the purpose of acceptance but for the purpose of payment and consequently the decision, so far as it purports to be based on the provisions of this section, must be taken to be erroneous. On the other hand the facts are that there was

a final refusal on or about the 10th of January and there cannot be the slightest doubt that the notice of this dishonour was conveyed to the defendants with all reasonable promptitude. This being so, the defendants are clearly liable and the claim must succeed. I, therefore, allow this appeal, set aside the decree of the lower Appellate Court and restore the decree of the Court of first instance. The appellants will get their costs both here and in the lower Appellate Court.

Appeal allowed.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 2420 of 1913.

April 2, 1918.

Present:—Sir Henry Rattigan, Kt., Chief Judge, and Mr. Justice Shah Din.

PANNA LAL, PROPRIETOR OF THE
GLASS MANUFACTORY, AMBALA—

DEFENDANT—APPELLANT

versus.

THE MARWAR BANK, LIMITED, OF
HISSAR, AMBALA—PLAINTIFF,
BASHESHAR NATH AND OTHERS—

DEFENDANTS—RESPONDENTS.

Court-fee—Appeals, separate, by several defendants—Court-fee payable—Principal and surety—Suit against surety, whether maintainable without principal being sued.

Plaintiff Bank sued to recover the sum of Rs. 18,853-12-0 from the defendants, alleging that defendant No. 3, a Company, opened a current account with the plaintiff on the 6th July 1908, agreeing to pay interest at the rate of Rs. 7-8-0 per cent per annum from the date of the account up to the 4th October 1909 and thereafter at the rate of Rs. 8-4-0 per cent per annum, that defendant No. 2 executed two promissory notes for Rs. 30,000 and Rs. 20,000 respectively in favour of the plaintiff by way of security for the overdraft allowed to defendant No. 3, and that defendants Nos. 1 and 2 in conjunction with one G executed a surety bond in favour of the plaintiff by which they agreed to act as sureties for the amount found due to the plaintiff from defendant No. 3 from time to time. The suit having been decreed, defendants Nos. 1 and 2 filed separate appeals in the Chief Court. Defendant No. 2 paid full *ad valorem* Court-fee and presented his appeal first, while defendant No. 1 stamped his memorandum of appeal with a Court-fee of Rs. 2 only on the ground that the full Court-fee had already been paid by defendant No. 2. It was contended, *inter alia*, that defendants Nos. 1 and 2 had executed the pro-notes as officers of defendant No. 3 and were not, therefore, personally liable on

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these documents and that in any event the pro-note jointly executed by defendants Nos. 1 and 2 was merely a contract of indemnity and that consequently until plaintiff had exhausted his remedies against the principal debtor, defendant No. 3, the suit against defendants Nos. 1 and 2 was premature:

Held, (1) that the defendants were entitled to file a joint appeal but as they had elected to present two entirely distinct and separate appeals, each must pay the full amount of Court-fee: [p. 428, col. 2.]

(2) that the creditor was not bound to exhaust his remedies against the principal before suing the surety. [p. 432, col. 2.]

Sankana Kalana v. Virupakshapa Ganeshapa, 7 B. 146; 7 Ind. Jur. 317; 4 Ind. Dec. (N. S.) 99, *Lachhman Joharimal v. Bapu Kandu*, 6 Bom. H. C. R. A. C. J. 241, *Totakot Shangunni Menon v. Kurusingal Kaku Varid*, 4 M. H. C. R. 190, followed.

A suit may be maintained against the surety though the principal has not been sued. [p. 432, col. 1.]

First appeal from the decree of the District Judge, Ambala, dated the 27th October 1913, decreeing the claim.

Bhagat Govind Das and Lala Dhanpat Rai, for the Appellant.

Lala Moti Sagar, R. S., Mehta Bahadur Chand and Messrs. C. Bevan Petman and K. Santanam, for the Respondents.

JUDGMENT.—The plaintiff in this case is the Marwar Bank, Limited, with its head office at Hissar and a branch at Ambala City, and the defendants are:—

1. Lala Bashesar Nath, son of Rai Damodar Das, Extra Assistant Commissioner, resident of Delhi City, Kashmiri Gate.

2. Lala Panna Lal, proprietor of the factory known as Upper India Glass Works, Ambala City; and

3. The Luxmi Company, Limited, head office, Ambala City.

Plaintiff Bank sues to recover Rs. 18,853-12-0 from the defendants on the following allegations, as set forth in the plaint:—

1. Defendant No. 3, noted in the heading, opened a current account with the plaintiff at Ambala on the 6th July 1908, and in the course of the account the plaintiff duly carried on dealings with the said defendant. Copy of the detailed account, which is duly verified, is attached to the petition of plaint.

2. Defendant No. 3, above named, agreed to pay interest at the rate of Rs. 7-8-0 per cent. per annum from the date of the account up to the 14th October 1909, and thereafter at the rate of Rs. 8-4-0 per cent. per annum.

3. On the 16th August 1903 and the 28th December 1903, defendant No. 2 executed two promissory notes for Rs. 30,000 and

Rs. 20,000 respectively in favour of the plaintiff by way of surety for the overdraft allowed to defendant No. 3. On the 28th December 1908 defendants Nos. 1 and 2 and Lala Ganga Ram executed a surety bond in favour of the plaintiff, under which both the said defendants and Lala Ganga Ram agreed to act as sureties for the amount found due to the plaintiff, from defendant No. 3 from time to time. The original promissory notes and the surety bond are attached to the petition of plaint.

4. Defendant No. 3 has failed to pay the whole of the amount due by him in spite of repeated demands and has now gone into liquidation.

5. By virtue of both the promissory notes above mentioned defendant No. 2, and by virtue of surety bond, dated the 28th December 1908, above referred to, defendants Nos. 1 and 2 are personally liable jointly and severally for the amount due from defendant No. 3.

6. Of the sureties mentioned in paragraph 3 Lala Ganga Ram has paid the amount of Rs. 9,384-5-6 and the plaintiff now wishes to enforce his claim for the balance against defendants Nos. 1 and 2 jointly and severally as sureties for the liability of defendants No. 3.

7. Defendants Nos. 1 and 2 have been repeatedly asked to pay the amount in question, but they have failed to do so.

8. The total amount in question, inclusive of interest due from the defendants after deducting the amount received from Lala Ganga Ram, is Rs. 18,853-12-0.

9. The cause of action accrued to the plaintiff on the 20th March 1911, when he made a demand for the amount in question from the defendants and they did not pay the same. Copies of notice, sent under registered covers, are attached to the petition of plaint.

The plaintiff, therefore, prays that (a) a decree for Rs. 18,853-12-0 may be passed with costs of the suit in his favour against defendants Nos. 1, 2 and 3. He also prays that the Court may pass an order for award of interest at the rate of Rs. 8-4-0 per cent. per annum from the date of the suit up to the date of realization of the whole of the amount.

(b). The Court may pass an order that defendants Nos. 1 and 2 are per-

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sonally liable jointly and severally for the amount to be decreed by the Court against the defendants as prayed in clause (a).

(c) Any other relief to which the plaintiff may be considered entitled in view of the facts of the case may be granted to him against the defendants.

Defendant No. 1 in his written statement raised certain objections which are not material for the purposes of the present appeal, and upon the merits of the claim pleaded as follows:—

1. The account produced by the plaintiff is not correct. Besides this the sum of Rs. 9,585, *hundis* which Luxmi Company, defendant No. 3, sold to the plaintiff, was not given credit for.

2. The ordinary rate of interest between the plaintiff and defendant No. 3 was Rs. 7-8-0 per cent. The defendant has no knowledge of anything beyond that.

3. Defendant No. 1 has no knowledge of the promissory note, dated the 10th August 1908, for Rs. 30,000. An agreement was made to open a separate account with the Laxmi Company, defendant No. 3. A letter, dated the 28th December 1908, in regard to a separate debt amounting to Rs. 20,000 by current account relating to the Bombay branch was written by the said Company under the signature of defendant No. 2 and Lala Ganga Ram as Directors and defendant No. 1 as officer of the Company, so that the promissory note, dated the 28th December 1908, for Rs. 20,000 made over to the plaintiff with the above letter may cover the future dealings of the Company and the Bank. This amount had no concern with the permanent loan of Rs. 30,000. The defendant signed the letter in the capacity of Managing Agent of the Bombay branch. He never held the office of a Director of the Bank. The letter does not make him liable to pay the sum as surety or in any other capacity. The document was not a security bond. It has no concern with the promissory note, dated the 16th August 1908, beyond the promissory note, dated the 28th December 1908, for Rs. 20,000. The letter was written according to the practice of Banks, so that the promissory note, dated 28th

December 1908, for Rs. 20,000 be treated as continuing security for the current dealings carried on by means of that promissory note.

4. The amount raised as per separate account and covered by promissory note, dated the 28th December 1908, had been re-paid to the plaintiff. If there was another permanent loan due to the plaintiff from defendant No. 3, he (plaintiff) made negligence in realizing it before.

6. If Lala Ganga Ram had paid any amount to the plaintiff, his act is not binding upon defendants Nos. 1 and 2. Besides the plaintiff has no right to realise the money from defendants Nos. 1 and 2 jointly and severally.

7. The defendants had been telling the plaintiff to recover the amount due to him from defendant No. 3. Defendant No. 1 is not liable for the same.

8. The amount claimed is not just. It was the duty of the plaintiff to give credit for the amount received from the Laxmi Company towards the satisfaction of the current separate account which was opened by means of a promissory note for Rs. 20,000.

12. Paragraph XII of the plaint is denied. The plaintiff is not entitled to get any relief, nor is he entitled to get any future interest.

14. The amount of *hundis* sold and given to the plaintiff by the Laxmi Company ought to have been given credit for in the amount claimed.

15. The plaintiff can in no way sue defendants Nos. 1 and 2 unless he fails to realize the debt from defendant No. 3.

16. The plaintiff has shown gross negligence in recovering his dues from the Laxmi Company. When the Laxmi Company executed a mortgage-deed in favour of the plaintiff and sent the same to him he refused to take it. If the said agreement created any personal liability against defendant No. 1, it has been extinguished on account of the acts of the plaintiff.

19. The plaintiff's claim should be dismissed with costs. The defendant is entitled to get his costs.

The defendant Company admitted having opened a current account with the plaintiff as alleged, but pleaded that plaintiff should have given credit for a sum of Rs. 9,385

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(apparently a mistake for Rs. 9,585) on account of *hundis* which were left with the plaintiff; that the defendant Company did not agree to pay interest at the rate of Rs. 8-4-0 per cent. but only at the rate of Rs. 7-8-0 per cent. per annum; that many payments made to the plaintiff Bank are omitted from the accounts in addition to the aforesaid sum of Rs. 9,385; that the defendant Company executed and offered to the plaintiff Bank a deed of hypothecation of certain debts amounting to Rs. 31,115 in settlement of plaintiff's claim; that the amount claimed in paragraph 8 of the plaint is incorrect; that no demand was ever made from the defendant Company and that on the contrary the defendant Company paid about Rs. 6,000 after the date specified in paragraph 9 of the plaint; and that the defendant Company was in liquidation and could not be sued without due sanction.

Defendant No. 2, Lala Panna Lal, in his written statement admitted that the defendant Company had dealings with the plaintiff Bank and that interest was to be paid at the rate of Rs. 7-8-0 per cent. per annum, but he urged that he executed the promissory notes of the 16th of August and 28th December 1908 not as a surety but merely as an officer of the defendant Company and that he was not personally liable thereon; that the document, dated the 28th December 1908, which was executed by himself, defendant No. 1 and Lala Ganga Ram, was not a security bond nor did it create any personal liability on the part of the executants; that the said document was executed by the defendant Company under the signatures of defendants Nos. 1 and 2 and Lala Ganga Ram as its Directors and that it was made over to the plaintiff Bank upon the understanding that it should be considered as covering future current dealings between the Bank and the defendant Company and that he had no concern with the debt amounting to Rs. 30,000; that he, defendant No. 2, was not personally liable upon any of the documents executed by him; that he had not been repeatedly asked to pay the debt but had received one notice only from the plaintiff Bank's Pleader; that whatever cause of action the plaintiff Bank had, was against the defendant Company

alone, and; that it could, if necessary, recover from that Company whatever may be due after adjustment of accounts; that plaintiff was bound to give credit for the sum of Rs. 9,385 which plaintiff Bank received on account of *hundis* from defendant Company; that the defendant Company never denied the plaintiff's debt but on the contrary paid about Rs. 6,000 to the plaintiff Bank after the 20th March 1911; that if the document dated 28th December 1908 be held to be a security bond, defendant No. 2 would be liable to pay only such sum as was raised by the defendant Company from the plaintiff Bank after the date of the execution of the said document; and that in any event the plaintiff Bank must recover first from the defendant Company and can only sue defendant No. 2 for such amount as may be due after realizations had been made from the defendant Company.

On the pleadings ten issues were drawn by the Court, but of these only eight need to be considered upon this appeal. These eight are as follows:—

1. Is the amount of Rs. 18,853 due from the Laxmi Company?
2. Whether there was any subsequent agreement to raise the interest from $7\frac{1}{2}$ per cent. to $8\frac{1}{4}$ per cent.?
3. Whether the defendants are estopped from contesting the enhanced rate of interest on account of their having admitted the same as correct by accepting the statements of account as correct?
4. Whether certain *hundis* which were sent by the Laxmi Company to the plaintiff were dishonoured by the drawees and was the Laxmi Company informed?
5. If so, are the defendants entitled to have the amount of these *hundis* credited to their account, and if so, to what amount?
6. Whether the promissory notes and document, dated 28th December 1908, sued upon make the defendants Nos. 1 and 2 personally liable as sureties, and if so, to what extent?
7. If issue No. 6 is proved in favour of plaintiff, are the defendants Nos. 1 and 2 entitled to have the decree made conditional on the plaintiff's first realizing the amount thereof from defendant No.

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3 before proceeding against defendants Nos. 1 and 2?—

9. Has the plaintiff not shown due diligence in the recovery of his money from the Laxmi Company, and are the sureties, therefore, discharged?

The District Judge's findings upon these issues are as follows:—

Issue No. 1.—That the accounts of the plaintiff Bank are correct and that the amount claimed is the balance due to the plaintiff Bank upon the allegations made in the plaint.

Issue No. 2.—That it is proved that the rate of interest was raised on the 15th October 1909 to $8\frac{1}{2}$ per cent. with the concurrence of the defendant Company.

Issues Nos. 4 and 5.—That the *kundis* were dishonoured by the drawees after the Bank had made every reasonable effort to realize on them, that the defendant Company was informed of the fact and that the defendants were not entitled to have the *kundis* credited to their account.

Issue No. 6.—That defendant No. 2 was personally liable on the promissory notes Exhibit P-52 and Exhibit P-53, that the defendants Nos. 1 and 2 were also personally liable on the agreement Exhibit P-54 to the extent of Rs. 50,000 therein specified.

Issue No. 7.—That defendants Nos. 1 and 2 were not entitled to have the decree made conditional on plaintiff's first realizing from defendant No. 3, inasmuch as under section 128 of the Contract Act the liability of the sureties was co-extensive with that of the principal debtor in the absence of any provision in the contract to the contrary.

Issue No. 9.—That the plaintiff Bank were entitled to refuse to accept a mortgage-deed which the defendant Company tendered to them on the 16th December 1910, inasmuch as if the plaintiff Bank had accepted the mortgage, they would thereby have entered into a fresh contract with the principal debtor and the sureties would have been released under section 134 of the Contract Act.

The learned Judge accordingly granted the plaintiff a decree for the amount claimed with costs and interest at $8\frac{1}{2}$ per cent. up to the date of realization.

Defendants Nos. 1 and 2 have appealed to this Court separately, the appeal of defendant No. 2 being presented on the 27th of November 1913 and that of defendant No. 1 on the 5th of January 1914. The amount of Court-fee on the first appeal, Rs. 745, has been paid by defendant No. 2, and defendant No. 1 has stamped his memorandum of appeal with a Court-fee of Rs. 2 only, on the ground that the full Court-fee has been paid already by defendant No. 2. Mr. Moti Sagar for the respondent Bank urged as a preliminary objection that the full Court-fee should be paid on both the appeals, and after hearing Mr. Petman on this point we accept the contention. Defendants were entitled no doubt, had they so desired, to file a joint appeal, but as they have elected to present two entirely distinct and separate appeals, we can find no provision of law which would exempt the memorandum filed at the later date from bearing the full amount of Court-fee. We accordingly directed that the deficiency should be made good within a week from the 20th of March 1918 and Mr. Santanam on behalf of defendant No. 1 undertook that this should be done. Upon this undertaking we proceeded to hear the arguments.

On behalf of the appellant it has been urged:—

(1) that defendant No. 2 executed the promissory notes P-52 and P-53 and defendants Nos. 1 and 2 executed the document P-54, merely as officers of the Laxmi Company and that neither of them is liable personally on those documents;

(2) that in any event P-54 is merely a contract of indemnity and that consequently until plaintiff has exhausted his remedies against the principal debtor, the Laxmi Company, the suit against defendants Nos. 1 and 2 is premature;

(3) that if it be held that defendants Nos. 1 and 2 are liable on the said documents, they are liable merely as sureties and only to the extent of Rs. 20,000, inasmuch as that was the amount due on the promissory note referred to in the first paragraph of Exhibit P-54, the reference to Rs. 50,000 in the same paragraph being an error;

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(4) that the liability on P-54 is in any case not joint and several and the plaintiff by accepting payment of Rs. 9,384-5-6 from Lala Ganga Ram has thereby released Ganga Ram's sureties;

(5) that the variation in the terms of the contract as to the amount of interest payable by the defendant Company, having been made without the consent of defendants Nos. 1 and 2, releases them from all liability in respect of the contract, inasmuch as it amounts to granting time to the defendant Company; and that in any event defendants Nos. 1 and 2 are not liable to pay interest at the enhanced rate of $8\frac{1}{2}$ per cent;

(6) that the plaintiff was guilty of negligence in not realizing the amount of Rs. 9,585 due on the *hundis* which had been deposited with the plaintiff as security for the loan, and that consequently that amount must be deducted from any amount found to be due to plaintiff from the defendants;

(7) that the plaintiff was not justified in refusing to accept the hypothecation deed, dated 19th December 1910 (Exhibit P. W. 1-I, page 67 of the printed paper-book), which had been offered to the plaintiff by the defendant Company; and

(8) that interest from the date of suit to the date of realization, if allowed at all, should have been allowed at the ordinary Court rate of 6 per cent. per annum and not at the rate of $8\frac{1}{2}$ per cent.

Elaborate arguments in support of these various contentions were addressed to us by Messrs. Petman, Gobind Das and Santhanam, and they were discussed and criticised in detail by Mr. Moti Sagar in reply. We now proceed to deal with them *seriatim*, though the first three can conveniently be discussed together.

The Laxmi Company, Limited, appears to have started in Ambala in 1907 for the purpose of doing business there and in Bombay and Delhi as "Bankers, Cotton Merchants and General Commission Agents," and upon the Board of Directors were (*inter alia*) Lala Panna Lal, Lala Ganga Ram and Lala Ram Saran Das. Lala Panna Lal is defendant No. 2 in this case; and according to Mr. Petman, Lala Bashesar Nath, defendant No. 1, was an "alternate Director" with his uncle, Lala Ram Saran Das, and it is for this reason that his

name is coupled with that of his uncle at the foot of the balance sheet printed at pages 7 and 8 of the paper-book. Both Lala Bashesar Nath and the respondent Bank were agreed upon this point at the hearing of the appeal before us. Lala Panna Lal, Lala Ganga Ram and Lala Ram Saran Das were also Directors of the respondent Bank.

In May 1908 the Laxmi Company opened a floating account with the respondent Bank's City Branch with a credit of Rs. 1,000 (see page 82), but it seems to have been early realized that the Company needed money to develop its business, and it is not surprising, in view of the composition of the directorate of the two concerns, to find that in July 1908 the Cantonment Branch of the respondent Bank advanced Rs. 28,000 to the Company (see page 46). This loan was understood to be one of Rs. 30,000, (Rs. 2,000 being taken in advance as interest), but at first it was covered by no security. On the 16th August 1908, however, this defect was remedied by Lala Panna Lal executing a pro-note (page 52) for Rs. 30,000 in favour of the Bank. It seems that the Company stood in need of further assistance from the Bank, and apparently approached the Bank for that purpose, for on the 13th September 1908 at a meeting of the Bank's Managing Committee, consisting of Rai Bahadur Lala Ganga Ram, C. I. E., Lala Ganga Ram, Lala Panna Lal and Lala Kidar Nath, a resolution was passed to the following effect:—

"Resolved that a standing loan up to Rs. 50,000 be given to the Laxmi Company on the personal guarantee of the three Directors:—

- (1) Lala Panna Lal,
- (2) Lala Ganga Ram,
- (3) Lala Ram Saran Das,

on the following terms:—

(A) Rs. 30,000 will be a standing loan carrying interest at $7\frac{1}{2}$ per cent. per annum all the year round. The Laxmi Company may draw Rs. 20,000 by *usance hundis* not exceeding Rs. 5,000 each and there should be an interval of a week between each and every drawing. These *hundis* will be accepted by the Bank on presentation, and if the Laxmi Committee wants to have these *hundis* paid on due date, it will give at least two weeks' notice to the Bank without

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sending remittance, or— The Laxmi Company may draw to the extent of Rs. 20,000 by giving one month's previous notice by demand drafts.

"(B) The Directors of the Laxmi Company should give an indemnity bond undertaking to satisfy all claims of the Bank in the event of the Company failing to meet its liabilities."

On the 28th December 1908 Lala Panna Lal executed a second pro-note (Exhibit P 53) for the sum of Rs. 20,000 for value received for amounts overdrawn with interest thereon, at the rate of seven and a half per cent. per annum from this date to date of payment in full.

Both the pro-note Exhibit P 52 and the pro-note Exhibit P 53 were signed by Lala Panna Lal as "Managing Director, Laxmi Company, Limited, Ambala City," and "it is common ground that the consideration for the two pro-notes was the money advanced to the Laxmi Company and that Lala Panna Lal had no personal account of his own with the respondent Bank. On the same date that Exhibit P-53 was executed, a document (Exhibit P 54, page 45) was executed in favour of the respondent Bank by Basheshar Nath, Panna Lal and Ganga Ram, whose signatures, are bracketed together with the word "Directors" against them. This document runs as follows:—

"The Manager,
The Marwar Bank, Limited,
Ambala City.

DEAR SIR,

In consideration of your allowing the Laxmi Company, Limited, to overdraw sums, not exceeding in the aggregate Rs. 50,000 (fifty thousand only), on the security of Laxmi Company, Limited, demand pro-note in your favour of date we hereby pledge for the re-payment on demand of the said overdraft together with interest thereon and of any other sum or sums of money which may be or become due to you from the Laxmi Company, Limited, on any account whatsoever during the continuance of this pro-note.

And we hereby declare and agree that the overdraft allowed and intended to be secured by this agreement shall be taken to have been allowed by you entirely upon

the faith of and relying upon the declaration signed by us at the foot hereof, which declaration solemnly we declare to be true in every respect.

It is hereby further agreed and declared that these presents shall remain and be a continuing security to you for the balance of the said account for the time being to the extent aforesaid, notwithstanding that at any time or times the balance of the said account may be in your favour, it being expressly intended that these presents shall be a security for the balance of the said account due by the Laxmi Company, Limited, to you while the said account shall continue open.

"Signed at Ambala City this 28th day of December in the year one thousand nine hundred and eight.

We are,

Yours faithfully,
Basheshar Nath }
Panna Lal } Directors."
Ganga Ram }

Such then in brief are the facts as they existed at the time when the three documents Exhibits P-52, 53 and 54 were executed, and in endeavouring to interpret these documents, we consider we are entitled to keep those facts in mind [section 92, proviso (6) of the Indian Evidence Act, 1872]. In our opinion, regard being had to the admissions of the parties and to all the circumstances, the two pro-notes Exhibits P-52 and P-53 must be held to have been executed by Lala Panna Lal in his capacity as Managing Director of the Laxmi Company for and on behalf of the said Company, and in respect of them he himself incurred no liability either personally or as a surety, and the Laxmi Company alone is liable thereon. As regards Exhibit P-54, however, our conclusions are different. It is evident from the resolution of the 13th September 1908 (Exhibit P-46) that the Directors of the Bank realised the necessity of having some further security than the pro note Exhibit P-52 which had been executed on behalf of the Company by Lala Panna Lal on the 16th August, especially if further advances to the limit of Rs. 50,000 were to be made from time to time to the Company and that they had decided that the form which any such further security should take was to be a

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personal guarantee by the then Directors of the Company, Lala Panna Lal, Lala Ganga Ram and Lala Ram Saran Das, of whom the last mentioned represented Lala Basheshar Nath, his nephew, no less than himself. The necessity for this further security would certainly not become less urgent as the year drew to its close and the time for audit of the Bank's books approached. It was in these circumstances that Exhibit P-54 came to be executed. *Prima facie*, therefore, we would expect to find the Bank, when fresh documents are being executed, insisting on the Directors of the Company complying with the terms of the resolution passed in September 1908 and we have now to look to Exhibit P-54 to see if it is in terms the guarantee which it is claimed to be by the Bank. Unfortunately (and probably for the sake of saving a lawyer's fee) the Bank decided to adopt a form of security bond which was one of their stock forms and used by customers who wished to overdraw accounts from time to time (see Exhibit P-60).

As a result of this false economy, this playing with dangerous legal instruments without understanding the real meaning of the terms employed, the Bank has been involved in costly litigation, for it is hardly too much to say that the present claim would probably never have been disputed by defendants Nos. 1 and 2, had not the person who adopted the form slavishly copied out the words "demand pro-note in your favour of date" after the words "Laxmi Company, Limited", in the first paragraph of Exhibit P-54. Despite the confusion caused by this carelessness (for such we must consider it), the general tenor of the document appears to be clear enough. The opening words: "In consideration of your allowing the Laxmi Company, Limited, to overdraw sums not exceeding in the aggregate of Rs. 50,000 only" must mean that the principal debtor is the Company and that the executants of the document are the guarantors for the repayment of all sums overdrawn or due by the Company up to the specified limit of Rs. 50,000. In other words, the agreement is a contract of continuing guarantee within the meaning and for the purposes of sections 126, 128 and 129 of the Contract Act, and that it is

not (as contended by defendants Nos. 1 and 2) merely an agreement by the Company itself through its Directors is obvious not only from the terms of the document to which we have referred but also from the fact that it was executed, unlike Exhibits P-52 and P-53, by three Directors and not one, whereas had it been a contract on behalf of the Company the signature of one Director would have been as sufficient for its due execution as it was for the execution of the two pro-notes. Moreover, it is a fact of some significance, and throws considerable light on the real meaning of the executants, that one of them, Lala Ganga Ram, has admitted his personal liability thereunder and paid up the one-third share, namely, Rs. 9,384 due from him under the contract. Mr. Petman contended that the liability of the executants could not in any event extend beyond the amount of the pro-note Exhibit P-53, inasmuch as that was the pro-note referred to in paragraph 1 of this document. We cannot agree with him, as we are satisfied that the words "demand pro-note in your favour of date" were by mistake copied from the form which served as a precedent for this document, whereas the amount which the Company were to, be at liberty to overdraw up to has been rightly stated in the same paragraph as being Rs. 50,000. Nor can we agree with the argument that there were two wholly independent accounts between the Laxmi Company and the respondent Bank, the one being "the pro-note account of Rs 30,000" covered by Exhibit P-52 and the other "a floating account" to which P-53 and P-54 referred. Originally no doubt two accounts appear to have been kept up by the Bank, but this was due to the fact that the Rs. 30,000 had been advanced by the Cantonment Branch of the Bank, whereas the smaller current account which opened in May 1908 was with the City Branch of the Bank. In October 1908 the amount then due to the Cantonment Branch was transferred to the City Branch, and that this was done to the knowledge of the defendants is clear from Exhibit D-3 (page 71), which is a statement of account submitted by the Bank to the Laxmi Company and filed by defendants. Thereafter the accounts were all kept by the City Branch and though there is a certain

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amount of confusion, inasmuch as the accounts which commence at page 82 of the paper-book were allowed to continue up to December 1909 *pari passu* with the account set forth at pages 48-57, it is clear that the accounts were those of the Company alone and that the amounts due on the pro-note and the sums drawn by the Company from the Bank and payments made from time to time by the Company to the Bank were all treated as being on the same footing. There is no doubt moreover that the accounts were consolidated in December 1909 and thereafter continued as set forth at pages 48 *et seq.* It is alleged that this was done without the knowledge of defendants Nos. 1 and 2. But it is clear from the correspondence on the record that statements of accounts were duly submitted from time to time by the Bank to the Company (*e. g.*, see Exhibits P-2 and P-3) and we have no reason to suppose that the Directors of the Company, or in other words the defendants, were unaware of what was being done.

We hold then that defendants Nos. 1 and 2 are personally liable under Exhibit P-54 for sums due by the Company to the respondent Bank within the margin of Rs. 50,000 and as no attempt has been made to impugn the accuracy of the various items set forth in the accounts filed by the Bank, we must further hold that the amount claimed, namely, Rs. 18,853 12-0 is correct.

As regards the arguments that the plaintiffs cannot sue defendants Nos. 1 and 2 until they have first sued the defendant Company, the principal debtor, and have failed to realise from the latter, it is only necessary to refer to *Sanjana Kalana v. Virupakashapa Ganeshapa* (1), *Lachhman Joharimal v. Bapu Kandu* (2) and *Totakot Shanguuni Menon v. Kurusingal Kaku Varid* (3) as sufficient authority for the proposition that in a case of this kind, the creditor is not bound to exhaust his remedy against the principal before suing the surety and that a suit may be maintained against the surety though the principal has not been sued.

The fourth contention is not tenable upon the terms of Exhibit P-54, as the obligation thereunder is clearly joint and several. Accordingly plaintiff by accepting payment of his one-third share from Lala Ganga Ram cannot be held to have released the co-sureties.

As regards the fifth contention, *viz.*, that a variation was made in the terms of the contract when the rate of interest was enhanced from $7\frac{1}{2}$ to $8\frac{1}{4}$ per cent. and that such variation being without the consent or knowledge of defendants Nos. 1 and 2 released them from their contract, or at all events did not render them liable to pay interest at a rate other than that originally agreed upon, we are unable to accept the argument, as we are satisfied upon the evidence that defendants Nos. 1 and 2 must have had knowledge of the variation in question. Admittedly, the Bank gave due notice of their intention to enhance the rate to the Laxmi Company (see Exhibits P-5, D-12 and P-6) and we cannot believe that the Directors of the Laxmi Company were altogether in the dark upon this point. According to Wadhawa Singh, P. W. No. 6, the liquidator of the Laxmi Company, Exhibit P-63, which will be found at page 66 of the printed record, was filed by himself and Lala Panna Lal in the Court of the District Judge at Ambala in connection with the liquidation proceedings, and upon this exhibit there is a "note" that interest at $8\frac{1}{4}$ per cent. is to be included from the 1st January 1912 on the balance of Rs. 28,000-9-4 due to the Bank. This again shows that defendant No. 2 at all events was well aware that enhanced interest was being charged, and in addition to this we have the significant fact that neither defendant No. 1 nor defendant No. 2 went into the witness-box to swear that they had no knowledge of the agreement between the Company and the Bank.

In the sixth place it is contended that the Bank were negligent in realising an amount of Rs. 9,525-0-0 due on certain *hundis* which had been sent to them by the Laxmi Company as security for the money due to the Bank and that consequently the said amount must be deducted from any sum found to be due to the Bank. It is not specified in the pleadings what particular

(1) 7 B. 146 7 Ind. Jur. 317; 4 Ind. Dec. (N. S.) 69.

(2) 6 Bcm. II. C. R. A. C. J. 241.

(3) 4 M. II. C. R. 190.

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hundis are referred to in this connection, but apparently they are the five set forth in Exhibit D-15 at page 80 of the paper-book. The District Judge has found that the Bank made every reasonable effort to realise the *hundis* in their possession and that on their failure to do so, they brought the matter to the notice of the Company and were told on more than one occasion to hold up the *hundis* for the time being. This finding is supported by various documents on the record (see Exhibits P-32, 33, 35, 36, 37, 38, 40, 41 and 44). In face of this evidence we cannot agree that the Bank showed negligence in the matter of realising the *hundis* and that they are, therefore, liable to make good to the Company any loss that may have been sustained by reason of the *hundis* being now time-barred.

We know of no authority in support of the argument that the plaintiff Bank was bound to accept the hypothecation of certain supplementary securities which the Company offered the Bank in December 1910 (see Exhibit P. W. 1 at page 67); or that their refusal to accept such hypothecation debars them from claiming relief against the sureties.

Finally, there is the question of the interest to be allowed from date of suit to date of realisation. The District Judge has granted this at the contract rate of $8\frac{1}{2}$ per cent. per annum and we are unable to hold that he acted unreasonably in so doing. The rate is not unduly high and it must be remembered that the Bank has been deprived of its money for some considerable time.

Before concluding we would advert briefly to Mr. Petman's request that we should remand the case in order to enable defendants to call evidence to prove that Exhibit P-54 has a well understood meaning in banking circles and that the form in which the contract of the 28th December 1903 was embodied was one employed by the customer of a Bank who wishes to be allowed to overdraw his account from time to time. We find it unnecessary to accede to this prayer as it is, in our opinion, the duty of the Court to construe a written contract of this kind for itself, and we are unable to see how the evidence of the bankers and bankers' clerks could be relevant to, or indeed of any material assistance in the interpretation of an agreement

in writing which is clear enough so far as its language is concerned.

The result is that we dismiss both the appeals with costs.

Appeals dismissed.

CALCUTTA HIGH COURT.

CIVIL RULE No. 337 of 1918.

August 9, 1918.

Present:—Mr. Justice Fletcher and

Mr. Justice Walmsley.

HARIMOHON ROY—PLAINTIFF—

PETITIONER

versus

KHALIL BEPARY AND OTHERS—

DEFENDANTS—OPPOSITE PARTY.

Specific Relief Act (I of 1877), s. 9—Possessory suit, whether can be dismissed on ground of want of title—Civil Procedure Code (Act V of 1903), s. 115—Revision.

In a suit under the provisions of section 9 of the Specific Relief Act, the plaintiff on proving his possession and dispossession as mentioned in the section is entitled to be restored to possession. [p. 434, col. 1.]

Where in a suit under section 9 of the Specific Relief Act, the Court after finding that the plaintiff was in possession dismissed the suit on the ground that the plaintiff's possession was without title:

Held, that the plaintiff was entitled to be restored to possession. [p. 434, col. 1.]

Rule against the order of the Munsif, 2nd Court, Nabinagora.

FACTS.—In this case the plaintiff brought a suit for recovery of a plot of Bazar land which was fenced round by him as part of land appertaining to the land on which his shop stands. The defendants, who were the co sharer owners of the Bazar, dispossessed the plaintiff of the disputed land by erecting a tin shed. The plaintiff thereupon brought this suit for recovery of possession under section 9 of the Specific Relief Act. The defense was that the plaintiff did not take any settlement of the disputed land, which was a piece of *khas* land, from any of the co sharer *miliks* of the Bazar and that the plaintiff was never in possession, whereas the defendants were in possession by allowing the itinerant stall-

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keepers to hold their stalls there. The Court below found that the plaintiff was in possession but without any title, as he did not take any settlement from any of the *maliks* and on finding that he was a trespasser dismissed the plaintiff's suit. Hence this appeal.

Babu Gopal Chandra Das, for the Petitioner.
—Upon the finding the plaintiff was entitled to succeed under section 9 of the Specific Relief Act. The scope of section 9 is to give summary remedy to a person who is dispossessed without his consent by restoring him to possession without any investigation into the question of his title. Now when in this case on an investigation it has been found that the plaintiff was in possession, the Court below should have given him a decree without going into the question of title. Under section 9 of the Specific Relief Act the Court had no jurisdiction to dismiss the suit while it found that the plaintiff was in possession but was dispossessed by the defendants.

No one appeared for the Opposite Party.

JUDGMENT.—This Rule was obtained by the plaintiff calling upon the opposite party to show cause why the judgment and decree complained of should not be set aside. No one shows cause at the hearing before us. The plaintiff brought the suit to recover possession under section 9 of the Specific Relief Act. The Court below found that the plaintiff was in possession of the land. Therefore, under the terms of the Act, he was entitled to be restored to possession. But the Munsif, finding the plaintiff to be in possession without any title, dismissed the suit. The suit being one under the provisions of section 9 of the Specific Relief Act, the plaintiff, on proving his possession and dispossession as mentioned in the section, was entitled to be restored to possession. The judgment and decree passed by the learned Munsif must be set aside and in lieu thereof a decree must be passed directing the plaintiff to be restored to possession of the suit land. The petitioner is entitled to his costs in this Rule. We assess the hearing fee at one gold *mohur*.

Rule made absolute.

SIND JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL No. 7 of 1918.

April 3, 1918.

Present:—Mr. Pratt, J. C., and

Mr. Crouch, A. J. C.

MESSRS. KODUMAL KALUMAL—

PLAINTIFFS—APPELLANTS

versus

MESSRS. VOLKART BROS.—DEFENDANTS—

RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 104 (c)—Arbitration Act (IX of 1899), s. 19—Appeal, right of, against order under s. 19 of Arbitration Act—Staying or refusing to stay suit—"After appearance," meaning of—Stay of suit—Duty of Court—Burden of proof.

An appeal lies under section 104 (c), Civil Procedure Code, against an order passed under section 19 of the Arbitration Act, staying or refusing to stay a suit, where there is an agreement to refer to arbitration [p. 435, col. 1.]

An appearance by a defendant for the purpose of making a stay application can be treated as an appearance in the suit. [p. 435, col. 2.]

The expression "after appearance" in section 19 of the Arbitration Act is merely directory, and neglect of this procedure would not invalidate an order of stay made by the Court. [p. 435, col. 2.]

Under section 19 of the Arbitration Act, where there is an agreement to refer, it is *prima facie* the duty of the Court to stay a suit and the onus is on the plaintiff to show why he should not be bound by his agreement. [p. 436, col. 1.]

The provision of English Law whereby an arbitrator can be compelled to refer a point of law for the opinion of the Court does not apply in India. Under the Arbitration Act an arbitrator is the sole judge of both questions of fact as well as of law arising under the reference and it is discretionary with him to apply for the Court's opinion on any question of law. [p. 436, col. 1.]

Appeal against the order of Mr. Fawcett, A. J. C., Sind.

Mr. Wadhmal Oodharam, for the Appellants.

Mr. T. G. Elphinston, for the Respondents.

JUDGMENT.—This is an appeal from an order made by the Additional Judicial Commissioner staying a suit filed by the appellants against Messrs. Volkart Brothers under section 19 of the Indian Arbitration Act.

The preliminary objection raised by Mr. Elphinston on behalf of the Volkart Brothers is that no appeal lies. It is true that no provision is made for an appeal in the Arbitration Act IX of 1899, but we think it clear that an appeal lies under section 104 (c) of the Civil Procedure Code,

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That sub-section allows an appeal from an order staying or refusing to stay a suit where there is an agreement to refer to arbitration. There is no ground for the suggestion that the word "order" in section 104 is limited to an order under the Civil Procedure Code. The word "order" is defined in section 2, sub-clause (14), in very wide words as "formal expression of any decision of a Civil Court which is not a decree." Section 104 takes the place of section 588 of the old Civil Procedure Code, in which the phrase was "the following orders under this Code." The words "under this Code" have been omitted from the present Civil Procedure Code, which refers merely to the "following orders." Again the section itself makes a distinction between orders under the Code and others generally, for sub-section (h) specially refers to orders under any of the provisions of this Code. It seems clear that section 104 (e) gives a right of appeal from any order made by a Civil Court staying or refusing to stay a suit where there is an agreement to refer to arbitration, whether under the Civil Procedure Code or under the Arbitration Act IX of 1899.

The first point raised by the appellants refers merely to a matter of procedure in the lower Court. Mr. Wadhmal complains that the lower Court wrongly refused the application for adjournment which he had made on the 25th February and that he had not, therefore, sufficient time to put his case before the Court. This, however, is a matter within the discretion of the Court, with which we should be reluctant to interfere unless very strong case had been shown. We do not think that such a case has been shown. The notice of the application was served upon Mr. Wadhmal three days before he applied for adjournment and the length of the arguments which he addressed to the lower Court shows that he had had sufficient time to prepare his case.

The next point raised is that the application for stay is premature and should not be entertained, because it was made on the 19th February 1918 at a time when no summons had been served upon the defendant. So that he could not be said to have appeared in the suit. This objection is based upon the words of section 19 of the Arbitration Act, which directs that a party

may apply for stay at any time after putting appearance and before filing a written statement or taking any other steps in the proceedings. This section was copied from the corresponding section of the English Act and under the English Procedure whereby a defendant may waive service and appear *gratis* without being served at all. Such appearance is also contemplated by the proviso to Order IX, rule 2, of the Civil Procedure Code. The appearance for the purpose of making the stay application could, therefore, be treated as an appearance in the suit. But in any event we think the expression "after appearance" in the section is merely directory, for, what the section is intended to prevent, is a party filing an application for stay after he has attained to the jurisdiction of the Court, as appears from the wording of the corresponding section in the Arbitration Schedule of the Civil Procedure Code. Neglect of this procedure does not, therefore, invalidate the order made by the Court.

Now coming to the merits of the case, the appellant's first contention is that he, as a plaintiff, has a right to come to Court and that the onus is on the other party, the defendants, to show why the suit should be stayed. But the wording of section 19 is perfectly clear. It shows that the Court must be satisfied by the plaintiff that there is a reason for not staying the suit and not acting on the submission to arbitration. In this respect the section is in accord with what has been described as a classic passage in the judgment of Lord Selborne, L. C., in the case of *Willesford v. Watson* (1). It is as follows: "But I think that the Legislature and the Act of Parliament under which the Court is now asked to act have given the answer to that argument. If parties choose to determine for themselves that they will have a domestic forum instead of resorting to the ordinary Courts, then since that Act of Parliament was passed a *prima facie* duty is cast upon the Courts to act upon such an agreement."

(1) (1873) 8 Ch. 473 at p. 479; 42 L. J. Ch. 447; 28 L. T. 428; 21 W. R. 350.

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The parties here have made that agreement. They probably knew what were the reasons in favour of determining these questions by arbitration, and what were the reasons against it, and made it part of their mutual contract that these questions should be so determined. The plaintiffs cannot, therefore, be now heard to complain if that part of their contract is carried into effect.

It is, therefore, a *prima facie* duty of the Court to stay a suit and the onus is on the plaintiff to show why he should not be bound by his agreement to refer to arbitration.

The reasons that have been shown are three:—

Firstly, it is said that the dispute involved complicated questions of law which can be better determined by the Court than by the arbitrators. Mr. Wadhupal contends that it is the law in England that wherever there is a complicated question of law to be decided the Court should stay the suit. But the English cases do not apply where questions of fact as well as of law are in dispute. Under the English Act the arbitrators can be compelled to refer a point of law for the opinion of the Court, and on this there is authority that where the only matter in dispute is a question of law, the Courts will be disposed to refuse the stay since it would be idle to remit to the arbitrator that which the arbitrator would, in his turn, have to remit to the Court. But this argument does not apply in India, for the Indian Arbitration Act contains no provision under which the arbitrators can be compelled to refer to the Court a question of law. The machinery of the Indian Act is adequate for the disposal both of questions of fact and questions of law, and section 10B of the Act gives the arbitrators power to invoke the assistance of the Court for a decision of a question of law, if they so desire. We do not, however, go to the length of saying that there may not be cases involving complicated questions of law which the Court would be better able to try than the arbitrators. But Mr. Wadhupal has entirely failed to convince us that any such question arises in the present case. What are the questions of law in this case which the arbitrators would be incompetent to decide? In the

first place it is said that a question arises as to the construction of the contract. But the contract is a simple mercantile contract and one which we think any man of business would be perfectly competent to construe. Next it is said that the defendants might raise a defence under a recent English Statute, *viz.*, Emergency Act of 1917, referred to by my learned brother in his judgment in Miscellaneous Appeal No. 40 of 1918 [*Messrs. Volkart Brothers v. Messrs. Kodumal*]. But that Statute has no application to the present contract. Next it is said that the plaintiffs anticipate that the defendants will raise a defence that there is a custom affecting the contract whereby the plaintiffs are bound to take delivery although the goods may have been shipped after the time limited by the terms of the contract. But it does not appear that there is any occasion to raise this plea, for, clause 13 of the contract makes a special provision for late delivery. And even if such a plea were raised, it would be a customary right arising out of the contract and falling within the scope of the very wide arbitration clause.

Next it is urged that the arbitrators would be unable to call the evidence necessary for the trial of the suit because the plaintiff would have to prove the dates of the sailings of the steamers leaving Java. But under present conditions the Courts would find great difficulty in executing Commissions in Java and no such evidence is necessary, for the sailing dates could be easily proved before the arbitrators from Reuter's cables.

The next point raised is that the class out of which the arbitrators are to be selected is prejudiced because all European merchants are importers, and, therefore, their sympathy would be with the defendants. But the class out of which the arbitrators are to be selected is not limited to sugar merchants. The arbitration is to be by two European merchants resident in Karachi, and we cannot believe that two disinterested European merchants cannot be found in Karachi. It is said that the European merchants would be unwilling to act as arbitrators in this case and that arbitration would fail for that reason. But in that event it would be open to the appellants to make an application to revive the suit

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Apart from these considerations, this Court would be loth to interfere with the discretion exercised by the lower Court, as suggested in the case of *Jaipal Kunwar v. Indar Bahadur Singh* (2), where it was held that the Court of Appeal will not interfere with the discretion judicially exercised by the lower Court. That was the consideration that governed the judgment of Lord Moulton in *Bristol Corporation v. Aird* (3).

We accordingly confirm the order of the lower Court and dismiss this appeal with costs.

Appeal dismissed.

(2) 26 A. 238; 31 I. A. 67; 8 C. W. N. 465; 6 Bom. L. R. 495; 14 M. L. J. 149; 8 Sar. P. C. J. 625; 7 O. C. 239 (P. C.).

(3) (1913) A. C. 241 at p. 260; 82 L. J. K. B. 684; 108 L. T. 434; 77 J. P. 209; 29 T. L. R. 360.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL CIVIL NO. 103
OF 1916.

May 22, 1917.

Present:—Sir Lancelot Sanderson, Kt.,
Chief Justice, and Justice Sir John
Woodroffe, Kt.

GAMMETER—PETITIONER—

APPELLANT

versus

THE CONTROLLER OF PATENTS AND
DESIGNS AND OTHERS—RESPONDENTS.

Patents and Designs Act (II of 1911), ss. 5, 17, 48, 62, 64, 77—Specific Relief Act (I of 1877), s. 45—New and original design, test of—Jurisdiction of Controller—Revision—High Court, power of, to revise Controller's decision under s. 64.

Section 62 of the Patents and Designs Act is limited to applications by the registered proprietor or some person in whom his interest is vested. [p. 438, col. 2.]

Section 64 of the Act does not apply to the case of cancellation of a design which has already been registered; the words "non-insertion in" or "omission from the register" used in section 64 do not cover a case of registration of a design and subsequent cancellation of it. [p. 439, col. 1.]

Section 77 of the Act does not give the Governor-General in Council power to extend the powers of the Controller beyond those which are given to him by the express provisions of the Act. [p. 440, col. 1.]

The High Court has no power to revise the Controller's decision under section 64 of the Act. [p. 440, col. 1.]

A design in order to be new or original within the meaning of the Act, need not be new or original in the sense of never having been seen before as applied to any article whatever; there might be a novelty in applying an old thing to a new use,

provided it is not merely analogous. [p. 441, col. 2; p. 442, col. 2.]

Where the design of a metal band called the "Novelty band," intended to attach a watch to the wrist, was similar in shape and configuration to a bracelet previously manufactured for ornamental purposes:

Held, that though the shape of the "Novelty" band by itself could not be said to be new and original, the application of it to a watch to be worn on the wrist was for a purpose so different from and for a use so dissimilar to the purpose and use of the bracelet that the design in question might be said to be original. [p. 442, col. 2.]

Appeal against the order of Mr. Justice Fletcher, dated the 13th July 1916.

Mr. Langford James (with him Mr. S. K. Gupta), for the Appellant.

Mr. B. C. Mitter, Offg. Advocate-General (with him Mr. S. C. Roy), for the Controller.

Mr. B. L. Mitter (with him Mr. S. R. Das), for Messrs. Boseck & Co.

JUDGMENT.

SANDERSON, C. J.—This is an appeal by Ernest Otto Gammeter against the judgment of my learned brother Mr. Justice Fletcher.

The matter arises in connection with an application which was made by Mr. Gammeter to the Controller of Patents and Designs on the 16th of January 1915, whereby the Controller was requested to register the accompanying design in class. The description of the design was as follows: "The design consists of a metal band, for attaching a watch to the wrist and novelty is claimed for such a band, preferably of silver, passed below the watch through loops affixed to each side of the watch case, which method by preventing the bending of the band between the said loops, tends to draw the free ends of the band apart, and thus assisted by the resilience of the metal, prevent the accidental opening of the fastening means which consist of one or more studs on one end and projecting from either the inner or outer side of the band, taking into one or more or several key-hole slots provided in the other end of band."

The Controller registered that design on the 5th of February 1915. On the 23rd of July 1915, Messrs. J. Boseck & Co. applied to the Controller for cancellation of the registration; and, after hearing both parties, that is to say, Mr. Gammeter and Messrs. Boseck & Co., on the 7th of August 1915, the Controller cancelled

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the registration. On the 23rd of February 1916, notice of an application to the learned Judge was given; and the notice was that an application would be made for an order that the Controller of Patents and Designs should place the Design No. 2611 upon the register of designs in such manner as the same was on and prior to 4th August 1915. The notice was headed "In the matter of section 45 of the Specific Relief Act, 1877, and, in the matter of the Indian Patents and Designs Act, 1911." Section 45 of the Specific Relief Act provides as follows: "Any of the High Courts of Judicature at Fort William, Madras and Bombay may make an order requiring any specific act to be done or forbore, within the local limits of its ordinary original civil jurisdiction, by any person holding a public office, whether of a permanent or a temporary nature, or by any Corporation or inferior Court of Judicature, provided . . . (c) that in the opinion of the High Court such doing or forbearing is consonant to right and justice, (d) that the applicant has no other specific and adequate legal remedy."

The first point that was taken before the learned Judge was that the Controller had exceeded his jurisdiction; and the second point was that, even if he had jurisdiction, he ought not to have cancelled the registration, because the design was in fact a new and original design.

Now, the Controller is alleged to have acted under section 62 of the Indian Patents and Designs Act: and it is argued on behalf of the appellant that the Controller had no jurisdiction upon the application of Messrs. Boseck & Co., which was hostile to the interest of Mr. Gammeter, to cancel the registration of the design, on the ground that section 62 is limited to cases of applications by the registered owner or somebody in whom is vested the interest of the registered owner, such as the trustees in bankruptcy or the Liquidator, if the registered owner happens to be a Company. That is the first question I propose to consider.

The first part of this Act deals with patents, and the second part, which begins at section 43, deals with designs; and section 43 provides, in sub-section (1) that

"The Controller may, on the application of any person claiming to be the proprietor of any new or original design not previously published in British India, register the design under this part." Sub-section (4) provides that "The Controller may, if he thinks fit, refuse to register any design presented to him for registration; but any person aggrieved by any such refusal may appeal to the Governor-General in Council": so that, the Controller upon an application for the registration of a design has discretion either to register or to refuse to register, but his decision is subject to an appeal not to the Courts, but to the Governor-General in Council. Then after several sections to which I need not refer in detail, comes section 62 in Part III, which part applies generally both to Patents and Designs. That section provides, "The Controller may, on request in writing accompanied by the prescribed fee,—(a) correct any clerical error in or in connection with an application for a patent or in any patent or any specification; (b) cancel the registration of a design either wholly or in respect of any particular goods in connection with which the design is registered; (c) correct any clerical error in the representation of a design or in the name or address of the proprietor of any patent or design, or in any other matter which is entered upon the register of patents or the register of designs." That is the section upon which this matter primarily depends. I am of opinion that the contention of the appellant in this case with regard to the construction of that section is correct. I think, on reading the section itself, the proper construction to put upon it is that it is limited to applications by the registered proprietor or by some person in whom his interest is vested. First of all the words "on request in writing" induce me to think that they must mean on request, by a person who is interested in the patent or design. Then when I come to look at the matters which are dealt with in that section, I find that clause (a) deals with the correction of any clerical error in or in connection with an application for a patent or in any patent or any specification; and clause (c) deals with the correction of any clerical error in the representation of a design, etc. These are

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obviously matters which can concern only the proprietor or the person in whom his interest is vested. Then between these two clauses (a) and (c), comes the clause in question, "(b) cancel the registration of a design either wholly or in respect of any particular goods in connection with which the design is registered." It is quite possible that the registered owner may desire to have the registration cancelled, for instance, he may desire to avoid a litigation which may be threatened against him in connection with the design which he has been successful in getting registered. I think it is an extraordinary way of providing, if it was intended to provide, that the Controller might cancel the registration upon an application by a third person hostile to the registered owner, by placing the provision between two clauses which obviously deal with the correction of clerical errors which obviously can only be corrected on the application of a registered owner. The matter does not rest there: because when I come to section 64, sub-section (1), I find it provides, "A High Court may, on the application in the prescribed manner of any person aggrieved by the non-insertion in or omission from the register of patents or designs of any entry, or by any entry made in either such register without sufficient cause, or by any entry wrongly remaining on either such register, or by an error or defect in any entry in either such register, make such order for making, expunging or varying such entry as it may think fit." I think the learned Judge in the Court below held that the words "non-insertion in or omission from the register" would cover a case of the registration of the design and subsequent cancellation of it. I doubt, having regard to the provision of section 62, whether that is the correct interpretation to put upon it. When the word "cancel" has been used in section 62, if the Legislature intended that section 64 should apply to cancellation by the Controller, I think it is a curious thing that that has not been specifically mentioned in section 64. The word "cancel" has been used in clause (b) of section 62; and if that was intended to be "cancellation" upon the application of a person hostile to the registered owner, and if it was intended by section 64 to give a right of appeal

against such cancellation, I think it is extraordinary that the word "cancellation" was not used in section 64. But again the matter does not rest there because when I turn to section 67, I find that section provides as follows:—"Where any discretionary power is by or under this Act given to the Controller, he shall not exercise that power adversely to the applicant for a patent, or for amendment of an application or of a specification, or for registration of a design, without (if so required within the prescribed time by the applicant) giving the applicant an opportunity of being heard." I think it is pretty plain that the sections which are referred to in that section are sections 5, 17 and 43, and that section 62 is not referred to. It provides that if the Controller is going to exercise his power adversely to the applicant in any of the cases mentioned, he should give the applicant an opportunity of being heard. The section does not deal with the application which it is suggested may be made by a third person under section 62 for cancellation of the registration. The learned Advocate-General argued that inasmuch as the Controller would be occupying a *quasi* judicial position, he would naturally give the applicant an opportunity of being heard. The point, however, is that when the Act specifies certain cases in which an opportunity of being heard should be given to the applicant, it seems to me that if paragraph (b) of section 62 had been intended to apply to the cancellation of registration upon the application of a person other than the registered owner, then section 67 would have contained a provision that in such a case an opportunity of being heard should be given to the owner of the registered design. These considerations lead me to think that the contention put forward by the appellant in this case is a correct one. Then again, this section is similar to section 70 of the English Act, (7 Edw. 7), and our attention was drawn to the form which had been drawn up by the Board of Trade in pursuance of the English Act: that section has been interpreted by the Board of Trade as applying only to applications by a registered owner or by somebody in whom the interest of the registered owner is vested, such as the trustee in bankruptcy or, in the case

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of a Company, the Liquidator. I quite agree with the learned Advocate-General that that interpretation is not binding upon this Court; but it is interesting, at all events, to find that the Board of Trade interpreted the Act in the same way that I have. It is argued by the learned Advocate-General that, as regards this country, Form No. 20 is not limited to applications by registered owners. That is quite true. But the section which gives power to the Governor-General in Council to make rules under the Act, is section 77, and it is in these words: "(1) The Governor-General in Council may make such rules as he thinks expedient, subject to the provisions of this Act (g) generally for the purpose of carrying into effect the provisions of this Act." It must be obvious that that section does not give the Governor-General in Council power to extend the powers of the Controller further than is given to him by the express provisions of the Act, and I do not think that the fact that Form No. 20 has been framed in a general way and is not limited in its words to applications by a registered owner, affects, what I think is the meaning of section 62.

Therefore, the conclusion at which I arrive on this point is that the Controller, upon the application of Messrs. Boseck & Co., had no jurisdiction to cancel the registration, and it seems to me that under the Act the proper and ordinary way of expunging the registration of a design was to apply to this Court under section 64.

This, however, does not conclude the question, because the learned Judge in deciding the first point in favour of the Controller adjourned the matter in order that he might see whether or not the design was a new or original design. The learned Judge thought that the Court had power to revise the Controller's decision under section 64. If, my interpretation of section 62 is correct, then that would not be so, and the applicant would be entitled to the order which he asks for, under section 45 of the Specific Relief Act, but for the existence of paragraph (c) to which I have already referred, namely, "that in the opinion of the High Court such doing or forbearing is consonant to right and justice."

Therefore, before we can direct the Controller to restore the registration of the design, we have to consider in effect the same question which was considered by the learned Judge, Mr. Justice Fletcher, namely, whether the Court should require the Controller to restore the design to the register on the ground that the design was new and original.

Now, the findings of the learned Judge on this part of the case are as follows: First of all, he points out that "the judgment of the Controller turned on the question as to whether there was any novelty in the key-holes and buttons which are used for fastening the band to the wrist." The applicant seems to have been rather doubtful as to the ground on which he ought to have based his case, and the point that was urged before the Controller has not been urged before us. Obviously it could not be because there was no novelty or originality in the fastening of this particular band. That is clear upon the evidence. But it is not unimportant to notice. Apparently this was the main point which the Controller had before him when Messrs. Boseck & Co. were objecting to the registration; and, if that was the main ground relied upon for novelty and originality, I can quite understand that the Controller came to the conclusion that there was no novelty, or originality. When this matter was before the learned Judge, one of the grounds on which the appellant relied was that there was *flattening* of the band. The learned Judge based his decision, to some extent at all events, upon the fact that he was convinced that there was nothing in that point and that the *flattening* did not really exist and that it only came into existence when the band was fitted on to the watch, and that by reason of the manner in which it was fitted to the watch a certain amount of *flattening* must take place. He did not base his judgment upon that ground alone, but he came to the conclusion that having regard to the shape and configuration of the bracelet which was produced before him in Court there was nothing new or original in the design which was relied upon. Before considering that point, which is the real point at all events as regards the merits of this case, I think I ought

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to point out that the learned Judge came to certain definite findings; *first*, he held with regard to this band which I may, for the sake of convenience, call the "Novelty" band, that prior to its introduction the evidence establishes that a plain metal band of uniform width in one piece passing through the loops of the watch had not been used in connection with wrist watches; *secondly*, that shortly after the "Novelty" band had been introduced, Messrs. Boseck & Co. copied it; *thirdly*, that on a threat of legal proceedings they applied to the Controller to remove the design from the register, which the Controller, after hearing the parties, did; *fourthly*, that the evidence also shows that when the "Novelty" band was introduced, it had a large and immediate sale; and, *fifthly*, that there was produced before him, as there had been before the Controller, a bracelet which, it was said, was an anticipation of the petitioner's design. Then he describes the bracelet as follows: "The bracelet consists of a plain metal band of gold of uniform width fastened in exactly the same method as the 'Novelty' band. In this metal band are two (it ought to be three) small holes, pierced so as to allow a pearl ornament to be affixed thereto by screws. The object, of course, is for this to be used as an ornament. This bracelet is one of a pair manufactured by Messrs. Cooke and Kelvey of this city, and which they have had in stock for about 5 years prior to August 1915. There is other evidence of the manufacture and sale of other similar bands, but I am not satisfied that the evidence on that point is reliable." Then he goes on to say: "The case must, therefore, stand or fall on the bracelet produced by Messrs. Cooke and Kelvey" (that is, this bracelet which I have now in my hand). "It has been decided in a series of cases that the test of novelty is the eye of the Judge. He must place the two designs side by side and see whether the one for which novelty is claimed is new." I entirely agree with the principle which is laid down by the learned Judge. The matter, of course, to a very large extent, is a matter of first impression, inasmuch as it depends upon the view a Judge looking at the article in question takes, when comparing it with the other

article which is said to be an anticipation.

In my judgment, the shape and configuration of the metal band taken by itself cannot be said to be new or original. I have the "Novelty" band before me and the bracelet which was produced by Messrs. Cooke and Kelvey. It is true that it is not of the same size, that is to say, it is narrower than the bracelet, and not of the same dimensions; but as regards the shape and the configuration, I confess I cannot see anything new or original. It is conceded that the fastenings are similar and that the method of the fastening has been known in the trade for a considerable time. But that does not conclude the matter. The real point in this case, in my judgment, arises in connection with the user of this metal band: and I have to ask myself the question whether the application of the "Novelty" band was in respect of an object analogous or kindred to the bracelet: or to put it in another way, was the metal band intended for such a different purpose and for a use so dissimilar that the design may be held to be new or original. I think the case of *Clarke's Design, In re* (1) lays down quite clearly what the test in matters of this kind is. In the judgment of Lord Justice Lindley, at page 45, he dealt with the case which had been decided by Mr. Justice Chitty [*Read & Greswell's Design, In re* (2)] and then with reference to that he said as follows: "In this last case, Chitty, J., said that 'to be capable of being registered a design must be new or original in fact and not, as is suggested, new or original as to some particular class of goods. It cannot be said to be new and original if it is already being applied to articles of an analogous character' (that is a quotation from Mr. Justice Chitty's judgment). The learned Judge was obviously referring to the classes of goods mentioned in the schedule to the designs rules, and the words referring to articles of an analogous nature show that the learned Judge did not intend by the words 'new or original in fact' to decide that a design must be new or original in the sense of never having been seen before as applied to any article what-

(1) (1896) 2 Ch. 38; 65 L. J. Ch. 629; 74 L. T. 631.

(2) (1889) 42 Ch. D. 260; 58 L. J. Ch. 624; 61 L. T. 450; 38 W. R. 88.

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ever. In *Walker, Hunter and Co. v. Falkirk Iron Co.* (3) and *Hecla Foundry Co. v. Walker, Hunter and Co.* (4), a design for the shape of an iron furnace-door was protected, although wooden doors of the same shape for side boards and other articles of furniture were old. The things shaped were for such different purposes and their uses were so dissimilar that the design for one of such things was held to be new or original, although it was old for the other. What then is the test to be applied to a case such as that before us? The design must be new or original with reference to the kind of article for which it is registered, meaning by kind of article, not the class of article mentioned in the schedule to the rules, but the kind of article having regard to its general character and use." Then he proceeds to give well known instances: "A design may be new for a coal-scuttle, but not for a bonnet." Now, that being the test, I formulate the question which I have to put to myself, having regard to its general character and use, was the "Novelty" band, for a purpose so different from, and for a use so similar to, the purpose and use of the bracelet that the design may be said to be new and original. To my mind the purpose and use of the band are entirely different from the purpose and use of the bracelet. The "Novelty" band is intended to attach a watch to the wrist. The object of wearing a watch on the wrist is generally different from that of wearing a bracelet,—one is for a useful purpose and the other is ornamental. It was pointed out in argument, and I think based upon evidence, that the leather straps which had been generally used for the purpose of attaching a watch to the wrist, were unsuitable to such a country as this, or in fact to any other country of hot climate, and consequently this band—the "Novelty" band—which was introduced had become a very useful article, and, as appears from the evidence, had, to use the words of the learned Judge, "a large and immediate sale." There may be a few cases where

the articles (the watches) are so ornamental that they are worn more as ornaments than as articles of use; but I think they are the exceptions and not the rule: and in my judgment this "Novelty" band which was made an exhibit in the case is not the kind of band which would be ordinarily used for an ornamental watch.

It is said by the learned Counsel for Messrs. Boseck & Co. that utility is wholly immaterial. So it is in one sense, that is to say, the Statute applies to all designs, whether they add to the utility of the articles to which they are applied or not. But in considering the purposes and uses of the article in question for the sake of considering whether they are analogous or kindred to the purposes and uses of the article which is said to be the anticipation, I think it is legitimate to take into consideration that one purpose is ornamental and the other is useful. In addition to that which I have already mentioned there are other facts which to my mind are significant. The fact that as soon as this article was produced there was a large and immediate sale, is strong evidence that it was novel and original: then there is the fact that Messrs. Boseck & Co. shortly after its production, adopted and copied it and put it in their catalogue on the top of one of the first pages (the catalogue was produced before us). Further, there was evidence of well-known people in the jewellery trade who described the "Novelty" band as a novelty. The result is that all these facts lead me to the conclusion that although in view of the bracelet produced by Messrs. Cooke and Kelvey, the shape of the "Novelty" band by itself cannot be said to be new and original, the application of it to a watch to be worn on the wrist was for a purpose so different from and for a use so dissimilar to the purpose and use of the bracelet that the design in question may be said to be original.

For these reasons, I think, that the appeal should be allowed and the application of the 22nd of February 1916 granted. In my judgment, the Controller ought to pay his own costs of the proceedings before Mr. Justice Fletcher and this

(3) (1887) 4 R. Pat. Cas. 390; 14 R. (Ct. of Sess.) 1072; 24 Sc. L. R. 750.

(4) (1889) 14 App. Cas. 550.

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Court, and Messrs. Boseck & Co. ought to pay the costs of the appellant in respect of the hearing, so far as the merits are concerned, before Mr. Justice Fletcher, and the appellant ought to have the costs of this appeal with the exception of one day, which was taken up in the argument with respect to the preliminary point, as to which there ought to be no costs before us. The costs will be on the basis as "of hearing."

I should myself like to say before parting with this case, that I am indebted to the learned Counsel engaged in the case for their able arguments and for the assistance they have given me in this matter.

WOODROFFE, J.—This application was made under section 45 of the Specific Relief Act. It is not, in my opinion, barred by section 64 of the Designs Act. The action of the Controller was not justified by section 62 of that Act. We have then to see whether the application is justified on the merits. Mr. Justice Fletcher seems to have dealt with the question as one under section 64 of the Designs Act. But the appellant does not admit that that section applies, for, if it did, he could not get relief under section 45 of the Specific Relief Act. His case is that the merits are to be entered into under the provisions of section 45, under which provision the application is made.

As to the merits, in my opinion, the appellant has established his case. There is no question, I think, that it is a good design. It is found as a fact that it had never been previously applied to wrist watches and the fact that it had an immediate and lucrative sale strongly indicates that the article sold was a useful novelty. It was also copied by Messrs. Boseck and Co. and inserted in their catalogue, and there given the first place. The case before Mr. Justice Fletcher was decided practically on one ground and one ground only, and that was that the design in question was not new, in that it had been anticipated by a bracelet of Messrs. Cooke and Kelvey which they had held in stock for about 5 years prior to August 1915; the learned Judge after finding several points in favour of the applicant then says that "the case must stand or

fall on the bracelet produced by Messrs. Cooke and Kelvey."

It has been argued by Mr. James that the band of the bracelet produced by Messrs. Cooke and Kelvey is not the same as the band of the design in question. Assuming for the sake of the argument, without deciding the point, that it is the same, there is, I think, novelty in applying what on this assumption is an old thing to a new use. If that is so, the design should be protected, provided it is not merely, to use the words of the cases, analogous. The present case does not seem to be within the proviso, though it may be that class divisions do not necessarily determine whether one case is analogous to another; it seems to me that the fact that articles are in different divisions is a matter of some account. However this may be, in the present case we have here different purposes and different uses. A wrist band used to carry an ornament such as that produced by Messrs. Cooke and Kelvey, and a wrist band to carry a watch do not appear to me to be so analogous as to deprive the applicant of his claim to novelty. Further, the band is, in my opinion, original and differs from the other band produced by its circular shape according to which it passes at the back of the watch, and as a consequence of that, produces a flattening which is referred to in the evidence.

In my opinion, therefore, the appeal succeeds and the applicant is entitled to the order which he sought.

Appeal allowed.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 370 OF 1915.

October 23, 1918.

Present:—Sir Henry Richards, Kt., Chief Justice, and Justice Sir P. C. Banerji, Kt.
MANNU LAL AND ANOTHER—DEFENDANTS—
APPELLANTS

versus

NELIN KUMAR MUKERJI AND OTHERS—

PLAINTIFFS—RESPONDENTS.

Provincial Insolvency Act (III of 1907), s. 42—

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Insolvency—Annulment of adjudication, effect of—Receiver, suit instituted by, whether maintainable after adjudication.

A suit instituted by the Receiver of the estate of an insolvent against a debtor of the insolvent during the pendency of the insolvency proceedings is not rendered unmaintainable on the annulment of the adjudication. [p. 444, col. 2.]

First appeal from a decree of the Subordinate Judge, Cawnpore.

Messrs. B. E. O'Connor and Dr. Surendro Nath Sen, for the Appellants.

The Hon'ble Mr. Motilal Nehru and Mr. Sital Prasad Ghosh, for the Respondents.

JUDGMENT.—The facts out of which this and the connected appeals arise are somewhat complicated but it is unnecessary to state them at any great length. It appears that there were three brothers, Ghasi Ram, Shankar Lal and Mannu Lal. There was also their father Fauji Lal. Ghasi Ram appears to have been a man of considerable business capacity and intelligence and to have started a number of businesses in various parts of the province, which were up to a certain period at least quite successful. He associated his father and brothers as partners in some of the concerns without any contribution of capital on their part. All went well until one of the brothers Mannu Lal started a suit for partition against his brother Ghasi Ram. Ghasi Ram, instead of meeting this suit in a straightforward fashion and having all questions decided between himself, Mannu Lal and the other members of the family, got himself declared an insolvent. After a good deal of litigation (out of which probably the legal profession alone gained anything), a scheme for composition was put forward and eventually accepted by the creditors and the Court. The bankruptcy was annulled. Before this happened, however, a suit had been commenced by the Receivers against Shankar Lal and Mannu Lal in respect of their alleged liability, as partners in some of the concerns, to Ghasi Ram and his son as the proprietors of certain other concerns in which Shankar Lal and Mannu Lal had no interest. Notwithstanding the fact that the declaration of insolvency was annulled, the present suit was continued and the learned Subordinate Judge has made a decree in favour of the Receivers, plaintiffs in the suit.

The first point argued on behalf of Shankar Lal and Mannu Lal (the latter being represented by Mr. O'Connor, Barrister, and the former by Mr. Katju) was that the annulment of the insolvency rendered the suit by the Receivers unmaintainable and that on this ground alone the suit ought to have been dismissed. In our opinion this contention has no force. The defendants are alleged to be the debtors of Ghasi Ram and the other late insolvents. Ghasi Ram makes no objection to the suit being maintained, (the objection that is raised is at the instance of the alleged debtors). There can be no doubt that the suit was properly instituted originally. There can be no doubt the suit could have been continued after the annulment in the name of the late insolvents, if not by the Receivers. It seems perfectly clear that if the debtors pay the amount found due either voluntarily or under stress of a decree, they will get a good discharge for their indebtedness to the late insolvents. We think under the circumstances that no injustice of any kind could be done to the defendants by the case being heard out on the merits.

The next point argued was that the suit should have been dismissed, because the suit as framed did not ask for an account of the transactions relating to a number of other concerns in which the parties were interested. Such pleas were raised in the Court below on behalf of the defendants and the Court admitted the equity of the defence by directing that the account should be taken in such a way that the liability, if any of the defendants would be finally decided after giving them credit for any sums which might be due to them from Ghasi Ram on account of the other concerns. We think that having taken care to prevent the possibility of any injustice being done to the defendants on account of original frame of the suit, the Court below was quite right in not dismissing the suit but directing that the accounts should be taken.

The next point that was urged was that the Court below has assumed the correctness of the claim for Rs. 13,538-3-0 being due to the Cawnpore firm. It was contended that the Court ought not to have assumed that this sum was actually due but should have gone further into the accounts, and it was vaguely hinted that fictitious entries

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might have been made by Ghasi Ram in the Lakhimpur and Gola accounts at the time the suit was brought for partition by Mannu Lal so as to inflate the indebtedness of these two concerns to the Cawnpore firm. It was urged that the learned Judge himself thought that there were fictitious entries in these accounts. We have carefully considered the point and we cannot see that the learned Judge thought anything of the kind. We have even seen the evidence that was given on this particular point. One item that was suggested as a fictitious entry was a sum of Rs. 1,300 or thereabouts, damages which the Cawnpore house had paid to Ralli Brothers and had charged against Lakhimpur. It appears that witnesses were examined to show that a consignment of corn was sent by the Lakhimpur house to Ralli Brothers but that this was done in pursuance of a contract entered into between the Cawnpore house and Ralli Brothers. The contract being between these two firms, the Cawnpore house had necessarily in the first instance to pay the damages for breach of contract, but it was quite right that the Lakhimpur house should have been debited with the payment of the damages if (as between the Lakhimpur house and the Cawnpore house) the grain was to come from Lakhimpur. If this item is to be taken as a specimen of the items suggested as fictitious, we think that there is very little weight or force in the allegation put forward on behalf of the defendants as to fictitious entries. We think that the Court below was justified in accepting the indebtedness as between the Cawnpore house and the Lakhimpur house and the Gola house of the sum mentioned above. It was argued that neither Shankar Lal nor Mannu Lal could be liable for any sum, because according to the contract between them and their brother Ghasi Ram they were entitled to share in the profits but they were not to be bound to contribute to any loss. We are perfectly certain that there was no such contract, and we are quite certain that the learned Judge never intended to hold that such an absurd contract existed. No doubt Shankar Lal and Mannu Lal contributed no capital and the shares in the partnership given to them were in lieu of their services, but as partners they were entitled to profit and liable

to loss in proportion to their shares.

The last point was that the rate of interest, namely, nine per cent., was not the rate agreed upon. On this point we see no reason to differ from the finding of the Court below.

We think on the whole the case was carefully tried and justice done by the learned Subordinate Judge. We hope that the brothers may see their way to bring this litigation to a speedy determination without incurring further cost. The result is that the appeal fails and is dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 1588
OF 1916.

July 24, 1918.

Present:—Mr. Justice Newbould and
Mr. Justice Panton.

JADUPATI CHATTERJEE AND OTHERS
—DEFENDANTS—APPELLANTS

versus

KAHETRA NATH PAUL —PLAINTIFF—
RESPONDENT.

*Bengal Tenancy Act (VIII B.C. of 1885), ss. 61, 62
—Deposit of rent made by tenant—Tenant not entitled
to make deposit—Deposit, whether operates as tender—
Landlord, remedy of.*

The receipt given by a Court on accepting a deposit under section 62 of the Bengal Tenancy Act cannot operate as a valid acquittance unless the tenant is entitled under section 61 of the Act to make the deposit. [p 447, col. 1.]

If the tenant deposits his rent without first making a tender or without any of the other conditions existing which makes section 61 applicable, the landlord's only remedy is to sue for rent ignoring the deposit, which cannot even be treated as a tender of rent so as to suspend the running of interest. [p. 447, col. 1.]

Appeal against the decree of the District Judge, Pabna and Bogra, dated the 26th of April 1916, affirming that of the Officiating Subordinate Judge, Bogra, dated the 1st of December 1914.

FACTS appear from the judgment.

Babu Baranasibasi Mukherjee, for the Appellants.—The question of tender or no tender of the rent due was a question

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for the determination of the Court receiving the deposit of rent and this question should not have been gone into by the Courts below, in other words, the Courts below have acted without jurisdiction in entering into the question as to whether the deposit under section 61 of the Bengal Tenancy Act can be regarded as a valid tender of the rent due to the landlord. Refers to sections 61 and 62 of the Bengal Tenancy Act. Under section 62 the Court receiving the deposit of rent is to be satisfied that the applicant is entitled to deposit the rent under section 61. The question of the right of making the deposit of rent is entirely a question to be determined by the Court receiving the deposit, and any other Court has got no jurisdiction to enter into that question.

Then the deposit having been accepted by the Court there was a valid acquittance and as such there was no arrear of rent and so the suit should have been dismissed, at any rate the deposit should have been treated as a valid tender of rent due at the time of making the deposit which would suspend the running of interest. As soon as the Court accepts the deposit and gives a receipt, there is a valid acquittance and there remains no arrear for which the defendant may be sued upon. The plaintiff, therefore, can get no relief whatsoever. The deposit is a valid discharge at least to the extent of the amount deposited. Refers to section 62, sub-section (2), of the Bengal Tenancy Act and *Sasi Bhusan Dey v. Umakanto Dey* (1). Before the suit was instituted the money due to the landlord was paid and paid within time and a receipt was duly granted by the Court for the amount deposited. Therefore, the Courts below should have dismissed the suit, allowing the plaintiff to withdraw the money deposited. Even if it be supposed that the deposit was not proper, it could be treated at least as a valid tender so as to stop the running of subsequent interest.

Babu Hemendra Chandra Sen (with him Babu Gunoda Charan Sen), for the Respondent.—Section 61 of the Bengal Tenancy Act provides that there cannot be a valid deposit unless there was a valid tender of

rent by the tenant and there was a refusal by the landlord to accept the rent tendered, but it has been found by the Courts below that there was no valid tender and so the deposit in question can be no defence to the plaintiff's claim. If the defendant was not entitled to make a deposit under the law, then he has got no case at all. Moreover the notice of the deposit in question was received by the landlord (plaintiff) after the institution of the suit, so even if the deposit had been made before the date of the institution of the suit that would not make any difference in the case. The deposit was made on the 24th October. Notice of deposit was served on the plaintiff on 20th November. The present suit was filed on 1st November, *i.e.*, before the receipt of the notice of deposit. There is no authority for the broad proposition of law that when a deposit is accepted by a competent Court, the question of the validity of the deposit cannot be entered into by the Court trying a suit for rent between the landlord and the tenant who made the deposit.

Babu Baranasibasi Mukherjee, for the Appellant, referred to *Sirdhar Roy v. Rameswar Sing* (2).

JUDGMENT.—In the present case the defendant made a deposit of rent under section 61 (a) of the Bengal Tenancy Act, alleging that he had tendered the money to the landlord who had refused to receive it. This deposit was made on 24th September 1913 corresponding with 8th Assin 1320 and was for the rent due in Assin 1320. The plaint in the present suit was preferred by the landlord for this rent on 1st November 1913 and the landlord had not then notice of the deposit. Both the lower Courts have held that the statement made by the tenant that he made a tender of the rent to the landlord was false, and that, as he was not entitled to make a deposit under section 61, the landlord's suit for rent should be decreed as if no deposit had been made. Before us it is contended that as the Court accepted the deposit and granted a receipt under section 62, that receipt operated as an acquittance for

(1) 25 Ind. Cas. 171; 20 C. L. J. 153 at p. 157; 19 C. W. N. 1143.

(2) 15 C. 166; 7 Ind. Dec. (N. S.) 693.

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the amount of rent payable by the tenant and that consequently at the time the suit was brought there was no arrear due. It appears to us that the lower Courts have rightly held that the receipt given under section 62 cannot operate as a valid acquittance unless the tenant is entitled to make a deposit under section 61. The Court which accepts the deposit must do so *ex parte*, as the Act makes no provision for the serving of a notice of deposit on the landlord until after a receipt under section 62 has been granted. It is pointed out in the case of *Sirdhar Roy v. Rameswar Sing* (2) that it is entirely at the option of the Zemindar either to receive the rent deposited or not, just as he pleases, and that he may bring a suit for the recovery of the whole of the arrear of rent due to him up to the date of deposit within six months from the date of the service of notice upon him, disregarding altogether the deposit made by the tenant and that if in that suit it be proved that the tenant had, without reasonable or probable cause, neglected or refused to pay the amount of rent due to the Zemindar, the Court might award to him damages and costs in addition to the rent. It appears to us that the law never contemplated that any tenant could make a deposit into Court simply by making a false affidavit that he had made a tender of the rent which had been refused. If the tenant does deposit his rent without having first made a tender or without any of the other conditions existing which make section 61 applicable, the landlord's only remedy is to sue for rent ignoring the deposit and this, we hold, he is entitled to do. It is contended that, at any rate, the deposit should be taken as a tender to the landlord and should at least suspend the running of interest. We cannot accept the contention that the Court is made by the provisions of this section a statutory agent of the landlords or that the payment into Court can be treated as a tender to the landlords themselves. We, therefore, hold that the appeal fails and must be dismissed with costs.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 2274 OF 1916.

February 28, 1918.

*Present:—Mr. Justice Shah Din.*RAM SINGH AND OTHERS—PLAINTIFFS—
APPELLANTS.*versus*BASTI AND OTHERS—DEFENDANTS—
RESPONDENTS.

*Adverse possession—Mortgagor and mortgagee—
Death of mortgagor—Mortgagee claiming to succeed
as heir against the proprietary body—Mutation in
favour of mortgagee, effect of.*

Where on the death of a mortgagor without issue and without leaving any reversioner related to him in a definite degree of relationship, the mortgagee claimed to succeed to the land as heir of the mortgagor as against the proprietary body of the village and mutation was effected in his favour:

Held, that the possession of the mortgagee became adverse to the proprietary body of the village from the date of the mutation. [p. 448, col. 1.]

Second appeal from the decree of the District Judge, Ambala, dated the 6th June 1916, reversing that of the Subordinate Judge, 1st Class, Simla, dated the 8th September 1915, decreeing the claim.

Messrs. N. C. Mehra and Qamar Din, for the Appellants.

Mr. E. W. Parker, for the Respondents.

JUDGMENT.—The mutation register for 1888 in original has been sent up in compliance with the order of this Court, dated the 30th January 1917. I have referred to the mutation order, dated the 21st December 1888, and I find that it is signed by Sheikh Najam-ud Din, Assistant Collector of the Second Grade. There can, therefore, be no doubt that the question of the mutation of the land in suit in favour of the mortgagee, Mansa Ram, as owner came up before a Revenue Officer who had jurisdiction to deal with it and was decided in favour of the mortgagee, mutation of the proprietary rights in the land being made in his name, as prayed by him. It would also appear from that order that some of the present plaintiffs were present in person or were represented by a *de facto* guardian at the mutation proceedings and that no objection to the proposed mutation was made. As noted by the *patwari* in his preliminary report and by the Revenue Officer in his final order, the usual notice of the proposed mutation was given in the village, and, therefore, the proprietary body

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must be presumed to have had sufficient knowledge of the mutation proceedings.

It is clear from the mutation in question that the mortgagee, Mansa Ram, set up a proprietary title to the land as against the proprietary body of the village on the ground that the mortgagor, *Musammât Lachmi*, had died without leaving any heirs except the mortgagee himself, and since no objection was raised by any member of the proprietary body to the claim set up by him, mutation of the land was made in his name as proprietor. Even if, as is now contended before me by the appellants' Counsel, Mansa Ram was not an heir of the widow, and the appellants, as members of the proprietary body or the descendants of the original settlers in the village, were entitled to succeed to the land left by her, it seems to me that Mansa Ram did effectually set up adverse possession as owner to the land in question and his adverse possession against the appellants, and in fact against the whole world, began from the date of the mutation in his favour. In the peculiar circumstances of this case, the fact that Mansa Ram was mortgagee of the land before the death of *Musammât Lachmi* is immaterial so far as the application of the doctrine of adverse possession is concerned, for it is not denied that there may be circumstances under which the mortgagee can in law set up adverse possession in regard to the mortgaged property. Counsel for the appellants relied upon certain decisions of our own Court and of the Allahabad High Court in support of his contention that, generally speaking, the mortgagee cannot claim adversely to mortgagor the property which had been mortgaged to him; but the correctness of that proposition is admitted on all hands; the question for decision in the present case being whether this is not one of those exceptional cases in which the mortgagee can set up adverse possession regarding the property mortgaged to him. I am of opinion that he can, for admittedly the mortgagor died without leaving any issue or reversioner of her husband related to him in a definite degree of relationship, and the land has been claimed by the proprietary body as the ultimate heirs to the property of a childless proprietor.

As pointed out by the District Judge, not only have the plaintiffs not brought the present suit within twelve years from the date of the mutation of 1898 but they have omitted to sue within twelve years from the year 1897, when the mortgage could have been redeemed according to the terms of the original contract.

For the above reasons I agree with the District Judge in holding the suit barred by limitation; and I accordingly maintain his judgment and decree and dismiss this appeal with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 992
OF 1916.

July 16, 1918.

Present:—Mr. Justice Newbould and
Mr. Justice Panton.

SATYENDRA NARAYAN BAGCHI

AND OTHERS—DEFENDANTS—

APPELLANTS

versus

SASHI BHUSAN CHOWDHURY

AND OTHERS—PLAINTIFFS—

RESPONDENTS.

Pleadings—Declaration of title, suit for—Title by adverse possession not expressly set up—Decree for title by adverse possession, validity of.

The plaintiffs brought a suit for establishment of their *Lakheraj* title to a tank. They did not expressly set up in the plaint a title by adverse possession, but the plea of title by adverse possession was included in the statement of facts on which the plaintiffs based their claim for title and the issue of the plaintiffs' title by adverse possession was fought out on its merits in the first Court. The case set up by the defendants was not that the plaintiffs had been in permissive possession, but that they had never been in possession:

Held, that on the finding that the plaintiffs had been in possession for generations and that the defendants had never been in possession, the plaintiffs were entitled to a decree declaring their title by adverse possession. [p. 450, col. 1.]

Appeal against the decree of the Subordinate Judge, Birbhum, dated the 30th November 1915, affirming that of the Mun-

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sif, Additional Court, at Rampurhat, dated the 18th of September 1914.

FACTS appear from the judgment.

Babu Amarendra Nath Bose (with him Babu Jatindra Narain Bagchi), for the Appellants.—Although the plaintiff failed to prove Lakheraj possession, adverse possession has been decreed in his favour, there being no prayer in the plaint for adverse possession. The Court below should not have entered into the question of plaintiff's title by adverse possession, as there was no prayer for that in the plaint and as that was not the subject-matter in issue in the lower Court. The plaintiff cannot succeed upon a title which he never set up. *Bijoya Debia v. Bydonath Deb* (1), *Shiro Kumari Debi v. Govind Shaw Tanti* (2), *Ram Chandra Sil v. Ramanmani Dasi* (3), *Vasudeva Padhi Khadanga Garu v. Maguni Devan Bakshi Mahapatrulu Garu* (4) referred to. The case of *Ram Chandra Sil v. Ramanmani Dasi* (3) was in regard to a suit for possession on declaration of plaintiff's title, whereas this case is for a declaration of title merely. Hence this case is distinguishable from the former set of cases beginning with *Bijoya Debia v. Bydonath Deb* (1).

Again it has been held in *Sundari Dasses v. Mudhoo Ohunder Sircar* (5) that where a mere declaration of title is sought you cannot succeed unless the title is proved. Again in *Vasudeva Padhi Khadanga Garu v. Maguni Devan Bakshi Mahapatrulu Garu* (4) also possession was sought upon declaration of title of the plaintiff. But the case was a suit for partition, so the case is not against me.

That this distinction between a suit for possession upon declaration of title and for simply declaration of title has been drawn to a great length I would show from a judgment of Mr. Justice Mookerjee in *Ananda Hari Basak v. Secretary of State* (6).

Babu Biraj Mohan Mojumdar (with him Babu Jatindra Lal Banerjee), for the Respondents.—Argument of the other side is rather academic. He says that this case is a new one altogether.

[NEWBOULD, J.—His case is that the cases on which the lower Court depended in dismissing the suit against him are cases of possession, whereas his case is for declaration of title.]

The two issues framed by the lower Court, viz., (1) whether the suit is barred by limitation, and (2) Has the plaintiff Lakheraj title in the land, involve adverse possession. Then again in *Vasudeva Padhi Khadanga Garu v. Maguni Devan Bakshi Mahapatrulu Garu* (4) the parties gave evidence on the point of adverse possession. In *Ananda Hari Basak v. Secretary of State* (6) it is said that if the point is raised directly or indirectly that is sufficient.

In a case like this where Lakheraj title is set up and adverse possession is found a decree should be given for this, and this view has been supported by two cases in 22 C. L. J., one at page 126 [*Jafar Ahmed v. Birendra Kishore Manikya Bahadur* (7)] and another at page 132 [*Birendra Kisore Manikya Bahadur v. Gagan Ohandra* (8)]. There is another case also at 22 C. L. J. 153 [*Birendra Kisore, Manikya v. Ram Ohandra Dey* (9)], which supports this view.

JUDGMENT.—The plaintiffs brought the suit out of which this appeal arises to establish their Lakheraj title to a certain tank. Both the lower Courts held that this Lakheraj title had not been proved but that the plaintiffs had succeeded in proving a title by adverse possession. It is contended on behalf of the appellants, first, that on the suit as framed the plaintiffs are not entitled to a decree, and, secondly, that the facts found are not sufficient to justify the conclusion that the possession of the plaintiffs was adverse.

As regards the first point, the learned Pleader for the appellants has addressed an able and interesting argument, taking us through a number of reported cases commencing with the case of *Bijoya Debia v. Bydonath Deb* (1) and ending with the case of *Ram Chandra Sil v. Ramanmani Dasi* (3). We do not consider it necessary to discuss the point how far the plaintiffs can succeed on a title by adverse possession that has not been expressly set up in the plaint, because it appears to us from a

(7) 24 Ind. Cas. 319; 22 C. L. J. 126.

(8) 30 Ind. Cas. 904; 22 C. L. J. 32.

(9) 30 Ind. Cas. 948; 22 C. L. J. 153.

(1) 24 W. R. 444.
(2) 2 C. 418 at p. 423; 1 Ind. Dec. (N. s.) 556.
(3) 36 Ind. Cas. 890; 20 C. W. N. 773 at p. 785.
(4) 28 I. A. 81; 5 C. W. N. 545 at p. 543; 24 M. 387; 3 Bom. L. R. 303; 7 Sar. P. C. J. 819 P. C.).
(5) 14 C. 592 at p. 597; 7 Ind. Dec. (N. s.) 392.
(6) 3 C. L. J. 316 at p. 330.

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reading of the plaint in this case that the plea of title by adverse possession was included in the statement of facts on which the plaintiffs based their claim for title, and it also appears that the issue of the plaintiffs' title by adverse possession was fought out on its merits in the first Court. Though such an issue was not distinctly framed, it appears from the judgment of the first Court, in joining the issue of limitation to the issue of Lakheraj title, that the parties clearly understood that the plaintiffs' claim to title by adverse possession was in issue.

As regards the second point, although the lower Courts have not distinctly stated on what ground they held the plaintiffs, long possession to be adverse, it appears that in those Courts the case set up by the defendants was, not that the plaintiffs had been in permissive possession, but that they had not been in possession at all. The defendants tried to prove that they themselves had been in actual possession of this tank. The finding that the plaintiffs have been in possession for generations and that the defendants have never been in possession must be taken as conclusive in second appeal; and on those findings, we cannot see that any other inference could be drawn except that the plaintiffs' possession was adverse.

Taking this view, we dismiss the appeal with costs.

Appeal dismissed.

—ALLAHABAD HIGH COURT.
FIRST CIVIL APPEAL No. 178 OF 1917.
May 22, 1918.

Present :—Mr. Justice Piggott and
Mr. Justice Walsh.

LAKHPAT RAI AND OTHERS—PLAINTIFFS—
APPELLANTS

versus

SRI KISHAN DAS AND OTHERS—

DEFENDANTS—RESPONDENTS.

Patents and Designs Act (II of 1911), s. 3—Patent

—Invention, what is—Combination of old materials in new form, whether can be patented.

Plaintiffs invented a stove for the preparation of *banslochan*, a medicinal powder. The essential features of the process were the treatment of the raw substance at a red heat with sulphuric acid inside a closed crucible or retort made entirely of earthenware. The advantages involved were:—(a) No iron or other metal being used in the composition of the crucible there was no danger of any deleterious action on the part of the furnace of the acid upon the metal; and (b) the retort or crucible being entirely closed from the time when the acid was added until the process of calcination was complete, there was no necessity of a chimney communicating with the retort for the purpose of carrying off the fumes of the acid. The action of the acid on the crude material under these conditions became more thorough and satisfactory and the possible nuisance from the escaping fumes of the acid was done away with.

Held, that this specification was a good subject-matter for a patent. [p. 463, col. 2; p. 464, col. 2.]

First appeal from a decree of the Additional Judge, Farrukhabad, at Fatehgarh.

Mr. Kemfry, (of the Calcutta Bar) (with him Mr. B. E. O'Connor, the Hon'ble Dr. Tej Bahadur Sapru and Dr. S. M. Sulaiman), for the Appellants.

The Hon'ble Mr. Moti Lal Nehru (with him Dr. Surendro Nath Sen), for the Respondents.

JUDGMENT.

WALSH, J.—We have come to the conclusion that this appeal must succeed. There has been a very full discussion, upon somewhat unfamiliar lines in this Court; but we have no doubt as to the proper conclusion which out to be reached. The appeal is brought by the plaintiffs, the registered patentees of a process of manufacture, the plaintiffs consisting of Lakhpat Rai, Sampat Rai and Manful Narain, and carrying on business at No. 14, Mulliek Street, Calcutta, against a judgment dismissing their suit brought against the defendants Srikishan Das, Babal Rai and Bhoop Narain, carrying on business at Farrukhabad, for infringement of the patent. One Prag Narain, who figures somewhat prominently in the case, is a member of the plaintiffs' firm but for reasons best known to the plaintiffs was not one of the applicants for the patent, and is, therefore, not a necessary party to the suit. The ground upon which the suit was dismissed was a question of fact, namely, that the process for which the plaintiffs had obtained their patent had

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been anticipated and was one of common use in the trade.

Speaking for myself, I think it desirable to make one or two general observations. The patent law is a provision made by the Legislature for the encouragement of research, industry and progress. It rewards genuine discoveries by giving them a limited monopoly and thereby seeks to encourage commercial enterprise and development. A patent suit in which the validity of an alleged discovery is challenged is one in which the Courts would seem to have a right to expect candour and honest dealing and genuine assistance in the often complex and difficult technical question of ascertaining whether the alleged new process is really a good subject-matter for a patent. In this case the parties appear to be men of position in their own commercial circle; each has charged the other with the perpetration or attempted perpetration of a mean and contemptible fraud. There has obviously been a mass of hard swearing which has enormously increased the difficulties of the task thrown upon the Court. We have had to do our best to sift the truth from a mass of untruth. Apart from this aspect of the case which must seriously have prolonged the litigation, there is even a graver aspect. It is regrettable, and it is a matter to which those who are interested in the industrial development of this country might well direct their attention, that commercial disputes of this kind should be tainted by a mass of palpably dishonest evidence, unfair methods of competition, and conduct which decent people cannot but reprobate. Moreover, the conduct of the case in Court (we are saying nothing about the learned gentlemen who appeared for either party before the Subordinate Judge who gave judgment in Farrukhabad, we refer particularly to some of the incidents when evidence was taken on commission) is characterised by a method of cross-examination in the case of independent and respectable professional witnesses, which is worthy of the worst traditions of the lowest forms of litigation and which is calculated, if indulged in as a practice in the way in which it was indulged in in this case, to make our trial Courts a terror to self-respecting men and to produce a state of things under which only those will care

to come and give evidence who have no character to lose. We may say at once, as we are differing from the view of the facts taken by the lower Court, that we find very little assistance in the Subordinate Judge's judgment. It consists of a considerable amount of painstaking criticism, some of which is difficult to follow, some of which we find ourselves unable to agree with, while some of the conclusions are so vague or so overburdened with details that their weight is largely discounted. We, therefore, have to approach the consideration of the mass of conflicting evidence in this case unobscured by the existing decision and to form an independent judgment of our own. In one respect we are not at a very serious disadvantage. It so happens that the majority of the principal witnesses in the case were examined either on commission or by the learned Subordinate Judge's predecessor and were, therefore, not seen or heard by the learned Judge any more than they have been by us. The controversy arises in this way. About the 23rd of June 1915 the plaintiffs applied to the Patent Office in Calcutta for a patent, the claim for which and the specification for which is contained in the document before us, Specification No. 2191. The claim related to the manufacture of an ancient and well-known medicinal commodity called *banslochan*. As a matter of interest we may quote here the chemical description of this article as found in Professor Thompson's *Pharmacopœia*.

<i>Percentage composition.</i>		
Silica (SiO_2 , silicon dioxide)		90.50
Potash (KOH, Potassium hydroxide)		1.10
Peroxide of Iron (Ferric iron Fe_2O_3)		0.90
Alumina (Aluminium Oxide Al_2O_3)		0.80
Carbon compounds and foreign matter		6.70
		100.00

The powder in question, which is manufactured by a calcining process from bamboo, is said to be a medicine for the home, and to possess certain restorative

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and invigorating qualities for the old as well as for the young which, if they do not entirely fulfil their promise, may at any rate account for their undoubted popularity. The powder is made from the interior of bamboo which is found in Singapore, by baking or calcining. According to the plaintiffs this process has up to, generally speaking, June 1915 been carried out by means of iron-pans when the commodity is prepared in any substantial quantities. Of course they do not allege, and no sane person could allege, that ordinary earthenware pans could not be and indeed were not in fact used from time to time by persons who wanted to prepare a small quantity for their own use without delay, but as a matter of trade use when the manufacturer is preparing the stuff in any quantity for the market, according to the allegation of the plaintiffs, the ordinary known method was by the use of iron-pans in which the stuff was placed for the purpose of being cooked under great heat in a stove. According to them also the effects of the use of iron-pans were to produce a rapid and intense heat operating directly upon the material; to make the cost of the stove somewhat greater than if ordinary earthen-ware pans were used, particularly because the tendency of the iron-pan was to wear out quickly and also to produce in the substance itself what has been called a brownish or reddish tint, specimens of which we have seen with our own eyes in bottles which have been exhibited in the case, and which is regarded in the market by those who know the stuff well, without having a serious drawback, as something which makes the article inferior to the best standard. According to the plaintiffs also they were constantly worrying and working by experiments of various kinds to arrive at some satisfactory process of heating which would be cheaper and more satisfactory than the old method; and in substance they claim by this patent to have achieved that result by a combination of earthen-ware vessels placed one upon the top of the other in the stove as described and delineated in the specification, which method they say has the superior advantages of securing a slower heat, enabling the material to be treated (as it always is treated at some

stage and in some form or another) with sulphuric acid at a red heat, of confining the fumes produced by the sulphuric acid within a closed crucible and of producing a better colour of pure white or bluish white. There is less risk of the brownish or reddish tint manifesting itself and the production is regarded in the market as superior in appearance and quality and costs less. Another feature, according to their allegation, which distinguishes the new process from the old, is that in the latter stoves there was a chimney of greater or less height which carried away the fumes. The specification was ultimately accepted and was published to the world by a formal notice in the Gazette of India of the 16th October 1915 in the following terms; "Improvements in the manufacture of a medical preparation, Patent No. 2191," which we feel bound to say in passing cannot be regarded as a satisfactory mode of summarising the real claim which had been accepted by the office.

We now turn to certain other dates. On a date in July 1915, by a coincidence which can only be described as remarkable, one Maharaj Narain paid a visit to Calcutta. This Maharaj Narain, who gave evidence in the case for the defendants, although not a member of the defendants' firm, was their general Attorney and apparently the moving spirit. We think that the object of this visit has not been satisfactorily explained. Maharaj Narain's reasons for it are two-fold. He says he was desirous to make arrangements or to ascertain how arrangements could be made for securing the raw materials of bamboo from Singapore, and also to take lessons from one Munna Lal in the construction of the stove which was in common use for the manufacture of *banslochan*. A railway journey from Farrukhabad to Calcutta strikes us as a somewhat expensive mode of communication by post with Singapore. And if, as the defendants' case is, it be the fact that the plaintiffs' process of manufacture was wellknown throughout India and particularly in Farrukhabad and all that was necessary was for somebody on the spot to show the workmen in Farrukhabad how to build a stove, we do not see why it was necessary to go to Calcutta at all. The process of imparting the knowledge which Munna Lal pos-

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assed to the mind of Maharaj Narain appears to have occupied a considerable period. Although the visit took place in July, it is not suggested that the defendants began to build until September of the same year. The nature of the construction of the stove is such that the time occupied by instructing a competent workman how to make it and in fact producing one complete from top to bottom could not possibly amount to more than a week. Whether the course of lessons was more troublesome than had been anticipated or whether there was an unexpected delay in obtaining the raw materials from Singapore we do not know, but the next date which is important is the 18th of December 1915, when the defendants wrote to a customer in Delhi in these terms:—"Our compliments to you. We have started factory for manufacturing *banslochan*. All kinds of goods are in stock. The rates will be given below, please note them. The rates have fallen down on account of the opening of our factory; so you should send for goods from us, in order that you may derive benefit and our factory may receive help from you. We shall send goods of a very superior quality. Please send for a small quantity of goods as sample and see them. What more to add?" And then follows a list of rates to which we shall refer in a moment. It is hardly to be wondered at, having regard to the terms of that letter and to the fact that it is common ground that the process of manufacture referred to in that letter was precisely the same as the plaintiffs' patented process of manufacture, that the defendants have not seriously challenged the plaintiffs' contention that the plaintiffs' process of manufacture if new is certainly an improvement. The defendants have not attempted to explain in any way consistent with the ordinary conduct of honest business men the sudden enthusiasm, worked up one may say to almost white heat, which they displayed for the manufacture of *banslochan* between June and December 1915, but having regard to the fact that the rates per seer set out in their letter were a very substantial reduction upon the price then being charged by the plaintiffs, and that the plaintiffs were admittedly practically in sole possession of the market, we have

not the slightest doubt that on the 18th of December when that letter was written and further back even when they determined to enter the market for the sale of this commodity, they knew perfectly well that whether it was a genuine discovery or not, the plaintiffs were coming upon the market with an alleged improved method of manufacturing this commodity which was likely to be a commercial success and that they had made up their minds, by fair means or by foul, to share the profits which they anticipated the plaintiffs were going to make if their invention were accepted by the public. On the 26th of January 1916 an even more striking document came into existence. A telegram was sent to the defendants from Calcutta by another Maharaj Narain, who appears upon the stage for a moment and subsequently is seen no more in connection with this case. The plaintiffs, by an application made in the course of the suit, not unnaturally showed considerable curiosity about this telegram and no doubt also as to what this Maharaj Narain was doing in Calcutta. That curiosity has never been satisfied as the defendants have not put this Maharaj Narain in the box. All we know about him is that he belongs to a younger generation, that he is the son of Bahal Rai, one of the defendants, and that he wired to the defendants in the following terms: "Lakhpatt Rai doing registry of *banslochan*, come immediately." It is to be observed that that telegram alleges, and it is quite possible that the plaintiffs themselves have alleged sometime or another, that this patent gave them the sole right of manufacture and sale of the commodity itself. It does not refer to the process. It is quite clear, however, that Maharaj Narain the general Attorney of the defendants, to whom it was sent and who, that is to say, Maharaj Narain in Farrukhabad undoubtedly received and dealt with the telegram, knew quite well that the telegram referred to a process and not merely to the commodity. What exactly he did except a visit to Cawnpore to consult somebody is not quite clear. But on the 27th of January he sent a telegram to the Controller of Patents, Calcutta, in the following terms: "Application for patent process

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manufacture of bamboo camphor tendered by Lakhpai Rai, Sampat Rai or other party is for a process used by ourselves and several manufacturers, are forwarding representation." Two observations arise upon that document. Maharaj Narain would have us believe that the telegram which he had received from his namesake was the only information which he had upon the subject at all. We find it impossible to believe this statement. The telegram to the Controller of Patents shows that he knew perfectly well that the application dealt with the process of manufacture, no reference to which had been made in the telegram received from Calcutta, but more than that, he alleged in the telegram sent within 24 hours of the news which he had received from Calcutta that the process for which application had been made was the same as that with which he was so familiar. It is impossible that he could have become aware of that fact, even if it were a fact, by means of the telegram from Calcutta. We are satisfied on these materials alone that the telegram was a disingenuous document sent expressly for some purpose of the defendants' own and that the conduct of Maharaj Narain and his perfectly hopeless attempts to get out of the difficulty are only evidence of the guilty conscience of a dishonest man. It does not, however, rest there. The telegram was followed up by a letter which it is necessary to examine very carefully, having regard to the statements about it made by Maharaj Narain when he was very naturally asked in cross-examination to explain its language. It is dated the 27th of January 1916, from Farrukhabad. It is signed "Sri Kishan Das by the pen of Maharaj Narain." It is, however, said on behalf of the defendants-respondents at the Bar before us, I think it was not very clearly said at the trial, to have been written by a scribe for Maharaj Narain when Maharaj Narain was in Cawnpore. It is in the following terms: "We are informed that Lakhpai Rai Sampat Rai of 14 Mullick Street, Calcutta, have applied for permission to patent a process for the manufacture of bamboo camphor (*banslochan*). We have the honour to state that the same process has been in use by us for sometime past

and others have been using it for a still longer period. The object of this applicant is apparently to place obstacles in the way of our doing business and although in our opinion there is nothing patentable in the process, we deem it necessary to record the fact that the process which the applicants propose to patent is not new" (so far the letter merely repeats what had been said in the telegram and then follow these significant words) "and is in common use by a number of manufacturers in this district." The defendants' case at the trial, as we shall have occasion to point out in a moment, was that this process of manufacture had been adopted for the most part by firms in Calcutta for many years although they had during the last decade been driven out of the market by the plaintiffs. Maharaj Narain was, therefore, asked to explain the language used in this letter. He first said: "I wrote in the letter to the Patent Office that the said process for preparing *banslochan* was used by a number of manufacturers in the district, because two factories were then using that process and several other factories in this district had formerly used that process." Now there can be no mistake about that sentence. He was confronted with the letter which he had written and he was asked by the cross-examiner perfectly naturally and fairly, "to what you were referring" and he pledged himself on a critical question in the dispute to the fact, although not a tittle of evidence has been called to support it, that in the district, that is to say, in Farrukhabad, because the writer was at Farrukhabad, there were two factories using that process and several other factories in the district had formerly used it. He could have had no doubt whatever as to the purport and meaning of the question which was put to him and as to the meaning of the answer which he gave. He was then reminded indirectly that his case at the trial was that it was mainly in use in Calcutta and the cross-examiner put this question, "Can you state any reason why you did not mention about Calcutta in it?" He answered: "I did not mention any place; but simply told him that several manufacturers used that process and I cannot say, what he understood that he mentioned the words in this district." So that after

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swearing point blank that he used the words in this district with special reference to factories which were really in his mind, and realising the difficulty that he got himself into having regard to the real facts which he was able to prove, he recanted and threw the blame on to the Babu to whom he was dictating the letter. We have dwelt upon this incident in the case, because it is only by such tests (they are specially valuable where you get a contemporaneous document under the hand of a witness which he cannot deny), fairly applied by a proper cross-examination, that you can prove the witnesses in a case of acute conflict of verbal testimony and see where the pinch comes. We have come to the conclusion that the conduct of Maharaj Narain, with regard to the statements which he made in the documents themselves and the hopeless attempt to get out of the difficulty in which he found himself when challenged on oath in the witness box, shows that he was a dishonest witness, that he was labouring under a guilty conscience and that there is no explanation of his conduct except upon the hypothesis which the plaintiffs allege, that he was the moving spirit in an attempt to steal and purloin the plaintiffs' process from them by unfair means.

Shortly after this incident and the telegram of protest to the Controller of Patents, it being too late for the defendants to challenge the registration of the patent, they continued the manufacture which, it is admitted, is practically the same process as the plaintiffs' and thereby forced the plaintiffs to bring this suit. The plaintiffs ask for an injunction and for damages. The defendants, while alleging generally that the alleged invention is not really a good subject-matter for a patent, for example they say in paragraph 6 of their defence that it was the original form of stove in common use for a long time in India, raise a somewhat broader issue of fact on which the trial in the Court below and much of the discussion before us has really turned, namely, they have committed themselves to this somewhat startling proposition that not only other traders mostly in Calcutta, but even the plaintiffs themselves, have all along manufactured *banslochan* by this method which

the plaintiffs now seek to patent, that it is really the only method known to the trade, that it is incapable of improvement, and that the plaintiffs have themselves been doing business by this method for some 12 or 13 years, and that they really were endeavouring to impose upon the Controller of Patents and the general public, not a thing in which they believed as a new discovery, but a thing which they knew was well known to others as well as to themselves and was an attempt to defraud the general public. Now that, as we have said, was a startling proposition which one would naturally require to be clearly and definitely established in fact. The defendants alleged in their answers to the interrogatories served upon them in the course of the suit by the plaintiffs the names of the firms relied upon by them as being those commonly using this process of manufacture:

1. Hulasi Rai, Calcutta.
2. Hanuman Sahai Rameshar, Calcutta.
3. Bhagwan Das Munna Lal, Calcutta.
4. Prag Narain, Calcutta. (Now one of the plaintiffs' firm).
5. Lakhpat Rai Chhote Lal, Calcutta. (The plaintiffs' firm).
6. Silchand Sadh, Calcutta.
7. Juggi Lal Bania, Farrukhabad.
8. Mathura Das-Sat Narain, Cawnpore

Omitting from this list the two now connected with the plaintiffs' firm, these persons appear to have ceased business altogether for periods varying from 40 years to 15. It is not suggested that any of them has manufactured *banslochan* during the last 14 years. Two of them or representatives of two of them appeared in the box. All of them were admittedly failures in business. At the trial Munna Lal, one of them, was called and he spoke of three, two of whom are additions to the list which I have read, namely, Karim Baksh and Gappu Lal. But inasmuch as neither of them appeared in person at the trial no further reference need be made to their business. Reference will have to be made to the two witnesses Munna Lal and Rameshwar in a moment. But the striking fact, and it is common ground between the parties in this case, is that the plaintiffs by

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ordinary competition, and if the defendants' case is to be believed by the use of precisely the same process that the defendants themselves have been using and everybody else in the trade has been using, have succeeded during the last 12 or 13 years in securing a paramount position in the trade. All their rivals have been beaten out of the field and it is not suggested that during that period of 12 or 13 years the plaintiffs have enjoyed any superior advantage over their competitors, and the theory is that in spite of that fact and although they have successfully carried on their business during that period, almost unrivalled, by the well-known process which was open to everybody, they nonetheless thought it necessary, so far as we can see for no possible object either of gain or of anything else, to invent a story which could have been exposed and blown to pieces in five minutes by honest evidence, namely, that all this time they have been adopting a totally different method, that they have been experimenting in new methods and only just discovered, and, therefore, went to the expense and trouble of obtaining a patent for this ancient method which was known to all. We think that theory has hopelessly broken down upon the evidence and that it is a hypothesis which would require overwhelming evidence for any Court to accept as the real truth.

Turning to the oral evidence, which it is necessary to examine in this case with the preface which we have already made, namely, that there is on the written evidence and on the admitted facts serious reason for doubting the honesty of the defendants' case, a very strong attack was made by the Hon'ble Motilal Nehru for the respondents upon the plaintiffs for not, as he put it, going into the box. We think this comment is really not justified. They did go into the box in the true sense of the word. The District Judge, who originally was intended to try this case, himself called Maharaj Narain for the defendants on the one side and Manful Narain, one of the plaintiffs, on the other side. Manful Narain gave his statement to the learned Judge describing in general language the present process, saying that in the old stove an iron

tray had been used, that the present stove is closed above the trays while the other was not so, that in the old stove there used to be a chimney while in the new there is no chimney, that under the old stove the working had been going on in his factory in Calcutta for many years, that he had never seen an earthen-bowl being used in any other factory until they decided to use it and as far as he knew, for 13 or 14 years nobody in Calcutta had been manufacturing this stuff at all. We do not know what more the plaintiffs could say than this witness said, unless he was cross-examined in detail either by the Court or by the other party. A sort of argument was suggested that Mr. Remfry, who conducted the case for the plaintiffs in the Court below, ought to have put the man into the box again. We cannot see the slightest reason why he should have done this. The witness had given a general account of his case consistent with the independent witnesses who were subsequently called to support it and if the defendants thought that they could get anything out of this particular witness of whom they now make a grievance as not having been called at all, nothing was easier than for them to apply to the learned Judge at the trial to re-call him for cross-examination. It is idle to suggest that the provision in the Code which enables a Judge to call one of the parties and put him on oath, does not make the witness just as much a witness and make the evidence just as relevant, as if he is called by his own representative. And why in the world when he has given satisfactory evidence his legal representative should go through the ceremony of putting him into the box again for examination-in-chief, we cannot for the life of us understand. But there is nothing in the point, even if there were any technical grievance which could be founded upon it, because Prag Narain, although not a plaintiff, is to all intents and purposes the same as a plaintiff; and he gave evidence at considerable length and his story was much to the same effect. He had obviously been working on his own account and had in 1911 joined the present plaintiffs in partnership. He described in detail the present form of manufacture and the old form of manufacture. He explained that the acid

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was mixed formerly with the dry *banslochan* and that the mixture was put into the stove. He said that acid was used before putting *banslochan* into the stove, apparently referring to the process of washing before baking. He described the chimney which was formerly in use. He described how for the last 18 months they had ceased to use iron-pans, and had used earthen-ware pans or *kholis* in their place. He said that the inventors were Lakhpai Rai, Sampat Rai and Manful Narain, giving the three names of the plaintiffs excluding himself, which may mean that they all individually took part, or may mean nothing, namely, that they were merely the owners and that somebody in their employ had lighted upon the idea. The only question is whether it was a real discovery, and he described the advantages of the new process in these terms:—"The new invention therein is this, three *kholis*, a *handi* and another *handi* to cover it and a *gamla* with a hole to cover it over which another *handi* is placed. This is the new invention. No stove of this kind was made before. Besides the above, there are four bricks inside the stove on which the three *kholis* rest and three bricks above to keep the *gamla* and the fact that fire affects *kholis* and *handis* from all sides. Besides this there is no new invention. By doing away with the chimney the benefit is that the fumes of acid formerly used to escape but now they materially affect the material and thoroughly clean it. This is the new invention in it." And he mentions by the way that Dr. Hossack, whom we shall have to refer to in a moment, came and saw the process when iron-pans were used, that he remained standing below the platform and asked a few questions for a space of five minutes, that they showed him how they mixed the acid into the crude *banslochan*, kept outside the stove, by pushing it in with a ladle and that no acid was used in his presence when the stuff became red hot. He also said that Dr. Hossack must have been in error or must have been misunderstood when he was reported as saying that the acid was thrown into the stuff, as it never was. In connection with the evidence of this witness and of the conflict,

if any, between him and Dr. Hossack, it is not unimportant to refer to the evidence of Mr. Briggs, commonly called Bugs in the book. He was called by the plaintiffs and was examined on commission and described himself as an analytical consulting chemist. He seems to have had good training in England and to have worked under a gentleman of experience in India since 1898. He was not a witness to any fact but merely an expert upon the new process. Assuming the facts to be as alleged by the plaintiffs, he said that he thought the new stove was better. He had been shown what was alleged to be the old process, and, therefore, he believed the pans in it to be of iron, and upon that hypothesis he said that the new stove was better on account of its slow heat, whereas the old stove being of iron must be a fast heater. He had never seen a stove like the plaintiffs' before. But it does not appear that he had been in the way of seeing these stoves one way or the other in the past. But his opinion was that the effect of adding sulphuric acid to cold material would not be nearly so satisfactory as at a red heat, while on the other hand an attempt to add it at a white heat would be to lead to too rapid an evaporation, which might be dangerous, and in the former stove which he saw it would be impracticable. He said it was not an ordinary accepted theory that sulphuric acid should be added at a red heat. And he suggested that the iron-pan (it was only a belief on his part but it is not without significance in its bearing upon the rest of the evidence) probably was the reason of the reddish or brownish appearance of *banslochan* which had been seen and objected to in the past, his theory being that the acid acting upon the iron-pan when hot would produce what he described as ferrous sulphate. He said that the furnace may be called a furnace on the reverberatory principle, and he made also this important statement. Having seen the stove which was alleged to be new and the stove which was alleged to be old, he said the stoves did resemble one another in outward appearance, although one was made of iron pans and the other of earthen vessels. The importance of that

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is (it is plain upon the evidence even if it is not plain to one's own intelligence) that you can only discover whether iron pans or earthen pans are used inside by some kind of physical or ocular test, and that you cannot possibly discover it by the naked eye when the place inside is a burning furnace. The next witness relied upon by the plaintiffs is Dr. Sandal. Dr. Sandal was a subordinate official in the Health Department in Calcutta, a kind of Inspector of nuisances, whose business it was to go round and visit factories under his superior officer, and he was subordinate at one time undoubtedly to the witness whom we shall refer to in a moment, Dr. Hossack. He gave a detailed account, which it is not necessary to recite, of the old system worked by the plaintiffs as he remembered it, and if his evidence is believed, the truth of this dispute would clearly be on the side of the plaintiffs. A most violent attack, and in our opinion an entirely unjustifiable attack, was made upon this witness and for certain reasons which are material to other parts of the case, we propose to examine it in some detail. It is quite true that the witness was not a man of the highest academic qualifications and that he had bought, as other people have bought, an American degree. The curious feature of the impertinent and virulent attack upon his intellectual and academical qualifications, apart altogether from his personal character, was the fact that when he was asked a question as to whether the stove now used by the plaintiffs was an improvement, an objection was raised by the legal gentleman who subsequently cross-examined him about his intellectual qualifications, on the ground that he was not called as an expert, so that while the defendants objected to his answering a question as an expert, they delivered a cold-blooded and deliberate attack upon his educational qualifications. As a matter of fact he did not profess to be an expert in the real sense of the word and his answer, when he was allowed to give it, shows what was uppermost in his mind, namely, his duties as an Inspector of nuisances. He said: "the present process that I have seen is far better and no nuisance is created either to the inmates

of the house or to the neighbours and the material now is whiter and better than before." It is due to this gentleman to say that he was in the employment of the Municipal Corporation of Calcutta for about 25 years and that he retired after that period owing to ill-health with a pension. He was challenged with the opinion of his superior officer and he answered as only an honest witness could do, that he did not think that Dr. Hossack was ever at the factory for any great length of time but whatever he (Dr. Hossack) said he had seen he (the witness) could say nothing. He (the witness) was only there to speak to what he had seen. Having failed by throwing every sort of mud at this witness for a considerable time to make the slightest impression upon his evidence, the defendants then embarked upon a new and more desperate form of attack. They deliberately accused this witness, not in the presence, be it observed, of the Court trying the case, but in the presence of a Commissioner, of having offered to sell his evidence to them for Rs. 500 and they did this by the production in person of the two persons to whom the offer was supposed to have been made. Their names were Kunji Lal and Gappu Lal. It is impossible for us to shut our eyes to the fact that Gappu Lal is the name of the petitioner in an original suit which has been connected with this appeal and which has been heard by us, although judgment has been reserved, in which he, Gappu Lal, seeks to revoke this very patent, and that Gappu Lal and Kunji Lal, these two men, have given evidence before us in that suit testifying to their personal knowledge of the old process by which *lanslochan* was manufactured. Mr. Moti Lal for the respondents, contended, when we asked him why these two men to whom Dr. Sandal is alleged to have offered to sell his evidence were not called, that the law did not permit him to put them into the box but that by another section of the Evidence Act he was bound by the answer of the witness. If that view is correct, Dr. Sandal's evidence stands untainted and untouched by the attack upon him. But it is impossible for us not to ask ourselves the question why, if these two men were in a position to give evidence

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before us in another suit, one of them being actually the petitioner and an alleged manufacturer and seller of the substance (*banslochan*) who alleges that he has suffered a grievance through this patent and could testify to the fact that one of the principal witnesses called by the plaintiffs had made an offer to them to sell his evidence to the defendants, they were not called as witnesses in this suit. To that question there has been no attempt of any kind to make any answer. The learned Judge undoubtedly rejected the evidence of Dr. Sandal. We are unable quite to understand the ground on which the learned Judge refused to treat him as an honest witness. It is true that Dr. Sandal admitted that he went for his own examination before the Commissioner on a date other than that on which he was really summoned, having reason to believe that he would be wanted on that date, and the learned Judge accepts the explanation in his judgment, but nonetheless he comes to the conclusion that this matter, which is satisfactorily explained, coupled with the negotiations about the purchase of his evidence makes the matter suspicious. The view of the learned Judge is that the evidence of a witness should be rejected if only he is asked questions sufficiently offensive to arouse suspicion as to his character. We cannot agree that this is a sufficient reason, and we see none for throwing over Dr. Sandal's evidence. It may be that Sanitary Inspectors are not always absolutely reliable, but they must be shown, and not presumed, to be untrustworthy.

The next witness relied upon by the plaintiffs was Dr. Mitter. Here again we have been ourselves unable to accept the somewhat hypercriticism to which this gentleman's evidence has been submitted by the lower Court. There does not seem to be anything extraordinary in Dr. Mitter's story that he, being a doctor on a ship between Singapore and Calcutta, made the acquaintance of one of the plaintiffs whose business was in both places and who was travelling backwards and forwards and as the result of this friendship he went to stay with the plaintiffs and had medically treated one of them, and was wandering about their premises and became acquainted with the manufacture which was going on and out of which

they were making their living. And why a doctor should not, assuming that he was there and interested himself on a holiday in the manufacture of the article by which his friends were making a livelihood, take the opportunity of looking into the stove out of curiosity and satisfying himself whether it contained an iron-pan or earthen ware pan we do not quite see. However, the learned Judge seems to find something so uncommon in it that he regards it as not true at all, and in the course of his judgment he has come to the conclusion that none of the details of Dr. Mitter's story can be accepted. Being apparently dissatisfied in his own mind with that criticism he finally came to the conclusion that Dr. Mitter was not there at all. But we think that there is no material on which we can treat Dr. Mitter otherwise than as an honest witness, who was desirous of giving the best assistance he could from his recollection. And again if Dr. Mitter's evidence is believed, the fact that the plaintiffs were using iron-pans in the stove is clearly established. On the whole we think that the plaintiffs have made out a satisfactory case; that there is no reason for disbelieving the five witnesses to whom we have referred; that upon their evidence it is established that iron-pans were formerly used; that the earthen-ware pans were new; that the present combination is an improvement and that it has the advantages claimed for it.

We have, however, to consider further how far the defendants' evidence makes a serious inroad upon this evidence. The defendants called a quantity of evidence. We have already given sufficient reason for distrusting the evidence of Maharaj Narain. The main features which the defendants otherwise rely upon are the evidence of Dr. Hossack, undoubtedly a scientific witness of high standing and respectability, Munna Lal who is alleged to have been in the trade and to have taught Maharaj Narain, and further a contemporaneous report made by one Mr. Kundu, a subordinate in the Health Department and a kind of Inspector of nuisances subordinate to Dr. Hossack. We think that giving full weight to Dr. Hossack's evidence it really comes to very little. He was palpably an honest witness who frankly said that

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he was very hazy, and the more pressed he was upon details, the more he explained that his recollection was really a hazy one. It is but natural that a busy man like Dr. Hossack with important avocations should forget what he had seen long before, to which at the time he attached no importance and in which he had no concern; and when reminded about it should come to Court with a very hazy recollection of it. Whereas the case of a man like Dr. Mitter is quite different. Although he had no concern in the matter, being a friend of the plaintiffs he might very naturally spend his leisure time in looking into their stove; but Dr. Hossack was a busy man engaged in his profession, and, therefore, the plaintiffs' case may be perfectly true and everything that Dr. Hossack said may be perfectly honest, whereas it is impossible for the defendants' case to be true without convicting Dr. Sandal and Dr. Mitter of flagrant and deliberate perjury. This in itself is a reason for preferring the plaintiffs' story, supported as it is by witnesses who relate facts which could only be wilfully untrue, if untrue at all: whereas in so doing we do not cast the slightest discredit upon Dr. Hossack's testimony. We do not think that he was really prepared to commit himself upon the question whether the interior of the stove was iron or not. It is plain from Dr. Brigg's evidence that he could not have examined it for himself at any rate with his eye, and he does not profess to have used any other means, and it is quite clear from the report which he made on the 14th of October 1909 that the process of calcining the bamboo camphor, in what he called a retort, with an addition of sulphuric acid occasionally, was being carried on in a stove which had a chimney—a fact wholly inconsistent with the defendants' case. In our opinion the evidence relied upon of Dr. Kundu, who is represented only by his report, ought really as a matter of law to be rejected. Dr. Kundu's report is alleged to be a public document under section 35 of the Evidence Act. We think that it does not come within this category at all, certainly not for the purpose of proving a fact immaterial to the matter in respect of which he was

making his report. But however that may be, Dr. Kundu is alive and available and was twice summoned by the defendants. The plaintiffs properly objected to the report. Their objection was overruled. They contend in one of their grounds of appeal that this report ought to have been rejected. We agree that it ought. On the other hand it has been referred to by both sides in the Court below and before us, and even if it was improperly admitted, we think that it would make no difference to our decision in any way. It refers to the addition of strong sulphuric acid at a white heat, it refers also to the existence of a chimney, and although it does describe the stove as a "native reverberatory furnace," which according to the best understanding of that expression is inconsistent with the method of iron-pans which the plaintiffs say they were using, we are not satisfied that a gentleman who thinks that a high chimney is useful for diminishing the amount of heat generated in a stove, is a gentleman whom *a priori* we can accept as fully acquainted with the technical meaning of the term "reverberatory furnace." The witness Rameshar does not appeal to us as a satisfactory witness. He said he worked this process according to the plaintiffs' method for 20 years. If he did he made an astonishing mess of it. He has not attempted to work it during the last 20 years. He became the owner of the factory, in which it was alleged he had formerly worked, by a deed of gift from his former employer, the result of which was that the concern was wound up within a year. He frankly says that there is nobody now to be found in Calcutta who might have seen the stove which he had at that time, and when he was asked about the books relating to his business he made the astounding statement that a Muhammadan gentleman who lived in a bungalow wrote out the books but he is not now to be found. Another witness relied upon was a man named Ram Kumar, who was a broker. If he is like most brokers, he interests himself more in the commission to be earned from a manufactured article of this kind than in the process by which it is brought into existence. He has not been at work since 1904. He says that somebody or his clerk has been receiving profits for him,

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but he does not know how much. He admits having been hard hit by the plaintiffs who have been selling this stuff without an agent, and really all that he says is that he never saw iron-pans, but did see broken earthenware pans about the place where manufacture was going on, and that when he did see them he "sat down and talked." Nor can we attach much greater weight to the evidence of the gentleman, Govind Singh, who visited Calcutta and stayed with the plaintiffs. His opportunity for seeing the internal construction of this stove was, according to his first impression, from a window some fifteen yards away where he was sleeping. When pressed, he thought he got a better view of it from the enclosure where he went to relieve nature. This gentleman is under the impression that Howra Bridge is a kind of *kuchha* bridge of *pipas* covered with straw and mud; and, if that is the best account he can give of it after visiting Calcutta (we take judicial notice of the fact that Howra Bridge is at times not unlike London Bridge in the middle of the day) if that is the best this gentleman can make of his impression of Howra Bridge, we do not think that any importance can be attached to his recollection of the internal construction of the stove. Dr. Srivastav's evidence really consisted of no more than the recitation of what he had read in the journals, "Indian Forester" and "The Commercial Products of India." We may say that the Court below was mistaken in thinking that there was any legal ground for the admission of this witness's information of literature on the subject which was otherwise inadmissible; but it really contributes nothing to the case. The witnesses Ohhedu and Sheoraj Narain, one of whom apparently is an old servant of the plaintiffs and the other, a relation of Manful Narain, one of the plaintiffs, is not on very friendly terms with them, sufficiently create doubt with regard to their power of observation in respect of the material drawn out from the fire. They say it was drawn out fifteen minutes after its treatment with the acid, whereas Munna Lal says the interval is two or three minutes.

So much for the defendants' witnesses, as a whole, many of whom no doubt were doing their honest best to give an account

of what they saw. This brings us to the consideration of Munna Lal, and this is the evidence which from the defendants' side causes us more difficulty than anything else in the case. He tells a story which on the face of it is clear and not open to much criticism and it has been accepted by the learned Judge who, by the bye it should be observed, did not see him as he was examined on commission. We think, however, that his connection with Maharaj Narain and with the defendants is very close, and that he is, if the expression may be used, tarred with the Maharaj Narain brush. We cannot accept as satisfactory, as we have already said, the story of Maharaj Narain's visit to Calcutta in July merely to take lessons from this witness, and one sentence in his cross-examination casts doubt upon the whole of his story. He committed himself to the positive statement that the plaintiffs had been using this process in Calcutta to his knowledge for 12 or 13 years. We have come to the conclusion that this is not the fact. It, therefore, follows that Munna Lal, when he made that statement, stated that which he knew to be untrue. We have been much pressed, as the learned Judge in the Court below was impressed, by the contents of this man's books. We have seen them. They are not in a character, although my brother, Mr. Justice Piggott, was able to read some of the figures, which was familiar either to the Commissioner who examined the witness or to the Counsel who examined and cross-examined him or to most of us in this Court. Without going in detail through the extracts which have been laid before us, it is true to say that they are not entries which by their sequence or by the way in which they occur amongst the other entries in the books absolutely recommend themselves. They do require some explanation, but the witness was not cross-examined upon this basis. He was not asked to explain them, and, therefore, no explanation was forthcoming and we are not prepared to say that they are untrustworthy in the sense that they do not represent actual contemporaneous entries; but after all they come to very little. It is true that he intended the Court to believe that the *kholis* and other earthenware articles, entered in these books as expenses connected with the stove, did

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relate to similar earthenware pans to those in the plaintiffs' stove and were used in connection with what we have described as the plaintiffs' process of manufacture and were bought and entered in the books for that purpose. But the entries are anything but clear or convincing upon that point, for example in one place *kholi* or covering is entered at Rs. 4-14-3, in another three *kholis* are entered at Rs. 2-4-0, in another three *kholis* are entered at Rs. 1-8-0 and in another three *kholis* are entered at Rs. 1-7-0, two *landis* at Rs. 3-9-0. These are not large or expensive or out of the way articles. They can be bought anywhere in the Bazar according to measurement, and, therefore, we ought not to be hypercritical about entries of this kind, but on the other hand it is obvious from the prices which we have mentioned that the sizes of these *kholis* were not all the same, and it is sufficient to say that while the entries are not inconsistent with the purchase of earthenware vessels such as are necessary for a stove like the plaintiffs', they are equally consistent with the ordinary use, by persons interested in the manufacture of the article, of earthenware pans for mixing it or washing it, and having regard to the other evidence regarded as a whole and Munna Lal's close association with Maharaj Narain whom we unhesitatingly hold to be a dishonest witness, we do not think that either he or his books are sufficient to destroy the case which the plaintiffs have established. For these reasons we have come to the conclusion that the plaintiffs' case is true, that iron pans were used and that they themselves by experiment have discovered the better use by combination of the earthenware pans.

We find that the essential features of the process patented by the plaintiffs are the treatment of the substance at a red heat with sulphuric acid inside a closed crucible or retort made entirely of earthenware. The advantages involved are:—(a) No iron or other metal being used in the composition of the crucible there is no danger of any deleterious action on the part of the furnace of the acid upon the metal aforesaid; (b) The retort or crucible is entirely closed from the time when the acid is added until the process of calcination is complete; this does away with the necessity of a chimney communicating with the retort, by means of

which the fumes of the acid used to be carried off. The action of the acid on the crude material under these conditions appears to be more thorough and satisfactory, while the possible nuisance from the escaping fumes of the acid is done away with. We think this combination as embodied in the plaintiffs' specification is new, that no one ever worked it out before, that it effects a useful purpose in reaching the point of heat at which the treatment of sulphuric acid can be most effectively applied and in eliminating the brownish tint or iron matter from the material, so as to produce a purer colour and a better quality.

The question of law which has been vigorously argued, therefore, arises; whether this has been properly claimed by the plaintiffs in this specification as a good subject matter. The specification must be read as a whole and the claim interpreted by the body of the specification.

There seems to have been some difficulty in deciding in many cases of improvements how far the law casts upon the applicant the obligation of making it clear to the public or to the workman of ordinary intelligence in the trade which portion of the combination is new and which is old. We do not think anything is to be gained by discussing at length the interesting series of authorities to which we were referred by Counsel on either side. We propose to apply the principle as laid down in *Harrison v. Anderston Foundry Company* (1), to this case, which we hold to be one "of a new combination of admittedly old materials." The principle is enunciated in the following terms. The Lord Chancellor at page 578 says:—"If there is a patent for a combination the combination itself is *ex necessitate* the novelty; and the combination is also the merit, if it be a merit, which remains to be proved by evidence." Lord Hatherley while delivering his judgment in the same case says at page 583:—"Well, my Lords, that being the case, the Judges extended, as it appears to me with great respect, the doctrine of *Forwell v. Bostock* (2) in their application of it to this case. It was there held—and that, I think, was all that was held—that it is not competent to a man to take a well-known existing

(1) (1876) 1 A. C. 574.

(2) (1864) 4 De G. J. & S. 298; 46 E. R. 934; 10 L. T. 144; 12 W. R. 723; 146 E. R. 321.

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machine and having made some small improvement, to place that before the public and say:—‘I have made a better machine. There is the sewing machine invented by so and so; I have improved upon that. That is mine; it is a much better machine than his.’ That will not do: You must state clearly and distinctly what it is in which you say you have made an improvement. To use an illustration which was adopted, I think by Lord Justice James in another case, it will not do, if you have invented gridiron pendulum, to say, ‘I have invented a better clock than any body else,’ not telling the public what you have done to make it better than any other clock which is known. That principle was laid down in *Fowell v. Bostock* (2) and I do not think that anything further was intended to be determined in that case. It could not have been meant in that case to say that where that happens, which may well happen, that a person, arranging his machinery in a totally different way from the way in which it has ever been before arranged, although every single particle of that machinery is a well-known implement, produces an improved effect by his new arrangement, that new arrangement cannot be the subject of a patent. It may be that the levers may be perfectly well known in their mode of action, and it may be that all the other separate portions of the machinery to which the patent relates may be perfectly well known; but if he says:—‘I take all these well-known parts, and I adjust them in a manner totally different from that in which they have ever before been adjusted. I have found out just what it is that has made these parts, though they may have been used in machinery, fail to produce their proper effect and it is this, that they have not been properly arranged; I have, therefore, re-considered the whole matter and put all these several parts together in a mode in which they never were before arranged, and have produced an improved effect by so doing.’ I apprehend it is competent to that man so to do, and that it would be perfectly impossible for him to say what is new and what is old because *ex concessis* it is all old, nobody ever before used it in the manner in which he has used it.” His Lordship further says at page

586: “That, my Lords, is what it appears to me the patentees have done by the claims which are contained at the end of the patent: ‘Having thus particularly described the nature of our said invention and the manner in which the same is or may be performed, we have to state that we do not restrict ourselves to the precise details herein described delineated, but what we believe to be novel and original, and, therefore, claim as the invention secured to us by the hereinbefore in part recited letters patent, is—First, the construction and arrangement of the parts of pattern mechanism and shuttle box moving and holding mechanism as herein distinguished generally.’ That seems to me to be the one great claim for the whole. They say—We cannot tell you that this part or that part or the other part is in itself a new engine or a new machine, but we tell you that our combination of all those parts into a complete machine, affecting both the shuttle box moving apparatus and the pattern apparatus, is a new combination and we claim to be capable of carrying that out in an improved manner under the specification in our letters patent.” And Lord Penzance in the same case at page 590 says:—“Having thus described what the novelty consisted in, were they bound to go further and state in what the novelty did not consist? In other words, to point out everything that in the several parts or the subordinate combinations of them might be old and had been previously used? I cannot think that they were or that there is any authority in law for this requirement. If such a task were attempted to be fulfilled in reference to a machine so old, so largely altered, and so greatly improved from time to time as the weaving loom, it is not too much to say that it would be hardly possible to fulfil it without insufficiency or error. If the patentee accurately defines on the face of his specification his real invention, and the limits within which that which he claims as a novelty is confined, he is not bound, as it seems to me, to go further and specify how it is, and why it is, that his invention is novel, or recapitulate all the particulars in which it differs from preceding arrangements.”

Applying the principles laid down in that case we think the specification in this

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case satisfies the legal requirements so far as the claim for combination and construction of the stove even of old materials is concerned.

A difficulty has been raised with regard to the first part of the claim, where the patentees state that they claim in the preparation of the said substance the treatment of the same when red hot with an acid. We have purposely refrained from referring in detail to the evidence with regard to the use of acid. We think it clearly establishes what the plaintiffs have not seriously denied, that in some form or another, and at some stage or another in the process of manufacture, acid has always been used for purifying the material. And there seemed at one time a difficulty with regard to this claim, namely, as to whether it was not either too wide, or too vague, or in itself old. Mr. Remfry, for the appellants, accepted the principle relied upon by Mr. Motilal Nehru, for the respondents, in the case of *Brunton v. Hawkes* (3), where it was held that a patent which consisted of more than one claim would be bad if it definitely and independently claimed something which was shown itself to be bad for want of novelty. But after all the attack made upon this part of the plaintiffs' claim raises an issue of fact, first what is 'red heat', whether it is understood and recognised as describing a particular stage in the process of heating which all members of the trade know, and whether, assuming that to be the fact, it was in common use, that is to say, whether the application of sulphuric acid at that particular moment, known and accepted by the trade as accurately described by the words "red heat", was in itself an old process of manufacture. We think that Mr. Remfry was well founded when he met this case by saying that there really was no dispute about that part of the case as a fact in the Court below and that if the defendants wanted to raise the question that "red heat" was not understood in the trade, or that being understood, it was too vague and uncertain and left too wide a margin of variation to be capable of a claim, that was a matter which ought to be dealt with above all things by evidence which

(3) (1821) 4 B. & Ald. 541; 601 E. R. 1034; 23 R. R. 382

could inform the mind of the Court. The defendants, so far from adopting this attitude towards this part of the claim, accepted it, and embraced it and said that they had always done it themselves, and that it was so well known that it was accepted generally through the trade, and that nobody had any doubt what it meant. Having taken that attitude, it does not lie in their mouth here and now to contend that it is impossible to say what is meant by the words "red heat". Therefore, we must hold that it is established that the treatment of sulphuric acid at "red heat", which is a defined stage in the process of heating, is well known to the trade and perfectly intelligible and also new, as nobody in the case suggests that there was any defined or ascertained stage at which it was always done. It is to be borne in mind, and perhaps it is desirable that we should make it once more perfectly clear, that it is quite immaterial what one or more members of the plaintiffs' firm may have said about the rights which the patent really gives them. What they think about it cannot enlarge the rights which are actually conferred by the patent; and the patent does not confer upon the plaintiffs either the sole right to manufacture and sell the substance itself or even the sole right to apply sulphuric acid at red heat so that nobody may use it. What people cannot do is to manufacture an oven or stove substantially as described and illustrated in the specification for drying, heating, roasting and calcining the said substance, and to use such construction for the purpose of applying sulphuric acid in the process of preparing and heating the substance to a red heat in the stove. That is what the plaintiffs claim as patentees. That is what we think the plaintiffs have established, and that is what they have a right to patent. Mr. Remfry referred us to the case of *Plimpton v. Spiller* (4). The passage which particularly seems applicable to this case is at page 428 in the judgment of Lord Justice James:—"It appears to me that in doing that he (His Lordship refers to Plimpton's claim) is claiming, not a distinct and substantive invention, but he

(4) (1877) 6 Ch. D. 412; 74 L. J. Ch. 211; 37 L. T. 56; 26 W. R. 285.

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is claiming it as one of the merits and advantages of the entire construction which he has before given, and he is not in any way pretending or claiming to enlarge his monopoly."

We think that language applies to this case. A suggestion was made by Mr. Remfry in the course of his argument that if there was any difficulty in this connection, it was possible even at this stage for the plaintiffs to withdraw this claim [*Plimpton v. Spiller* (4)] and apply for an amendment. In answer to this we have no hesitation in saying that in our opinion the authorities he quoted are not applicable, and cannot be applicable, to an application made at the eleventh hour in a Court of Appeal by an unsuccessful litigant in the Court below who made no application in that Court, and who is actually suing for infringement. The plaintiffs are entitled to an injunction substantially in the form referred to in Seton on Decrees at page 549, restraining the defendants or their servants or agents or any of them from building, constructing, selling, using, or in any way dealing with a stove manufactured in accordance with the plaintiffs' patent, and that the plaintiffs are entitled to a certificate under section 32 of the Act. With regard to damages the matter is not free from difficulty. We have already expressed our view of the defendants' conduct. We think it is clear that they went out of their way to perloin, if they could, the advantages of the discovery which the plaintiffs had made. On the other hand, no satisfactory case for damages was made out in the Court below for one reason because the plaintiffs failed to establish their right, and for another reason because the learned Judge seemed to think that the profit made by the defendants was the sole criterion. That can hardly be a sound view, having regard to the fact that the defendants deliberately tried to undersell the plaintiffs, and quoted prices below market price. On the other hand Mr. Remfry, when challenged in this Court to make out a case, proceeded to claim damages, or rather to frame his claim upon the evidence in the case, as if he was entitled to damages as enjoying the monopoly for the sole sale of the article itself, which is not the case. We think the evidence before us does not

enable us to come to a conclusion on the question of the actual damages suffered by the plaintiffs, and that in any event having regard to the early stage in which the plaintiffs quite properly brought their suit, the amount involved does not make it worth while to award anything more than nominal damages. We, therefore, hold the plaintiffs entitled to the nominal damages of one rupee. We decree the injunction and grant a certificate and one rupee damages. We think under the circumstances the plaintiffs are entitled to their full costs, which will include fees calculated on the higher scale on the subject-matter of Rs. 4,000, with the exception of so much of the Court-fee as was paid in respect of the sum of Rs. 25,000 claimed under the head of damages; that much the plaintiffs must bear themselves.

PIGGOTT, J.—I concur.

Suit decreed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2862
OF 1916.

June 17, 1918.

Present:—Mr. Justice Fletcher and Mr.
Justice Panton.

CHANDRA MOYI CHOWDHURANI
—PLAINTIFF—APPELLANT

versus

MR. C. B. GREGSON AND OTHERS—
DEFENDANTS—RESPONDENTS.

Construction of document—Mortgage or sale—Intention of parties—Transfer of Property Act (IV of 1882), s. 58—Interest Act (XXXII of 1839)—Mortgage not providing for interest—Discretion of Court to allow interest—Civil Procedure Code (Act V of 1908), s. 21—Jurisdiction—Appeal, second, question of jurisdiction whether can be raised in.

Where the parties to a document use words that indicate a mortgage by way of conditional sale and all the terms contained in the document are consistent with the terms of a mortgage by way of conditional sale, the proper construction is that the document is a mortgage by way of conditional sale, and it cannot be contended that the intention of the parties as gathered from the instrument was to make an out-and-out sale subject to the right of re-purchase on re-payment of the money within the stipulated time. [p. 466, col. 2; p. 467, col. 1.]

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The question whether in a suit to enforce a mortgage by way of conditional sale, where no interest is provided for in the deed, the Court should have in its discretion allowed interest in accordance with the terms of the Interest Act, cannot be raised in second appeal unless it was raised in the lower Appellate Court. [p. 467, col. 1.]

The question that the primary Court had no territorial jurisdiction cannot be gone into in second appeal, unless it was raised at the earliest possible moment in the course of the suit. [p. 467, col. 1.]

Appeal against the decree of the District Judge, Rajshahye, dated the 7th September 1916, affirming that of the Subordinate Judge of that District, dated the 18th August 1915.

FACTS appear from the judgment.

Babus Brojo Lal Chakraborty and Purna Chandra Roy, for the Appellant:—In *Bhagwan Sahai v. Bhagwan Din* (1) *kut kobala* is called a mortgage by conditional sale.

We have to construe a document with reference to the terms contained in it. In *Bhagwan Sahai v. Bhagwan Din* (1) their Lordships held that that was a sale out and out. In that case although the document consisted of a term for re-conveyance of property, their Lordships held it was an out-and-out sale because there was no stipulation for interest.

[FLETCHER, J.—But with regard to the *kut kobala* here it is translated as a mortgage by way of conditional sale.]

In *Subhabhat v. Vasudevhat* (2) a document was executed in connection with a debt. It was held to be a case of sale. In all these cases although the documents were by nature mortgages, they were held to be sales out and out.

[FLETCHER, J.—What is the use of giving us cases when the case before us is exactly a case of mortgage by way of conditional sale and fits in with section 58 of the Transfer of Property Act?]

Then in *Abdulbhai v. Kashi* (3), although it was in the nature of a bond, it was held to be a case of an out-and-out sale. There also was the condition that the money was to be paid within a certain time.

Then again in the Full Bench case of

(1) 12 A. 387; 17 I. A. 98; 5 Sar. P. C. J. 557 6 Ind. Dec. (N. S.) 992.

(2) 2 B. 113; 2 Ind. Jur. 174; 1 Ind. Dec. (N. S.) 503.

(3) 11 B. 462; 6 Ind. Dec. (N. S.) 303.

Moti Singh v. Ramohari Singh (4) the mortgage bond contained no stipulation for re-payment of money within a certain time and it was held to be a case of sale.

Mr. U. N. Sen Gupta (with him Babus Promotha Nath Das and Probodh Kumar Das), for the Respondents, not called upon.

JUDGMENT.

FLETCHER, J.—This is an appeal by the plaintiff against the decision of the learned District Judge of Rajshahye, dated the 7th September 1916, affirming the decision of the Subordinate Judge of the same place. The plaintiff brought the suit to recover possession of certain property on the ground that she had acquired it; alternatively, she prayed for a decree on the footing that she was the mortgagee of the property. The main point in the appeal turns on this: Is the plaintiff the mortgagee under the document or is she a purchaser? The document is called by the parties as *kut kobala* and the plaintiff states that she got this *kut kobala* executed to the following effect: The transfer, the ostensible sale in this *kut kobala*, was subject to the condition that, on payment being made within the month of Pous next, the sale should become void and that if, on the other hand, there was a failure to pay the money within the said time, the mortgagee should be entitled to bring the properties mentioned in the said *kut kobala* into her possession by resorting to law. It is quite clear that the words, used in the document bring the case exactly within the definition of a mortgage by way of conditional sale contained in section 58 (c) of the Transfer of Property Act. It is said that, notwithstanding that it falls within that definition, the intention of the parties, as gathered from the instrument, was to make an out-and-out sale subject to the right contained therein of the mortgagor to pay the money within Pous next and to get the property released, and, therefore, the document is an instrument of sale and not of mortgage. It is quite clear that that is not so. The parties used the word *kut kobala*, which is an ordinary word used to indicate a mortgage by way of conditional sale; and where the parties

(4) 24 C. 699; 1 C. W. N. 437; 12 Ind. Dec. (N. S.) 1135.

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use words that indicate a mortgage, by way of conditional sale and then give all the terms in the document that are consistent with the terms of a mortgage by way of conditional sale, it seems to me that the proper construction is that the document is a mortgage by way of conditional sale. The case is, I think, an extremely simple and clear one. The authorities which have been cited are of no assistance at all.

The other point in the appeal is this: The mortgage by way of conditional sale does not provide for interest. It is said that the Court has a discretion to award interest in accordance with the terms of the Interest Act and that that interest along with the principal should be made a charge on the property. That may be so. But in a case like this, such a matter ought to have been raised in the Court below and evidence ought to have been adduced and proper findings arrived at by the Judge, in order to satisfy himself as to whether or not he should exercise the discretion which the law vested in him either to allow or to disallow interest in respect of this sum. No point like that having been raised before the learned Judge of the lower Appellate Court, it is much too late now before us, we not having the evidence nor the attending circumstances before us, to raise the point that we should allow interest on this sum.

The appeal must, therefore, stand dismissed with costs.

As to the cross-objection preferred by the respondent the Midnapur Zemindary Company, Limited, namely, the want of territorial jurisdiction of the Subordinate Judge of Rajshahye, I think it is quite clear that the Midnapur Zemindary Company did not raise the point at the earliest possible moment and, therefore, under section 21 of the Code of Civil Procedure the question that the Court had no territorial jurisdiction cannot be gone into in this Court. The cross objection is therefore, dismissed with costs.

PANTON, J.—I agree.

Appeal dismissed.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 576 OF 1916.¹

July 18, 1918.

Present: —Mr. Justice Heaton and Mr. Justice Hayward.

LAXMAN GANESH RAJENDRA

—DEFENDANT—APPELLANT

versus

KESHAV GOVIND DESHPANDE

AND OTHERS—PLAINTIFFS—RESPONDENTS.

Limitation Act (IX of 1908), s. 14—Bombay Hereditary Offices Act (III Bom. of 1874), ss. 10, 11A—Exclusion of time—Proceedings before Collector, time taken by, whether can be excluded—Collector, whether "Court."

The Collector when acting under sections 10 and 11A of the Bombay Hereditary Offices Act acts purely as an administrative officer. He does not act as a "Court" and the proceedings before him are not civil proceedings within the meaning of section 14 of the Limitation Act. The time occupied by such proceedings, therefore, cannot be excluded under section 14 of the Limitation Act in computing the period of limitation for a suit. [p. 463, cols. 1 & 2; p. 469, cols. 1 & 2.]

Second appeal from the decision of the District Judge, Nasik, in Appeal No. 355 of 1913, confirming the decree passed by the Joint Subordinate Judge, Nasik, in Civil Suit No. 283 of 1912.

Mr. Bahadurji (with him Mr. S. R. Bakhale), for the Appellant.

Mr. S. S. Patkar, for the Respondents.

JUDGMENT.

HEATON, J.—This was a case in which the respondents sued to recover possession of half of a certain property on partition. They were met by a plea that the suit was time-barred. The facts necessary to be borne in mind in determining this question of limitation are that the defendant or his predecessors had been in possession of this property for some time (how long is immaterial) prior to 1899, and that on the 8th of July 1899 their possession became adverse to the plaintiffs who filed their suit only on the 8th of September 1912. Apparently, therefore, on the facts so presented the plaintiffs' suit was out of time: for the defendant had been in adverse possession of the property claimed for more than twelve years. The plaintiffs, however, pleaded that they could take the benefit of section 14 of the Limitation Act, and this plea was found in their favour both by the trial Court and the Court of first appeal. The defendant has come here in second appeal and

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maintains that section 14 of the Limitation Act does not apply and that the claim should be dismissed. It is claimed that section 14 does apply in this way. It appears that the Collector gave a certificate of the kind provided by section 10 of the Vatan Act and on the strength of this certificate a Court sale was set aside. Thereafter the plaintiffs applied to the Collector to take action under section 11A of the Vatan Act. It is claimed that the time occupied by the Collector between receiving this application and disposing of it should be allowed to the plaintiffs in addition to the ordinary period of limitation, in virtue of section 14 of the Limitation Act. That proposition is arrived at by assuming that the Collector in the case stated was 'a Court' and that the proceedings before the Collector were "civil proceedings" within the meaning of these words as used in section 14. On the other hand, on behalf of the defendant it is maintained that these were administrative and not civil proceedings and that the Collector was an administrative officer acting as such and not a 'Court.'

There were other arguments also and we had an interesting discussion as to the meaning of the word 'Court.' We were referred to the cases bearing on the meaning of that word as used in section 195 of the Criminal Procedure Code and in section 115 of the present Civil Procedure Code. But I propose to base my opinion, which is in favour of the appellant, on two grounds. I recognize that there are other grounds also from which the same conclusion might be reached. The two I am about to name are those which appeal more particularly to me, and the first ground is this: When I read sections 10 and 11 of the Vatan Act, I come to the conclusion that the Collector, when acting under those sections, is acting purely as an administrative officer, that he is not acting as 'a Court' and that the proceedings before him are not judicial proceedings. In the case of *Queen Empress v. Tulja* (1), there is in West, J.'s judgment a quotation from the case of *Reg. v. Price*

(2), in which Blackburn, J., says: "Where the common law or the Legislature has cast on a person the obligation, where certain facts exist, not to form his opinion or exercise a discretion, but to do a certain thing, then, no doubt there is a preliminary inquiry whether those facts exist, and no doubt the person called upon to perform the obligation must, to some extent, exercise common sense, and see whether the facts do exist," and Blackburn, J., then goes on to say that a person doing such a thing is not 'a Court.' West, J., himself gives as an illustration the case of a policeman who has a warrant to arrest a certain person. He has, of course, to satisfy himself that the person he arrests is the person to whom the warrant refers and for that purpose he may have to make an inquiry. But he is not a Court. In the case before us, all that the Collector had to determine was whether certain action had been previously taken with regard to this property and having ascertained that circumstance, he had to take certain action himself. The ascertaining of this particular circumstance was merely a matter of referring to certain proceedings, and did not involve the ascertainment of disputed facts by taking evidence. Therefore, it is to my mind quite clear that the Collector was, as I have said, acting purely as an administrative officer and that he could not be described as 'a Court' in the sense in which the word is used in section 14 of the Limitation Act. Nor could his proceedings be described as civil proceedings.

My second reason is this: Section 14 of the Limitation Act to my mind quite clearly refers primarily to suits and proceedings such as are dealt with in the Schedule to the Limitation Act itself. If section 14 can apply to proceedings taken before a Collector, one would expect that the application on which those proceedings were begun would also be an application of the kind covered by the Limitation Act. As a matter of fact it is conceded that the application to the Collector is not an application of this kind. If for that purpose or if in that particular the proceedings before the Collector are entirely outside the provisions and the intention

(1) 12 B. 36 at p. 41; 6 Ind. Dec. (N. S.) 509.

(2) (1871) 6 Q. B. 411 at p. 418; 24 L. T. 387.

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of the Limitation Act generally, it seems to me that it naturally follows that the proceedings are equally outside the scope and purpose of section 14 of the Limitation Act; unless it is quite plain otherwise that the proceedings are civil proceedings and also are the proceedings of a Court. This is not quite plain in this case, indeed it is very far from plain, so this second reason which I have given, strengthens and supplements the first.

I think, therefore, that the appeal should be allowed and that the claim should be dismissed and that the plaintiffs should pay the costs of the defendant in all three Courts.

HAYWARD, J.—I concur. The substantial question for decision is whether an application to the Collector to take action under section 11A of the Bombay Vatan Act (III of 1874) can be held to be a 'civil proceeding' in a Court within the meaning of section 14 of the Indian Limitation Act. There appears to have been no general definition of the terms 'civil proceeding' and 'Court.' It is, therefore, necessary in each case to examine the precise nature of the proceeding and the constitution of the authority before whom such proceeding is taken, in order to decide whether it should properly be termed 'a civil proceeding in a Court.' This has been indicated in the discussion upon a similar matter in the case of *Royal Aquarium v. Parkinson* (3), in which Fry, L. J., is reported at page 448 to have said: "I find in the Act no words prescribing any particular mode of procedure, or requiring them (the authorities prescribed by the Act) to hear and determine." He then proceeded to consider further directions in the Act and came to the conclusion that the proceedings for granting licenses under that particular Statute were not judicial proceedings in a Court. If we look then to the provisions of section 11A of the Vatan Act, we similarly find no particular procedure laid down and no direction requiring the hearing and determination by the Collector. All he is required to do is either to resume possession of the land or to assess it at full rates for the benefit of the Vatan on receipt of the order

of the Civil Court. It is true that there are *dicta* of West, J., in the case of *Collector of Thana v. Bhaskar Mahadev* (4) tending to show that the Collector exercises judicial functions under section 10 of the Vatan Act. It is not altogether easy to follow the argument in view of the specific provisions of section 10. But it is sufficient here to observe that those *dicta* were *obiter* and that the Collector's order under section 10 was not in that case interfered with as an order of a Civil Court in exercise of the powers there invoked of superintendence vested in the High Court. It is again true that the Collector was said to be made a Judge for the particular purposes of the Vatan Act in the case of *Khando Narayan Kulkarni v. Apaji Sadashiv Kulkarni* (5) by the same learned Judge. But that referred to the entirely different sections dealing with the duty conferred on the Collector to determine the custom of the Vatan and the representative Vatan-dars under sections 24 and 25 of the Act, and it is no doubt such proceedings which were contemplated by the directions in section 72 making them judicial proceedings for the particular purposes of the Criminal Procedure Code. It seems to me, however, unnecessary to refer to this further or to the several decisions quoted before us dealing with similar directions in other Acts for preventing malicious prosecutions under the provisions of section 195 of the Criminal Procedure Code, in which the definition of 'Court' has for that particular purpose been discussed by this and other Courts. For we have here to consider the particular words of section 14 of the Limitation Act. Those words refer expressly to civil proceedings, whether in a Court of first instance or in a Court of Appeal, and appear to me to point particularly to regular civil proceedings in the ordinary Civil Courts under the Civil Procedure Code. There is, moreover, a ruling upon this very section in the case of *Muhammad Subhan-ullah v. Secretary of State* (6) which appears to me very similar to this case, in which it was held that proceedings for mutation of names

(4) 8 B. 264; 4 Ind. Dec. (N. S.) 550.

(5) 2 B. 370; 1 Ind. Dec. (N. S.) 670.

(6) 26 A. 382; A. W. N. (1904) 54.

(3) (1892) 1 Q. B. 431 at p. 448; 61 L. J. Q. B. 409; 60 L. T. 513; 40 W. R. 450; 56 J. P. 404.

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in the Record of Rights were not civil proceedings in a Court within the meaning of section 14 of the Limitation Act.

I concur, therefore, for these reasons that this appeal ought to be allowed and the suit dismissed with costs throughout.

Appeal allowed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1475 OF 1917.

August 1, 1918.

Present:—Sir Henry Rattigan, Kt., Chief Judge.

TURA BAZ—PLAINTIFF—APPELLANT

versus

HAMID & Co.—DEFENDANTS—

RESPONDENTS.

Pre-emption suit—Appeal by vendee—Pre-emptor, failure of, to pay extra sum directed by Appellate Court, effect of—Civil Procedure Code (Act V of 1908), O. XX, r. 14.

In an appeal by the vendee in a pre-emption suit the pre-emptor was directed by the Appellate Court to pay into Court an extra sum within the time fixed by the original Court. The pre-emptor had twelve days after the date of this order within which the amount could be paid into Court, but he failed to make the payment:

Held, that the consequence of the pre-emptor's default was that the decree became final and that his suit must be dismissed.

Second appeal from the decree of the District Judge, Mianwali, dated the 16th February 1917, varying that of the Munsif, 1st Class, Mianwali, dated the 20th January 1917, decreeing the claim.

Mr. Badri Nath Kapur, for the Appellant.

Dr. Nand Lal, for the Respondents.

JUDGMENT.—At first sight it seemed inequitable that the plaintiff pre-emptor should lose his right of pre-emption because he had not paid the small extra sum of Rs. 12-9-0 ordered by the District Judge within the time fixed by the original Court. It appears, however, that when the District Judge passed his order on the 16th February 1917, the pre-emptor came to know on the same date that he had been

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ordered to pay that extra amount and on the date in question, i. e., 16th February, there still remained 12 days within which that amount could have been paid into Court in compliance with the order of the first Court. Knowing this fact the pre-emptor did not comply with the order of the District Judge within the time limited and as a consequence a final decree was passed dismissing his suit. In these circumstances I can see no ground for going behind the final decree and accepting an appeal from the preliminary decree of the District Judge dated the 16th February 1917.

I must accordingly dismiss this appeal with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1286 OF 1916.

July 2, 1918.

Present:—Mr. Justice Tudball and Mr. Justice Abdul Raoof.

KISHORE SINGH AND OTHERS—DEFENDANTS

—APPELLANTS

versus

BAHADUR SINGH AND OTHERS—

PLAINTIFFS—RESPONDENTS.

Agra Tenancy Act (II of 1901), s. 167—Jurisdiction of Civil and Revenue Courts—Ejectment of tenant, decree for, by Revenue Court—Declaration, suit for, in Civil Court, maintainability of.

Where a Revenue Court has exclusive jurisdiction to try a certain question and it tries that question as between the parties, the finding arrived at by it is binding upon the parties and cannot be questioned in a Civil Court. [p. 472, col. 2.]

Defendant brought a suit in the Revenue Court to eject the plaintiff from certain fields on the ground that the latter was a sub-tenant, and obtained a decree. During the pendency of that suit the plaintiff brought a suit in the Civil Court for a declaration that he was a co-owner of the occupancy right with the defendant and was not, therefore, liable to ejectment:

Held, that having regard to the provisions of section 167 of the Agra Tenancy Act the suit in the Civil Court was not maintainable. [p. 471, col. 2.]

Second appeal from a decree of the Additional Subordinate Judge, Mainpuri.

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Mr. Lakshmi Narain Tewari (with him Mr. Haribans Sahai), for the Appellants.

Mr. N. C. Vaish, for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiffs-respondents for a declaration that they were co-owners with the defendants, first, in a *muafi* holding and secondly, in an occupancy tenure. The Court of first instance granted a declaration in favour of the plaintiffs. We may point out that though the plaintiffs asked for a decree for joint possession, the Courts below held that they were in possession and so granted them a declaration only. The defendants have come to this Court on appeal, and the appeal is pressed only in respect to two plots Nos. 238 and 245 which form portions of the alleged occupancy holding. It was the defendants-appellants' case in respect to these two numbers that the plaintiffs were their sub tenants. It was the plaintiffs-repondents' case that they were co-owners with the defendants of the occupancy tenure. In respect to these two numbers there are certain facts which have to be set forth. The defendants-appellants instituted a suit in the Revenue Court for the ejectment of the plaintiffs on the ground that the latter were their sub tenants. To this suit the defendants replied that they were not sub-tenants but that they were co-tenants with the plaintiffs. That suit was instituted on the 14th of August 1915. While it was pending the plaintiffs brought the present suit in the Civil Court. The Revenue Court was the first Court to come to a decision in regard to Nos. 238 and 245. It held that the present plaintiffs-respondents were the sub-tenants of the present appellants and were not the co-tenants. It, therefore, granted to the present appellants a decree for the ejectment of the present plaintiffs. Subsequent to that the Civil Court came to its decision and gave the plaintiffs a decree for joint possession of all the land including these two numbers. That decision was upheld on appeal in the Civil Court. From the decision of the Revenue Court no appeal whatsoever was preferred and that decision became final and binding between the parties. The result, therefore, is the absurdity that a *Revenue Court with competent and exclusive jurisdiction* has granted a decree for ejectment which

can be enforced in respect to these two numbers. The Civil Court has given a decree for joint possession on the ground that the present plaintiffs are co-tenants and not sub-tenants. What the result is to be nobody can at present state. It is urged before us and with considerable force, specially in the face of a large number of rulings of this Court, that the decision of the Revenue Court as between the parties, to the effect that the plaintiffs are the sub-tenants in these two numbers of the defendants-appellants, is the decision of a competent Court with exclusive jurisdiction, that it is final and binding upon the parties and that the Civil Court has no jurisdiction whatsoever to upset or reverse that decision. Reliance has been placed upon the decision of this Court in *Sheo Prakash v. Karna* (1), wherein it is remarked that the Revenue Court having made a decree for ejectment and that decree having been carried into effect and the plaintiff having been ejected, a suit in the Civil Court is not maintainable. The decree of the Revenue Court was binding upon the parties and any decree made by the Civil Court would be wholly nugatory. The point is covered by authority in the case of *Ram Dei v. Bindsri Upadhyaya* (2). The judgment of the learned Judge who decided that case was affirmed on appeal under the Letters Patent. In this case while a suit in the Revenue Court for the ejectment of Karna was pending and before that case was decided, Karna brought a civil suit out of which that appeal arose. It was a suit which was brought in such form as would ordinarily make it cognizable by a Civil Court. Its object was clearly to nullify the decree of the Revenue Court. That is also the case in the present suit. An ejectment suit in the Revenue Court had been brought and was pending and was about to conclude when this present civil suit was brought. It is true that the present civil suit was brought in the form in which a suit would be entertained only by the Civil Court, but in so far as these two numbers were concerned, the suit was clearly one brought with a view of possibly nullifying the decision of the Revenue Court.

(1) 21 Ind. Cas. 2; 11 A. L. J. 671; 35 A. 464.

(2) 11 Ind. Cas. 287; 8 A. L. J. 940.

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We think that the principle which was applied in *Ram Dei v. Bindesri Upadhya* (2) applies equally to the present case before us. It was solely within the jurisdiction of the Revenue Court to hold that the present respondents were the sub-tenants of the present appellants and that as such they were liable to ejectment. Practically the same principle was applied in the case of *Ram Singh v. Girraj Singh* (3). There it was held that the Revenue Court in a case of ejectment had jurisdiction to go into a certain question and that decision was binding on the parties, and the Court in the civil suit was bound to look to the substance of the relief and not merely to the form of the suit, and that the civil suit was not maintainable as it was merely directed to the upsetting of the decision of the Revenue Court. In *Maharaja of Vizianagaram v. Chhango Kurmi* (4) a suit for ejectment of the defendant on the ground that he was a tenant-at-will was brought in the Revenue Court, which decided that he was a tenant but not a tenant-at-will of the plaintiffs, and subsequently a suit was brought in the Civil Court for the ejectment of the defendant on the ground that he was a trespasser; it was held that the Revenue Court having determined the nature of the defendant's tenancy and the class to which he belonged, a suit in the Civil Court could not be maintained. It was equally in the present case that the Revenue Court has determined the nature of the defendant's tenancy and he is clearly liable to ejectment. The present suit is an attempt, as remarked in that judgment, to go behind the decision of the Revenue Court and ask the Civil Court to do that which under section 167, it is forbidden to do. On behalf of the opposite party, our attention has been called to two decisions of this Court, *Jagar Nath v. Ajudhya Singh* (5) and *Kanhi Ram v. Durga Prasad* (6). The former of these two cases may be distinguished from the present case. In that case there had been no decision by the Revenue

Court on the question and Mr. Justice Banerji in his judgment remarks as follows:—"It is true that the plaintiffs sued in the Revenue Court to eject the defendant on the allegation that the defendant was their sub-tenant. Had the Revenue Court decided that question and held that the defendant was the tenant of the holding, there might have been some difficulty in the plaintiffs' way, but in this case, as pointed out by the lower Appellate Court, the Commissioner did not determine the question whether the plaintiffs were the tenants of the holding, or the defendant was so." The case of *Kanhi Ram v. Durga Prasad* (6) is somewhat in favour of the respondents' contention. We would call attention to the opinion expressed by the late Sir Sundar Lal in his judgment on the point. He referred to Mr. Justice Chamier's decision in Second Appeal No. 1001 of 1911 and remarked:—"Like him I am inclined to think that the matter should be deemed to be *res judicata*." In that suit the defendant brought a suit in the Revenue Court seeking for the ejectment of the plaintiff on the ground that the latter was his sub-tenant. The Revenue Court ordered ejectment. The plaintiff brought a suit in the Court for a declaration that he was the owner of certain occupancy holdings and claimed possession. He sued the opposite party on the ground that he was a trespasser. It has held in that case that the decision of the Revenue Court did not operate as *res judicata*. We do not propose to decide the present appeal on the question of *res judicata*. There have been a long series of rulings of this Court for a considerable length of time in which it has been consistently held that where a Revenue Court has exclusive jurisdiction to try a certain question and it tries that question as between the parties, that is a finding which is binding upon them and it is a finding which cannot be questioned in the Civil Court, reference being made to section 167 of the Tenancy Act. We think that that is the principle which will govern the decision of the case before us. In so far as these two plots are concerned, there is a final and binding decision between the parties. The present respondents are the

(3) 26 Ind. Cas. 731; 12 A. L. J. 1252; 37 A. 41.

(4) 6 Ind. Cas. 834; 7 A. L. J. 555.

(5) 17 Ind. Cas. 376; 10 A. L. J. 468; 35-A. 14.

(6) 27 Ind. Cas. 913; 18 A. L. J. 278; 37 A. 223.

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sub-tenants of the present appellants and a decree for their ejection has been passed. We do not think that a Civil Court is empowered to go behind that decision or to set it aside. We, therefore, allow the appeal in respect of these two numbers and in respect to them the plaintiffs' suit will stand dismissed with proportionate costs in all Courts. The rest of the plaintiffs' claim is not contested before us and the decree of the Court below will stand in respect thereto.

Decree modified.

PRIVY COUNCIL.

APPEAL FROM THE JUDICIAL COMMISSIONER'S COURT, NORTH-WEST FRONTIER PROVINCE.

February 7, 1918.

Present:—Lord Buckmaster, Sir Walter Phillimore, Bart., and Sir Lawrence Jenkins.

DAKAS KHAN AND OTHERS—PLAINTIFFS—
APPELLANTS

versus

GHULAM KASIM KHAN AND OTHERS—
DEFENDANTS—RESPONDENTS.

Wajib-ul-arz, entry in, value of—Record of Rights—Presumption.

Though an entry as to title in a *wajib-ul-arz* or Record of Rights does not create a title, it gives rise to a presumption in its support, which prevails until its correctness is successfully impugned. [p. 475, col. 1.]

Ex parte appeal from a decree of the Judicial Commissioner, North-West Frontier Province, dated the 13th January 1913, varying that of the District Judge, Dera Ismail Khan, dated the 10th May 1918.

Messrs. *De Gruyther, K. C.*, and *H. B. Raikes*, for the Appellants.

JUDGMENT.

SIR LAWRENCE JENKINS.—In the district of Dera Ismail Khan there are two villages, Mauzah Darakki and Mauzah Sher Ali. Of the first the plaintiffs are the proprietors, of the second the defendants.

The dispute is between the proprietors of these two villages as to the ownership of village common lands measuring upwards of 7,989 acres. The plaintiffs contend that these lands belong to them jointly with the defendants in proprietary right by virtue of ownership of the two villages;

the defendants maintain that they are the exclusive proprietors. There was a subsidiary question as to the omission of certain provisions from the *wajib-ul-arz* relating to these common lands but on this there is no longer any contest.

On the 10th May 1912 the District Judge of Dera Ismail Khan decided on both points in the plaintiffs' favour. On the 13th January 1913 this decree was varied by the Judicial Commissioner, North-West Frontier Province, who dismissed the plaintiffs' claim of joint ownership. In other respects the decree was confirmed. It is from this variation in the appellate decree that the present appeal has been preferred by the plaintiffs.

The history of the land in suit is summed up in the following passage taken from the judgment of the Judicial Commissioner.—

"This land originally formed part of the hinterland of the Kundi village of Darakki. During the period that Nawab Sarwar Khan, of Dera, held a vague authority in the district under the Sikhs, one Mian Khan, a Kundi, obtained a Sanad authorising him to found a new village on the Darakki waste. He collected a group of colonists, consisting chiefly of Murats, and the village of Sher Ali was established. At the Regular Settlement (1874-78) the separate entity of Sher Ali was recognised by the Authorities, and the persons actually holding land in the village were shown as owners in the Record of Rights."

Mian Khan was not an unwarranted intruder, entering on his new possession with a strong hand and with no sanction. He acted under the authority of the Nawab. And in this connection it is interesting and relevant to observe what Sir Henry Maine has to say of such matters:—

"The Native Indian Government," he writes, "sometimes claimed (though in a vague and occasional way) some exceptional authority over the waste; and acting on this precedent the British Government at the various settlements of land revenue has not seldom interfered to reduce excessive waste, and to re-apportion uncultivated lands among the various communities of a district." ("Village Communities," page 122).

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This is aptly illustrated at page 38 of Volume II of "Tupper's Punjab Customary Law," where it is said:—

"Nawab Muhammad Khan, Sddaozai, Governor of the province of Dara, gave a great impulse to Baluch immigration. Without much regard to the claims of the old *had* proprietors, he allotted waste lands to any one who would found a village."

It is principally by reference to the Settlement of 1874-78 that the dispute between the litigants has to be determined.

There are certain matters that are beyond controversy. Thus it is clear (a) that though what is now Mauzah Sher Ali was at one time a part of Mauzah Darakki, it was at the date of the Settlement, and still is, a separate and distinct village, and (b) that the lands in suit are within the boundaries of Mauzah Sher Ali.

At the same time it is apparant from the Revenue proceedings which led up to the *wajib ul-arz* of 1878 that in adjusting the rights in these lands regard was had to the origin and history of Mauzah Sher Ali, and it was a part of the scheme of adjustment that the claims of the parent Mauzah should be recognised. The Settlement Officer responsible for the Rekhar of the 5th February 1876 recorded the opinion that it was fair and proper that the waste land should be entered as the joint property of the village Sher Ali and Mauzah Darakki. But from the earlier part of this document it would seem that what was in the Settlement Officer's contemplation was that the Zemindars of Darakki should have equal rights with the cultivators of the Marat tribe to break up the waste lands of Mauzah Sher Ali.

The next document that calls for notice is the *shajra nash*, or genealogical tree. The whole of it is not on the record but only section 1, which is, in effect, a narrative of the origin and development of Mauzah Sher Ali. It is there stated that: "The proprietors of Sher Ali and Darakki villages were held as *malikan qabiz* (proprietors in possession) of 7,989 *ghomaons* 6 *kanals* 14 *marlas* of *shamilat* land." It has been urged that this supports the appellants' case, and much has been made of the expression *malikan qabiz*. But here

their Lordships are confronted by an initial difficulty. In the official translation of this document, Exhibit No. 25, there is no sort of indication that this statement as to proprietorship was derived from or based on the terms of the *wajib-ul-arz*, but in his judgment the District Judge renders this part of the document in these words:—

"According to paragraph 14 of the *wajib-ul-arz* 7,709 *ghomaons* 6 *kanals* 14 *marlas* of land was held to be the *shamilat* property of the proprietors of Mauzabs Darakki and Sher Ali."

Which of these renderings is the more correct their Lordships have no means of judging, and their difficulties in this respect are enhanced as the appeal has been heard *ex parte*. Yet there is a vital and obvious difference between their effect for the purpose in hand. In the one there is what purports to be an independent statement of the rival rights; in the other, there is a statement which is merely the interpretation placed on paragraph 14 of the *wajib-ul-arz*. Nor do the difficulties end there. The expression *malikan qabiz* is a term of art used for the purpose of Settlement proceedings, and before its value as an indication of any group of rights or their quality can be justly appreciated its precise signification in this context should be known. And here again their Lordships have been left without such assistance as would justify a decisive pronouncement on the point. That the expression may bear a meaning that would not advance the plaintiffs' case may be reasonably inferred as a possibility from a passage to be found at page 150 of Boulnois and Rattigan's "Customary Law." But, when all is said and done, the statements of these documents were not immutable, and the determination of this case must depend on the interpretation to be placed on the *wajib-ul-arz* or Record of Rights, in which the final result of the settlement proceedings was recorded.

A Record of Rights has been described by Sir Henry Maine as a detailed statement of all rights in land drawn up periodically by the functionaries employed in settling the claims of the Government to its shares of the rental ("Village Communities," page 72). He adds that—

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"The most important object of the Settlement operations—not second even to the adjustment of Government revenue—is to construct a Record of Rights, which is a detailed register of all rights over the soil in the form in which they are believed to have existed on the eve of the conquest or annexation."

The authority of such a document is universally recognised, and in *Musammât Lali v. Murlî Dhar* (1), it was said:—

"The term *wajib-ul-arz* in the North-Western Provinces is applied to what is considered to be the most important document contained in the official records relating to the village administration."

Though it does not create a title, it gives rise to a presumption in its support, which prevails until its correctness is successfully impugned.

Had the opinion expressed in the Robkar been reproduced in the *wajib-ul-arz* and had the villagers of Darakki been entered there as owners jointly with the "proprietors of Murat tribe," it might well have been contended that the plaintiffs' title was impregnable. But this was not done; and an examination of the *wajib-ul-arz* shows that it was a far more complete and exhaustive adjustment of rights than the outline sketched in the proposal of the Robkar.

It will be found that the proposed rights of cultivation and grazing are carefully safeguarded. And though the method employed may not have followed literally that contemplated by the author of the Robkar, it calls for no great ingenuity to guess how, on balancing expediences and reckoning up the advantages, it may have been felt, when the final word came to be said, that the conflict of claims could be best reconciled and most conveniently arranged by bestowing the inferior rights of enjoyment on both villages alike, but securing the superior right of proprietorship, with its obligations to the Government, exclusively to the village in which the lands were situated, and of which they formed a part for the purposes of Revenue administration.

The only sections of the *wajib-ul-arz* disclosed in the record are the 14th and the 17th, and on their true construction they do not (in their Lordships' opinion)

(1) 33 L. A. 97 at p. 101; 8 Bom. L. R. 402; 3 A. L. J. 415; 10 C. W. N. 730; 3 C. L. J. 594; 28 A. 488; 1 M. L. T. 171 (P. C.)

support the contention that their legal effect was that for which the appellants contend. Section 14 draws a sharp distinction between the superior right of proprietorship of the village common lands and the inferior right of bringing them under cultivation and of grazing cattle. The superior right is recorded as belonging to the proprietors of the Murat tribe, or, in other words, the proprietary body of Mauzah Sher Ali, and the inferior right as vested in the Khewatdars of both Mauzahs. Section 17, after dealing with the cultivation of the village common land and the revenue to be paid, provides that the income is to go to the revenue of Mauzah Sher Ali, and not to Darakki. The learned Judicial Commissioner, in holding that the defendants' title had the sanction of the Revenue Records, attributed great importance to this provision as to the revenue, and their Lordships do not think he exaggerated its significance when he described it as marking the true proprietorship of the waste lands. Indeed, Counsel was unable to point to any other circumstance in the case as a mark of proprietorship which was not equally, and even preferably, referable to the inferior right of cultivation and grazing bestowed on the villagers of the two Mauzahs.

This view as to the meaning and effect of the *wajib-ul-arz* has not been held by the Judicial Commissioner alone. In the report of Mr. S. Mulaim Din, Tahsildar, Tonk, dated the 2nd July 1894, it is said that the names of the Darakki people are not shown in the column of proprietorship in the Settlement and the *jamabandi* files, but it is shown as village *shamilat* of the proprietors of Sher Ali. And this opinion is repeated in the Commissioner's order of the 20th May 1895. These views are of value, as Revenue Officers would be intimately conversant with topics of this kind.

Nor do the difficulties in the appellants' way rest there, for the subsequent treatment of the lands lends no small support to the view expressed as to the legal effect of the *wajib ul arz*.

To begin with, the revenue of the lands has actually been received and dealt with according to the provisions of section 17. Then, again from 1878 onwards the lands have been consistently shown in the official

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records as the *shamilat deh* of Mauzah Sher Ali. The appellants seek to escape from the obvious inference this invites by the suggestion that this entry merely indicated the situation of the lands within the bounds of Mauzah Sher Ali, and was in no sense a token that the proprietorship belonged to that village. This attempted explanation leaves their Lordships unconvinced.

And it is not as though there was this entry in the records and nothing more. The Darakki claim to proprietorship has been repeatedly and consistently challenged. As far back as 1883, the learned Judicial Commissioner declares, the plaintiffs' rights were definitely traversed. Then, from Mr. Bruce's order of the 20th May 1895, it is apparent that the villagers of Sher Ali at that time asserted that the Darakki village had no proprietary rights in the land and denied the Darakki title. Again in 1900 this denial was repeated. And yet it was not until the institution of this suit on the 23rd of March 1909 that the plaintiffs attempted to vindicate their claim in a Court of Law, though long before this the urgent necessity of such action had been pressed on them. It would be wrong to treat all this as of no moment. Apart from any bar of limitation which this delay may entail, the reluctance or, at any rate, prolonged failure of the Darakki villagers to assert their claim in the Civil Courts, whether due to a lack of confidence in its merits or not, imposes on their Lordships the clear and imperative duty of cautious reserve before accepting the appellants' contention that the decree adverse to their claim should be reversed. And the need for this reserve is the greater as this case with its difficulties and peculiarities has come before this Board in the absence of anyone to present the defendants' case.

But, in truth, so far from being convinced that the decree under appeal is erroneous, their Lordships consider it to be amply supported by a judgment which is well reasoned and well founded; and they certainly are not prepared to dissent from the Appellate Court's conclusion that the plaintiffs' claim to joint ownership has failed.

Nor do their Lordships differ from that Court's decision that the plaintiffs' claim to a declaration of joint ownership is barred

by limitation, though in the view they take this aspect of the case calls for no elaboration.

The Judicial Commissioner has affirmed so much of the first Court's decree as declared clause 14 of the *wajib-ul-arz* to be still operative, but it follows from what he had previously determined that its legal effect would be in accordance with his view, and not that of the First Court, as to its true interpretation. The rights thus secured to the plaintiffs are not of as high a degree as they claimed, yet they are probably substantial. Any attempt, however, at a definition of them would be outside the scope of this appeal, for the determination of their meaning, as the Judicial Commissioner has indicated, is more a matter for the Revenue Authorities, should the occasion ever arise.

The result, then, is that their Lordships will humbly advise His Majesty that this appeal be dismissed, but without costs as the respondents have not appeared.

Appeal dismissed.

Solicitors for the Appellants: Messrs. Hughes and Son.

ALLAHABAD HIGH COURT.

REVIEW APPLICATION IN LETTERS PATENT APPEAL
No. 99 of 1916.

October 26, 1918.

Present:—Sir Henry Richards, Kt., Chief Justice, and Justice Sir P. C. Banerji, Kt.

KALYAN SINGH AND ANOTHER—
DEFENDANTS—APPLICANTS

versus

ALLAH DIYA—PLAINTIFF—RESPONDENT.

Letters Patent (Alt.), s. 10, decree under—Review, whether permissible.

No application for review is allowable where the decree sought to be reviewed was given in an appeal under section 10 of the Letters Patent.

Application for review of judgment.

Mr. J. M. Banerji, for the Applicants.
Messrs. Hameedullah and S. M. Y. Hasan, for the Opposite Party.

JUDGMENT.—A preliminary objection has been taken to the hearing of this application that no application for review is allowable where the decree was given in an appeal under section 10 of the Letters Patent. It was so held in the case of *Hafiz Muhammad Mohsin v. Sheo Prasad* (1). This decision is binding on us. We accordingly reject the application with costs.

Application rejected.

(1) 1 A. L. J. 509.

RAUNAQ ALI v. GUL MUHAMMAD.

OUDH JUDICIAL COMMISSIONER'S
 COURT.

SECOND CIVIL APPEAL NO. 431 OF 1916.

JUNE 20, 1917.

Present:—Pandit Kanhaiya Lal, A. J. C.

RAUNAQ ALI AND OTHERS—PLAINTIFFS

—APPELLANTS

versus

GUL MUHAMMAD AND OTHERS—

DEFENDANTS—RESPONDENTS.

Oudh Rent Act (XXII of 1896), s. 103, cls. (2), (4)

—Mortgage—Mortgagor allowed to remain in possession of mortgaged property as tenant of mortgagee—Rent, arrears of, suit to recover—Jurisdiction of Civil and Revenue Courts.

A *zar-i-peshgi* lease created the relationship of mortgagor and mortgagee between the parties. On the mortgagor's failure to deliver possession of the mortgaged property to the mortgagee the latter filed a suit for possession against the former. The suit ended in a compromise, whereunder it was provided that the mortgagor would remain in possession on behalf of the mortgagee on condition of his paying to the latter a certain amount of annual rent and that in default of such payment of rent the former would be liable to ejectment. On the mortgagor's failure to pay rent the mortgagee brought a suit in the Civil Court against the mortgagor for possession of the mortgaged property and for arrears of rent.

Held, that the compromise in the previous suit created the relationship of landlord and tenant between the parties and that, therefore, the present suit was not maintainable in the Civil Court in view of the provisions of section 103, clauses (2) and (4), of the Oudh Rent Act. [p. 477, col. 2; p. 478, col. 1.]

Altaj Ali Khan v. Latta Prasad, 19 A. 496; A. W. N. (1897) 128; 9 Ind. Dec. (N. S.) 320, distinguished.

Appeal against the order of the District Judge, Gonda, dated the 12th September 1916, upholding that of the Munsif, Utraula (Gonda), dated the 17th July 1916.

Mr. Abdur Rauf, for the Appellants.

Mr. Ali Muhammad, for the Respondents.

JUDGMENT.—On the 26th October 1896, Gul Muhammad, Pir Muhammad and Wali Muhammad executed a *zar-i-peshgi* lease in favour of plaintiffs Nos. 1, 2 and 3 and the ancestors of plaintiffs Nos. 4 to 11, whereby they borrowed Rs. 200 and agreed to give possession over the mortgaged property to the mortgagees, subject to the condition that the latter shall pay a rental of Rs. 6-13-0 per year to the former till the mortgage was redeemed. The time fixed for redemption was Baisakh 1313 Fasli.

The mortgagors did not, however, deliver possession. A suit was then filed

by the mortgagees for possession and a decree was obtained on the 22nd August 1902.

The mortgagees got possession in pursuance of that decree but were ejected thereafter. They, therefore, brought another suit for possession in 1904 in which there was a compromise, the effect of which was that the mortgagors were allowed to remain in possession on behalf of the mortgagees on condition of their paying Rs. 14-5-0 yearly to the latter. The compromise provided that if the mortgagors failed to give the rent they would be liable to ejectment. The mortgagees alleged that in spite of the said compromise the defendants had not paid the rent, which they had agreed to pay. They, therefore, sued for possession of the mortgaged property and for arrears of rent for the three years preceding the suit. In the plaint, they described arrears of rent as profits, but that description does not make any difference in the nature of the suit.

The Courts below found that the mortgagors became the tenants of the mortgagees by virtue of the compromise and that the suit for possession and arrears of rent was not maintainable against them in the Civil Court.

The learned Counsel for the plaintiffs-appellants relies on the decision in *Altaj Ali Khan v. Latta Prasad* (1). But the facts of that case were clearly distinguishable from the present. In that case the suit was based on the *zar-i-peshgi* lease or the mortgage itself, and was for the recovery of the money due on the mortgage. There was also a lease accompanying the mortgage; but the lease and the mortgage were taken to form part of the same transaction and the mortgagees were declared entitled to seek their remedy for non-payment of the rent, reserved by the lease, in the Civil Court by means of a suit upon the mortgage. The relationship of landlord and tenant was constituted in the present case by a compromise effected on the 16th September 1904. The compromise was an entirely separate transaction and as held in

(1) 19 A. 496; A. W. N. (1897) 128; 9 Ind. Dec. (N. S.) 320.

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Chimman Lal v. Bahadur Singh (2) and *Mahmud un-nisa v. Fakhr-ud-din* (3), a suit for the recovery of arrears of rent on the basis of the lease, created by the said compromise, in regard to agricultural land would not lie in the Civil Court, much less a suit for the ejectment of the tenants from the land leased. Section 103, clauses (2) and (4), of the Oudh Rent Act (XXII of 1886) gives exclusive jurisdiction to the Revenue Court to entertain suits for arrears of rent or for the ejectment of a tenant. A *zar-i-peshgi* lease, accompanied by a covenant for redemption, may amount to a mortgage, but the relation, which the compromise created and which the plaintiffs seek in this suit to terminate, is not that of a mortgagor and mortgagee but that of a person in possession of the mortgaged property as a tenant on behalf of the mortgagee.

The plaintiffs have also impleaded some of the transferees of the mortgagors, but that fact makes no difference, because the transfer was made after the date of the compromise and whatever rights they might have need not be determined in this case. The suit is principally for the ejectment of the mortgagors, who occupy the mortgaged property as tenants of the mortgagees, and for arrears of rent due by them, and the Courts below were justified in treating it as excluded from the cognizance of the Civil Court.

The appeal is, therefore, dismissed with costs.

Appeal dismissed.

(2) 23 A. 333; A. W. N. (1901) 95.

(3) 6 O. O. 26.

ALLAHABAD HIGH COURT.
FIRST CIVIL APPEAL NO. 288 OF 1915.

April 11, 1918.

Present:—Mr. Justice Piggott and
Mr. Justice Walsh.

RADHEY SHIAM—PLAINTIFF—

APPELLANT

versus

BIHARI LAL—DEFENDANT—

RESPONDENT.

Contract Act (IX of 1872), s. 85—Contract by minor—Mortgage—Fraudulent representation, absence of—Minor, whether liable to repay money borrowed—Costs, award of—Successful party, whether can be deprived of costs—Discretion of Court—Appeal—Appellate Court, interference by.

A minor cannot be made to repay money which he has spent merely because he received it under a contract induced by his fraud. [p. 479, cols. 1 & 2.]

In a suit for sale on a mortgage bond, the defendant pleaded that at the time of the execution of the bond he was a minor and no fraudulent representation on the part of the defendant inducing the plaintiff to enter into a contract was either alleged or found:

Held, that the defendant was not liable to repay the money borrowed by him. [p. 480, col. 1.]

Where a trial Judge has given his reasons for depriving a successful party of costs and all the circumstances are before the Court of Appeal, the latter can, if satisfied that the trial Judge has not exercised his discretion judicially, interfere with it and make the order which the lower Court ought to have made. [p. 480, cols. 1 & 2.]

The mere fact that a defendant relies upon a right which a Statute gives him is not a sufficient ground for depriving him of his costs. [p. 480, col. 2.]

First appeal from a decree of the Subordinate Judge, Allahabad, dated the 30th of September 1915.

The Hon'ble Dr. Tej Bahadur Sapru (with him Messrs. B. E. O'Connor and Sital Prasad Ghosh), for the Appellant.

Messrs. Gokul Prasad and Radha Kant Malaviya, for the Respondent.

JUDGMENT.—This is an appeal from a decree dismissing a suit in effect by two judgments, dated respectively the 13th of September 1915 and the 30th of September 1915, on what were really two preliminary points. The suit was brought upon a mortgage-deed for sale of the property hypothecated in respect of a default made by the defendant at an early stage of the transaction. The plaintiff chose to shelter himself behind the legal arguments of Counsel and did not go into the box, and at present there is nothing before us to show why and how the defendant was persuaded in January 1915 to enter

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into a fresh transaction at compound interest with security in order to get rid of some comparatively recent unsecured liabilities which are not even shown to have borne compound interest. We do not know either whether the defendant ever received a single rupee in respect of this transaction. The uncontradicted evidence of the defendant is that he did not, and the general conduct of the plaintiff raises some inference that he has not paid a rupee more than he was obliged to pay.

Two grounds are raised in appeal against the judgments which I have mentioned; each deals really with a separate judgment. By the fourth ground of appeal it is contended that the defendant, as to whom it has been found that he was a minor, is estopped by his fraudulent misrepresentation from relying upon this defence. This is the latter of the two judgments to which I have referred. The law is well settled and this point has been disposed of by the learned Subordinate Judge in an excellent judgment, in which he relies very largely upon the recent decision of the English Court of Appeal in a considered judgment of three Lords Justices in *Leslie Limited v. Shiell* (1). That decision, by the way, has been recently approved by the Privy Council: see *Mahomed Syedol Ariffin v. Yech Ooi Gark* (2), in a case which was cited to us for another purpose. The learned Judge of the Court below cites a passage from the judgment of Mr. Justice A. T. Lawrence, who was then sitting in the Court of Appeal, to the following effect:—"Wherever the infant requires, as a plaintiff, the assistance of any Court, it will be refused until he has made good his fraudulent representation. Wherever the infant is still in possession of any property which he has obtained by his fraud, he will be made to restore it to its former owner." So far Mr. Justice Lawrence has given expression to the equitable principle recognised in England and adopted in the case relied upon by Dr. Sapru, *Jagar Nath Singh v. Lalta Prasad* (3). "But," continues Mr. Justice

Lawrence, "I think that it is incorrect to say that he can be made to repay money which he has spent merely because he received it under a contract induced by his fraud." And that was in substance the decision of the Court of Appeal which has been consistently followed by the Courts in India. The contention as to the legal proposition, therefore, fails and we agree with the judgment of the Court below on this point. We desire, however, to add, lest it should be supposed that this decision conveys any reflection upon the defendant, that not only has no fraudulent representation been found against the defendant but it has not even been alleged. There is a faint suggestion in paragraph (c) of the reply which the plaintiff made to the written statement where the defendant set up his minority at page 9 of the printed book, which suggests that the defendant put forward some active misrepresentation with regard to his age in the form of a document. It is not alleged that that was done fraudulently, and applying the principle which has always been applied by Courts of Justice in a case of this kind, this point really ought not to have been allowed to have been argued by the plaintiff at all. The plaintiff, as we have said, was not called and there is no suggestion from first to last by any positive evidence of any active misrepresentation by the defendant before the contract was entered into. Further than that it would be necessary for the plaintiff to establish that he was induced by such misrepresentation, if in fact it had been made. One's experience of these cases in Courts is that the plaintiffs who carry on money-lending business, like the present plaintiff in this case, and enter into similar transactions, are not as a rule so much influenced by the statements of their respective debtors as by the desire to get inexperienced young men into their clutches and to make as much profit out of them as the law will permit, or as the fear of criminal charges, or other consequences of that kind may prevent the debtors from resisting. As we have already said, we are inclined to think that the plaintiff himself entertained grave doubts as to the age of the defendant and, therefore, it is unlikely that he was influenced by anything the defendant had

(1) (1914) 3 K. B. 607; 83 L. J. K. B. 1145; 111 L. T. 106; 53 S. J. 453; 30 T. L. R. 460.

(2) 39 Ind. Cas. 401; 21 C. W. N. 257; (1917) M. W. N. 162; 19 Bom. L. R. 157; 56 L. J. P. C. 15; (1916) 2 A. C. 575 at p. 582.

(3) 1 Ind. Cas. 562; 31 I. A. 21; A. W. N. (1908) 267; 5 A. L. J. 674.

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said to him. So much for the first point raised in the fourth ground of appeal which is dealt with in the latter of the two judgments.

With regard to the other point, namely, the judgment of the 13th of September 1915, on the pure question of fact as to the actual age of the defendant one really cannot improve upon the able and careful analysis of the evidence contained in the judgment itself. Out of respect to the arguments addressed to us, however, we will add this. It seems to us that the evidence with regard to the defendant's actual age is overwhelming. The best evidence of course is the evidence of a minor's parents. In this case the mother was dead, but it so happened that she made an application in 1900 with reference to her child who, if the rest of the evidence be believed, had been born only three years before. It is almost impossible that she could have been mistaken at that time, and no reason of any kind is suggested why she should have desired to mislead anybody. The sister, who was a *pardanashin* lady and called on commission, gave strong and clear evidence which we have no reason to suppose to be dishonest and which was not shaken by a long and determined cross-examination. The brother's evidence is much to the same effect. In the result the family evidence in this case is peculiarly strong and clear. It is, therefore, unnecessary to say anything about the weight or admissibility of horoscopes and other matters of that kind which have been much discussed. As against such evidence as exists in this case expert evidence, horoscopes and medical certificates are of very little, if any, value. In this case they are, in our opinion, of no value whatever. The appeal fails on both grounds and must be dismissed with costs.

The matter, however, does not rest there. There is a cross-objection by the defendant upon the ground that he has been deprived of his costs. We agree with Dr. Sapru in his contention upon this point that this is a matter for the discretion of the trial Court. At one time it was thought that a Court of Appeal would never interfere with the exercise of such discretion, but where the Judge has given his reasons and all the circumstances are before the Court

of Appeal it is now settled that the Court of Appeal can, if satisfied that the discretion has not been judicially exercised, interfere with it and make the order which the Court below ought to have made. We think that there was really no evidence to support a finding that the defendant was "mostly responsible for this litigation." The presumption usually is that a plaintiff is responsible for a suit which he has brought into Court. In this case the plaintiff was in a peculiar hurry to bring the case into the Court. We cannot agree with the ground upon which the learned Subordinate Judge has proceeded. It has been held in the English Courts of Appeal that the mere fact that a defendant relies upon a right which a Statute gives him is not a sufficient ground for depriving him of his costs. Some people think that in the ordinary sense of the word it is a shabby thing to rely upon a Statute of Limitation, or the Gaming Act or a defence of infancy, but it has been distinctly held that neither of those grounds is a judicial ground for depriving the defendant of his costs. In the case which was relied upon by the appellant and was referred to in argument [*Leslie Limited v. Shiell* (1)], the defendant was deprived of his costs even of that part of the suit in which he succeeded. He had been found guilty by a Jury of fraudulently deceiving the money-lender. There is nothing of that kind in this case. The plaintiff has chosen to come into Court with a hopeless case. The defendant has succeeded in establishing a legal defence. We see no reason why the costs should not follow the result.

The appeal is dismissed with costs and the cross-objections are allowed. We modify the decree of the Court below by allowing the defendant his costs throughout.

Appeal dismissed.

BHAGWATI v. EMPEROR.

ALLAHABAD HIGH COURT.

CRIMINAL APPEAL No. 459 OF 1918.

July 31, 1918.

Present:—Sir Henry Richards, Kt.,
Chief Justice, and Mr. Justice Tudball.

BHAGWATI—ACCUSED—APPELLANT

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 512
—Evidence taken against absconding accused—
Procedure.

Where a Magistrate had clear evidence that the accused were absconding and evidence from which he might reasonably infer that there was no immediate prospect of their arrest, and he expressly stated in his order that he was taking evidence under section 512 of the Criminal Procedure Code, the presumption is that he did his duty and did not record the evidence under the section unlawfully. The mere fact, that the Magistrate did not recite a finding that there was no immediate prospect of the arrest of the accused does not render the evidence inadmissible. [p. 482, col. 1.]

Criminal appeal from an order of the Additional Sessions Judge, Allahabad, at Mirzapur.

Mr. C. R. Alston (with him Mr. Peary Lal Banerji), for the Appellant.

Mr. R. Malcomson (Assistant Government Advocate), for the Crown.

JUDGMENT.—The accused in this case has been found guilty of murder and sentenced to transportation for life. The alleged murder took place as far back as the 24th of June 1904. A trial took place in respect of this murder in the year 1904 and one Khedu was convicted. He was sentenced in the first instance to transportation for life, but that sentence was subsequently enhanced by the High Court to a sentence of death. The present accused was arrested on the 8th of February 1918 at Madras. He was put upon his trial and convicted and sentenced to transportation for life. The depositions of three witnesses were used as evidence against him. All these three persons were dead. Mr. Ross Alston, on behalf of the appellant, has raised the point that these depositions were not admissible. The Magistrate in the year 1904 took the evidence of these witnesses having previously made the following order:—"I find that Mahabir and Bhagwati have absconded. The evidence which I am about to take will be regarded as taken under section 512 of the Code of Criminal Procedure as regards Mahabir and Bhagwati."

The point raised by the learned Counsel is that the omission in the order of an express finding that there was no immediate prospect of arresting the two persons renders the evidence inadmissible. In support of this contention the case of *Rustam v. Emperor* (1) has been quoted. In that case a person was put upon his trial sometime after an offence had been committed. The evidence of certain witnesses, who had been examined previously, was admitted at the trial. The evidence, it seems, purported to have been taken under section 512. At page 31* the learned Judges say:—"The learned Counsel for the appellants contends that the said evidence is inadmissible, inasmuch as no proof of the absconding of the accused had been formally received and recorded prior to the examination of the said witnesses. We think that this objection is valid and must prevail. In section 512 it is distinctly laid down that if it is proved that an accused person has absconded and there is no immediate prospect of arresting him, the Court competent to try or commit for trial such person for the offence complained of may, in his absence, examine the witnesses (if any) produced on behalf of the prosecution and record their depositions. It is clear from the language of the section that the Court which records the proceedings under it, must first of all record an order that in its opinion it has been proved that the accused has absconded and that there is no immediate prospect of his arrest. No such finding appears on the file of 1897, in fact no evidence was taken in that year to show that the present appellant was absconding and that there was no immediate prospect of his arrest. The evidence of 1897 being inadmissible, the conviction of the appellant on the basis of such evidence cannot stand."

It would seem from this passage that the learned Judges looked at the file of the previous trial and found that there was no evidence from which the Magistrate could draw the inference that the accused was absconding and that there was no immediate prospect of his

(1) 31 Ind. Cas 817; 39 A. 29; 13 A. L. J. 1043; 16 Cr. L. J. 801.

* Page of 33 A.—Ed.

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arrest. In the present case we find that a witness was examined who proved that the accused were absconding, and from his evidence the Magistrate might most reasonably have inferred that there was no immediate prospect of their arrest. In the evidence as recorded by the Magistrate the witness actually said that the accused had absconded and that there was no prospect of arresting them and that action under sections 87 and 88 had been taken by the Court. In the passage we have quoted the learned Judge who delivered the judgment says:—"It is clear from the language of the section that the Court which records the proceedings under it must first of all record an order that in its opinion it has been proved....."

The section nowhere says that the Magistrate must record a finding. We wish to make it quite clear that in our opinion a Magistrate before recording evidence under section 512 ought to be satisfied that the accused is absconding and that there is no immediate prospect of his arrest, and it is certainly advisable that he should recite in his order that he finds this to be the case. However, in this case we find that the Magistrate had clear evidence that the accused were absconding, and evidence from which the Magistrate might reasonably infer that there was no immediate prospect of their arrest. In his order he expressly states that he is taking the evidence under section 512. The presumption is that the Magistrate did his duty and did not record the evidence under section 512 unlawfully. In our opinion the mere fact that the learned Magistrate did not recite a finding that there was no immediate prospect of the arrest of the accused does not render the evidence inadmissible. In the present case neither of the accused were very promptly arrested. One was only arrested in the present year and the other is still absconding. We think that the evidence was clearly admissible. Once we decide this point, we see no reason whatever to differ from the conclusion arrived at by the Court below. The evidence was believed at the original trial and there is no reason to doubt it. We dismiss the appeal.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL No. 49-B OF 1918.

June 7, 1918.

Present:—Mr. Kotwal, Offg. A. J. C.

SAYAD LAL—ACCUSED—APPELLANT

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 234, 239—Joint trial of several persons for separate offences, legality of—S. 239, applicability of.

The joint trial of several accused persons for two or more separate offences is illegal. [p. 483, col. 1.]

Section 234 of the Criminal Procedure Code applies only to offences committed by a single person. It is not applicable when several persons are tried jointly under section 239 of the Code. [p. 483, col. 1.]

Section 239 of the Criminal Procedure Code is the only section of the Code which refers to a trial of more persons than one jointly, but it does not authorise such trial for two or more distinct offences unless they form part of the same transaction or unless one is the actual offence and the other or others are offences of abetting or attempting that offence. [p. 483, col. 1.]

Appeal against the judgment and finding and sentence of the Sub-Divisional Magistrate, Akola, in Criminal Case No. 10 of 1918, dated the 10th April 1918.

The Hon'ble Mr. G. P. Dick, for the Crown.

JUDGMENT.—Two separate Challans were filed by the Police against 3 persons named Chand Khan, Sayad Lal and Umar Khan charging them with offences under section 457, Indian Penal Code, in the houses of Govind Rao (P. W. No. 6) and Draupadibai (P. W. No. 7) respectively. The offence in Govind Rao's house is said to have been committed on some day between the 12th and 19th February 1918 and in Draupadibai's house between the 16th and 19th of the same month. Two separate cases were registered in the Magistrate's Court, No. 10 in respect of the offence in Govind Rao's house and No. 11 in respect of that in Draupadibai's house.

The order-sheets of the 8th March 1918 in the two cases are as follows:—

"Case No. 11.

"All the accused are present. The offence of this case and the one of case No. 10 are of one and the same kind and against the same accused. The two offences will, therefore, be tried together under section 234, Criminal Procedure Code. For

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further orders see order sheet of case No. 10."

"Case No. 10.

"Accused produced. Public Prosecutor represents the Crown. Mr. Sirsalkar defends Chand Khan and Mr. Pingle and Mr. Pande defend Sayad Lal. Five witnesses for prosecution examined and discharged. It is now 5-15 p. m. The remaining witnesses will be bound in Rs. 10 each. This case and the offence mentioned in Case No. 11 are of the same kind and against the same accused alleged to have been committed within one year. The two cases will, therefore, be tried together under section 234, Criminal Procedure Code. Accused remanded to jail custody. Case for 14th March 1918. The articles in evidence be kept with Nazar. On and after this date all the proceedings are recorded in case No. 10 only."

After the prosecution case was over Chand Khan was examined and discharged, and charges with two heads in respect of two offences were framed against Sayad Lal and Umar Khan. These two have been convicted. Sayad Lal has been sentenced to suffer rigorous imprisonment for five years and Umar Khan to 2 1/2 years for each offence. The two sentences on each accused have been ordered to run concurrently. The two accused have filed separate appeals and this judgment will govern both.

It is clear that the trial of the three accused jointly for two separate offences is illegal and the convictions must be set aside. The Magistrate purports to act under section 234, Criminal Procedure Code, but that section applies only to offences committed by a single person. It is not applicable when several persons are tried jointly under section 239. [See *Budhi-Sheik v. Emperor* - (1) and *Emperor v. Balwantsingh* (2).] Section 239 is the only section which refers to a trial of more than one person jointly, but it does not authorise such trial for two or more distinct offences unless they form part of the same transaction or unless one is the actual offence and the other or others are offences of abetting or attempting that offence. The two offences in the present case are not, and the learned Magistrate

has rightly not treated them as, committed in the same transaction.

I set aside the convictions of Sayad Lal and Umar Khan. It will be open to the prosecution to take such further proceedings against the accused as they may think proper, and in this connection I would draw attention to the remarks at pages 77 and 78 in *Emperor v. Balwant Singh* (2) cited above as to the courses open to the prosecution if they wish to take further proceedings.

Convictions set aside.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 446 OF 1918.

August 8, 1918.

Present:—Mr. Justice Piggott.

MAHADEO SINGH AND OTHERS—ACCUSED—
APPLICANTS
versus

EMPEROR—OPPOSITE PARTY.

Defence of India Act (IV of 1915), s. 2—Rules framed under Act, rr. 23, 29—Criminal Procedure Code (Act V of 1898), ss. 191, 200—Dissuading or attempting to dissuade person from entering military service—Cognizance of offence—Statement by complainant—Procedure.

In view of the exceptional powers conferred upon the authorities by the Defence of India Act and by the rules framed under it, the Courts are entitled to require strict compliance with all the provisions introduced into the rules by way of safeguarding the liberty of the subject. [p. 484, col. 2.]

M., a tenant of the accused, was recruited in the army and received a certain sum in advance. About a month afterwards the accused brought a suit against M. for arrears of rent. M. appeared before the District Magistrate and made a statement which was neither made on oath nor signed. The District Magistrate thereupon directed warrants without bail to issue for the arrest of the accused and took up the case himself. The accused were charged with having contravened rule 23 of the rules framed under the Defence of India Act and were convicted and sentenced under rule 29:

Held, (1) that the proceedings in the Court of the District Magistrate were irregular in their initiation, inasmuch as the Magistrate, if he conceived himself to be taking cognizance of the offence upon information received from M. within the meaning of section 190 (c) of the Criminal Procedure Code, was bound to offer the accused the option of being tried by another Court as provided by section 191 of the Code and if he treated the statement made by M. as the complaint in the case, was bound before

(1) 33 C. 292; 10 C. W. N. 32; 3 Cr. L. J. 126.

(2) 4 N. L. R. 71 at p. 73; 8 Cr. L. J. 11.

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issuing warrants to take from M. a sworn declaration that he had spoken the truth and to obtain the signature of M. to that declaration; [p. 484, col. 2.]

(*) that the facts alleged in the charge having occurred after M. had joined the army, rule 23 of the rules framed under the Defence of India Act was not applicable to the case, inasmuch as a person cannot be said to dissuade or to attempt to dissuade another from doing something which the latter has already done. [p. 485, col. 1.]

Criminal revision from an order of the Additional Sessions Judge, Allahabad, at Mirzapur.

Mr. A. P. Dube, for the Applicants.

Mr. R. Malcomson (Assistant Government Advocate), for the Crown.

JUDGMENT.—In this case Mahadeo Singh, Mahabir Singh, Harnarain Singh and Diprarain Singh, Thakurs, residents of Jhingurpatti in the district of Mirzapur, have been sentenced by the District Magistrate of Mirzapur to undergo imprisonment for a period of twenty months each under rule 29 of the rules framed under section 2 of the Defence of India Act, No. IV of 1915. The rule which they are alleged to have contravened is No. 23, which runs as follows:—"No person shall dissuade, or attempt to dissuade, any person from entering the Military or Police Service of His Majesty." The facts of the case, which I find to be established beyond question, are that Musai Pasi of Jhingurpatti is a sub-tenant of two of the accused persons, namely, Mahadeo Singh and Harnarain Singh, and that he has also worked as a ploughman for all the accused. On March the 4th, 1918, Musai was recruited in the Bandel corps for service in Mesopotamia and received an advance of Rs. 25. On April the 2nd, 1918, Mahadeo Singh and Harnarain Singh sued Musai, as their sub-tenant, for arrears of rent for the year 1324 Fasli, amounting to Rs. 30-15 0 plus interest. On the 8th of April 1918, Musai, having previously made some statement to the Recruiting Officer, Mr. Branford, appeared before the District Magistrate of Mirzapur. The record of this case commences with a statement recorded in English by the District Magistrate as made to him by Musai on that date. The statement is not made on oath and is not signed by Musai. Then follows an order in the District Magistrate's hand, and signed by him, directing warrants without bail to issue for the arrest of these four accused persons and an order for the summoning of certain

witnesses. The District Magistrate took up the case himself on the 22nd of April 1918. He framed a charge on the 13th of May and he convicted and sentenced the accused on the 15th of May, after having heard their defence witnesses. The conviction and sentence have been affirmed by the Additional Sessions Judge on appeal and the matter has been brought before this Court in the exercise of its revisional jurisdiction.

The proceedings in the Court of the District Magistrate were certainly irregular in their initiation. If the Magistrate conceived himself to be taking cognizance of this offence upon information received from Musai within the meaning of section 190 (c) of the Criminal Procedure Code, he was bound to offer the accused persons the option of being tried by another Court, as provided by section 191 of the same Code. If, on the other hand, the statement of Musai with which this record opens is the complaint in the case, upon which the District Magistrate proceeded to take cognizance, he was bound, before issuing warrants, to take from Musai a sworn declaration that he had spoken the truth in the complaint made by him and to have obtained the signature of Musai to that sworn declaration. A further question has been raised as to the application in this case of rule No. 30 of the rules in question. In view of the exceptional powers conferred upon the authorities by the Statute, and by the rules under consideration, I think that the Courts are entitled to require strict compliance with all the provisions introduced into the rules by way of safeguarding the liberty of the subject. The District Magistrate ought, strictly speaking, as soon as he decided that action was called for on the information which Musai had given, to have recorded a formal proceeding, intimating his opinion that the initiation of a prosecution against the persons implicated in Musai's statement was advisable. If he had done this, and had also made up his mind definitely whether he was taking cognizance of the matter upon a complaint, or merely upon information received, he would probably have gone on to consider, whether the interests of justice required that he should try the case himself. I do not say that I should necessarily

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have interfered in this matter if I had no other exception to take to the proceedings in the Courts below than the irregularity of their initiation. As a matter of fact, however, it seems to me that these proceedings have been misconceived in essential particulars. The rule under which the applicants have been convicted is not the rule applicable to the facts stated in the charge. Musai had enlisted, that is to say, had entered the Military Service of His Majesty, on March the 4th, 1918, and all the facts alleged in the charge are subsequent to that date. It is contrary to the genius of the English language to hold that one person can "dissuade or attempt to dissuade" another from doing something which the latter has already done. It is arguable that the Courts below might have acted, or may have conceived themselves to be acting, upon a statement made by Musai, to the effect that threats had been addressed to him prior to his enlistment with a view to dissuading him from taking that course. It also seems to have been present to the mind of the District Magistrate, and of the Additional Sessions Judge, that the accused might be liable to conviction on the ground that they had dealt with Musai in a certain manner with the object, not of dissuading Musai himself from enlisting, but of discouraging other persons from following his example. Finally, it may be argued that the accused specified in the charge might under certain circumstances be held punishable under rule 24, though not under rule 23, if the Court were satisfied that they had attempted to induce Musai to fail in his duty as a person in the Military Service of His Majesty by refusing to fulfil the engagement which he had taken upon himself at his enlistment. I mention these points to show that they have been considered by me before disposing of the case; but I think it sufficient to say that if the accused had been tried on charges suggested by any one of the three lines of argument above set forth, not only would the charge have required to be differently framed, but also the prosecution would have been faced with other and serious difficulties before any Court could have felt justified in holding the suggested

offences, or any of them, proved by the evidence on the record. It has, of course, been necessary for me to subject the entire record to a careful examination before I could form any final opinion about the merits of this application. I cannot help remarking that in the reasoning which has satisfied both the Courts below that the evidence on the record, which is certainly scanty and is admittedly discrepant in some important particulars, was sufficient to prove certain facts against the accused persons, there seems to me one fairly obvious and somewhat serious flaw. Most of the points suggested in favour of the accused persons have been put aside in the Courts below, with the remark that there seems no adequate motive for Musai in bringing this accusation if it is not true, or at least founded on fact. I take it on myself to suggest that a very possible explanation of all the evidence on the record, and one which meets most of the difficulties suggested on both sides, would be that Mahadeo Singh and Harnarain Singh thought themselves justified in bringing pressure to bear upon Musai to pay up his arrears of rent before he left the country, and that Musai strongly resented their doing so. There is only one other point on which I think it fair to say a word or two. Both the Courts below have taken it to be proved that the four accused persons first succeeded in obtaining by threats of violence from Musai's wife a sum of Rs. 25 on account of the arrears of rent due to them, and that subsequently Mahadeo Singh and Harnarain Singh sued Musai for arrears of rent without giving him any credit for this payment of Rs. 25. If this were proved by the evidence, the accused, or at least Mahadeo Singh and Harnarain Singh, would deserve to be prosecuted for an offence punishable under section 209 of the Indian Penal Code, and it might be my duty to go further into the matter from this point of view. It seems to me, however, that the evidence on which the Courts below have found that Musai's wife actually handed over Rs. 25 to the accused persons is of the slenderest, and I have ascertained, by going a little outside the record, a fact which the accused persons should have taken the

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trouble to have brought upon this record, namely, that Musai did not defend the suit for arrears of rent and made no attempt to prove that the major portion of the claim had been satisfied by a payment of Rs. 25 obtained by Mahadeo Singh and Harnarain Singh from his wife. In my opinion, therefore, it is useless to pursue this matter further. The conduct of the accused persons was not particularly creditable to them, and may have been worse than anything that appears to be clearly proved by the record, but they have undergone very nearly three months' rigorous imprisonment in consequence, and the District Magistrate may perhaps feel that, whatever order this Court may now pass, the proceedings instituted by him have served a useful purpose. I do not wish to say anything to deprive him of that satisfaction. On the contrary, I think it fair to say that I fully recognise the fact that he acted in all good faith in the public interests. The conclusion I come to is that the four applicants have been convicted on a charge which is not supported by the evidence on the record and which is in fact bad in law, inasmuch as the facts alleged therein did not amount to an offence punishable under the rule therein quoted. Any further examination which I have made of the record and any further comments which I have passed on the evidence, are merely directed towards the question of the propriety or otherwise of ordering further proceedings to be taken after setting aside this conviction. The remarks which I have made are, I think, sufficient to explain my reasons for contenting myself with quashing these proceedings, without passing any further order. The result is that I set aside the conviction and sentence in this case, acquit the four applicants of the offence charged, and direct that they be forthwith released.

Application allowed.

PUNJAB CHIEF COURT.

CRIMINAL APPEAL No. 425 of 1918.

September 27, 1918.

Present:—Mr. Justice Scott Smith and
Mr. Justice Broadway.

EMPEROR—PROSECUTOR—APPELLANT

versus

RALLA SINGH—ACCUSED—

RESPONDENT.

Arms Act (XI of 1876), ss. 4, 19—"Arms," what are.

The definition of the expression "arms" as given in the Arms Act is not, and is not intended to be exhaustive, and the true meaning of the term must be arrived at by consideration of the circumstances in each case. [p. 487, col. 1.]

Neither the length, breadth or the form of the blade of a weapon, nor the handle, afford any certain test of its classification as "arms." Whatever can be used as an instrument of attack or defence and is not an ordinary implement for domestic purposes falls within the purview of the Act. [p. 487, cols. 1 & 2.]

Appeal from the order of the Magistrate, 1st Class, Gujranwala, dated the 14th January 1918.

Mr. C. Bevan Petman (Government Advocate), for the Appellant.

JUDGMENT.—The facts of the case out of which this appeal has arisen are as follows:—On the night of the 21st/22nd of April 1917, Ali Muhammad, Sub-Inspector of the Muridke Police Station, was patrolling with certain Zaildars, Lamberdars and others. On nearing the Serai at Mauza Fatteh Rehan certain persons were seen coming out of the Serai and running away. They were called upon to stop but instead of doing so increased their speed. They were pursued and two of them were surrounded and put up a fight, calling out to one of their companions, Ralla Singh by name, to come to their assistance. This man returned with what appeared to be a *dang* in his hand. The Sub-Inspector thinking that the *dang* looked very like a *chhavi* called upon him to stop. Instead of doing so, however, he moved still nearer in the direction of the Sub-Inspector, who thereupon fired a pistol at him hitting him in the hands and thigh. Ralla Singh fell and was captured, when he was found to be in possession of what is described as a *chhavi* similar to a *takwa*, vide Exhibit P. C. In due course Ralla Singh was tried for an offence under section 457/511, Indian Penal Code, in connection with the breaking of a lock in a *kothri* of the Serai, and

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in the same trial was charged under section 19 of the Indian Arms Act for possessing a *chhavi* without a license. The learned Magistrate convicted him of an offence under section 457-511, Indian Penal Code, and sentenced him to two years' rigorous imprisonment, including three months' solitary confinement. He held, however, that the weapon with which he was armed was not a *chhavi* as defined in *Gahna v. Emperor* (1) and was not an arm within the meaning of the Indian Arms Act, and, therefore, acquitted him on the charge under section 19 of the said Act.

Against this acquittal the Local Government has preferred this appeal and the learned Government Advocate has urged that the instrument or weapon in respect of which the charge had been framed fell within the meaning of "arms" as defined in the Arms Act. Mr. Petman drew our attention to *Crown v. Santa Singh* (2), in which it was held, by a Division Bench of this Court, that the definition of the expression "arms" as given in the Arms Act was not, and was not intended to be, exhaustive and that the true meaning of the term must be arrived at by consideration of the circumstances in each case. This ruling was approved of in *Empress v. Kesar Singh* (3). In *Emperor v. Satish Chandra Roy* (4) it was held that neither the length, breadth or the form of the blade of a weapon, nor the handle, afford, any certain test of its classification as "arms." Whatever can be used as an instrument of attack or defence, and is not an ordinary implement for domestic purposes, falls within the purview of the Act. With these decisions we agree.

There is on the record a full size sketch of the instrument which was undoubtedly found in possession of Ralla Singh when he was arrested after he had been wounded. This sketch shews that the instrument has a handle 4 feet, 8 inches long, and a head which is not the ordinary shape of a *chhavi*. This head weighs 1 seer and $2\frac{1}{2}$ *chhataks* and is removable from its handle.

(1) 24 Ind. Cas. 594; 33 P. L. R. 1914; 1 P. W. R. 1914 Cr.; 15 Cr. L. J. 506.

(2) 16 P. R. 1900 Cr.

(3) 20 P. R. 1900 Cr.; 33 P. L. R. 1901.

(4) 34 C. 749; 6 C. L. J. 751; 11 C. W. N. 971; 6 Cr. L. J. 227.

The head or blade is similar in shape to an axe head but has an elongation of the head downwards towards the handle ending in a somewhat blunt point. It is clear that it cannot be regarded as an ordinary axe head; nor have we ever seen an axe with a handle of this length. There can be no doubt that this instrument can be used as a weapon of offence or defence and so far as we are aware it is not ordinarily used as an agricultural implement or for domestic purposes. As has been stated above, the definition of "arms" in the Arms Act is not exhaustive and it is immaterial whether it can be described as a *chhavi* or not. We have no hesitation in holding that the instrument in question falls within the meaning of the word "arms" as used in the Indian Arms Act and renders its possessor amenable to the provisions of that Act. The circumstances in which it was found with Ralla Singh leave no doubt as to the object with which he had it.

We accordingly accept this appeal and convict Ralla Singh, son of Mewa Singh, of an offence under section 19 of the Indian Arms Act and sentence him to two years' rigorous imprisonment.

Appeal accepted.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL No. 52-B OF 1918.

June 19, 1918.

Present :—Mr. Batten, A. J. C., and Mr. Kotwal, A. J. C.

Musammât TANI—ACCUSED—APPELLANT
versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 34, object of—Accused, examination of—Accused, duty of—Procedure

The provisions of section 342 of the Criminal Procedure Code are mandatory and non-compliance with them vitiates the trial. [p. 491, col. 1.]

The object of section 342, Criminal Procedure Code, is (1), to communicate to the accused, to the full extent that may be found necessary in each particular case, what is alleged against him in the evidence for the prosecution;

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(2) to ascertain from him what explanation or defence, in law or in fact, he wishes to put forward in respect thereof. [p. 490, col. 1.]

Where the accused is an ignorant person who cannot be expected to know or understand what particular parts of the evidence are, or are likely to be considered by the Court to be, against him, it is necessary that his attention should be directed to all the vital parts of the evidence against him. [p. 490, col. 2.]

It is not a sufficient compliance with the provisions of section 342 of the Criminal Procedure Code to ask an accused the general question: "Have you anything more to say in this case or?" "you have heard the prosecution witnesses against you, what have you to say?" [p. 490, col. 2.]

Appeal from the judgment of the Sessions Judge, East Berar, dated the 11th May 1918, in Sessions Trial No. 5 of 1918, on a charge under section 302 of the Indian Penal Code and sentence of death passed on 11th May 1918.

Messrs. G. R. Pradhan and O. B. Parakh, for the Appellant.

The Hon'ble Mr. G. P. Dick, for the Crown.

JUDGMENT.—The appellant Musammât Tani has been convicted and sentenced to death for the murder of Musammât Jakhai, her mother-in-law, and Musammât Bulki, a cousin of her husband, on the 27th March 1918 by administering *dhatura* poison.

Tani lived in Mouza Dhamangaon, but as that village was infected with plague she was at the time of the alleged crime living with her husband Venkati (P. W. No. 6) and Musammât Jakhai in a hut outside the village. Musammât Bulki occupied an adjacent hut with her mother Poonji (P. W. No. 8) and her two daughters, the elder of whom is Musammât Jani, (P. W. No. 7).

The 27th March 1918 was *shimga* or Holi day. About an hour after Jakhai had taken her evening meal she had an attack of giddiness and pain in her stomach which became distended, and she felt difficulty in speaking and began to snatch at her clothes and the ground on which she lay: later she became speechless and unconscious and died shortly after midnight. A short time before Jakhai died, Bulki who had taken her meal at the same time as Jakhai and had eaten some of the *puranpoli* which formed part of Jakhai's meal also developed similar symp-

toms and died a little after sunrise on the 28th March 1918.

The following questions arise for consideration:—

What was the cause of the sudden illness and death of Jakhai and Bulki?

If poison, who administered it and how?

P. W. No. 6 and P. W. No. 7 describe the symptoms exhibited by the two women before they died. There can be no doubt about this part of their evidence; they could not have invented the symptoms. P. W. No. 5, the Sub-Assistant Surgeon, says that these symptoms are symptoms of *dhatura* poisoning. Chemical examination showed the existence of a substance having the properties of *dhatura* in the stomach viscera of Jakhai and in the stains on her *choli* and the *tudhan* on which she was lying after she was taken ill. Traces of arsenic were also found in the stomach viscera of both Jakhai and Bulki. There is no reason to discredit this evidence and it must be held that the deaths of these women were due principally, at any rate, to *dhatura* poison.

The Investigating Police Officer had from the very beginning suspected *dhatura* poison as the probable cause of the deaths and had worked for a clue upon that suspicion. The viscera of the two deceased women were not forwarded to the Chemical Examiner until the case came up for hearing before the Magistrate and the report of the examination reached the Sessions Court after the trial had begun on the 6th May 1918. The Police had thus no information about the existence of arsenic in the viscera before their investigation was closed, otherwise they would have sought for some clue with regard to the arsenic also. It is regrettable that under the present arrangements as to chemical examinations and the rules as to transmission of articles to the Chemical Examiner, it is practically impossible for the Police to have early information as regards the results of chemical examination. The Officiating Sessions Judge has also omitted to question the Sub Assistant Surgeon examined as P. W. No. 5 in his Court, whether his *post mortem* examination disclosed any indication of arsenical poisoning or whether any of the symptoms described by the witness could be ascribed to such poisoning. Probably

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the deaths were due in a minor degree to the effect of arsenic also.

The evidence on which the prosecution rely to prove that the poison was administered by the appellant is as follows. P. W. No. 7, Jani's statement is to the effect that on the evening of the 27th March 1918, while *Musammatt Jakhai* was sitting in Bulki's hut, the appellant brought food for herself and Jakhai in two separate plates. Bulki also brought her food in a plate and the three sat outside Bulki's hut to take their meals. Some *puranpoli* formed part of the food in Jakhai's plate. Jakhai, while eating the *puranpoli*, remarked that it tasted bitter. The appellant explained that it was due to the *puran* (the sweetened *dal* filling) having been burnt in the making. Bulki ate some of the *puranpoli* from Jakhai's plate. The evidence of Poonji (P. W. No. 8) to the same effect may be left out of consideration as it is admittedly hearsay.

P. W. No. 6 (Venkati), P. W. No. 7 (Jani) and P. W. No. 8 (Poonji) were questioned with a view to prove that it was the appellant who had cooked the food brought by her for Jakhai and herself. Their evidence is not of much value, as none of them states that he or she saw the appellant cooking the food.

P. W. No. 1 (the investigating Police Officer), P. W. No. 4 (Laxman Patwari), P. W. No. 9 (Shanker) and P. W. No. 10 (Raghupat Patwari) state that the appellant pointed out a rubbish heap in which she had concealed some capsules of *dhatūra* fruits and produced them from the heap in their presence.

Ganpat, P. W. No. 2, states that on the Sunday preceding Holi day (Wednesday) the appellant had asked him where she could get *dhatūra* leaves for application to her throat which was paining. We think it unlikely that the appellant did not know where *dhatūra* plants were to be found in the village, and it appears to us improbable that she questioned this witness as he deposed she did.

The accused was examined by the Committing Magistrate and the Sessions Judge, and we transcribe below both her examinations *in extenso*:

"Q. You have heard the prosecution witness against you: what have you to say? 01]

A. I know nothing about the allegations made out against me.

Q. Was *Musammatt Jakhai* related to you?

A. *Musammatt Jakhai* was my mother-in-law as well as my father's sister.

Q. Was she living with your husband?

A. She was living with me and my husband since I was married.

Q. Do you know how *Musammatt Jakhai* met with her death?

A. I don't know how Jakhai died.

Q. Who ordinarily cooks food for the inmates of your house?

A. Ordinarily I used to cook food but on festival days *Musammatt Jakhai* used to cook the food. On the occasion of the last *shimga* or Holi day *Musammatt Jakhai* had cooked the food. I had brought water from the well and supplied her fuel on the *shimga* day.

Q. Whether the deceased Jakhai used to quarrel with you?

A. No. She never quarrelled with me and she used to treat me properly. My husband used to quarrel with me.

Q. Do you know *Musammatt Bulki*?

A. Yes. She was my husband's cousin sister.

Q. Where did she live?

A. She used to live with her mother in a separate hut close to mine and in the same field in which we were living.

Q. Do you know how Bulki met with her death?

A. I do not know how she met with her death.

Q. Have you got anything more to say?

A. My mother-in-law used to treat me properly. When my husband left me for 2 years she brought me back from my parents. I have to say nothing more except that my husband and my aunt-in-law Poonji had suggested to me to say that I mixed *dhatūra* with the food, but in fact I did nothing and know nothing about it."

Before the Sessions Judge:

"Q. Is the statement made by you in the lower Court and now read out to you correct and is it true?

A. Yes, that statement is correct and true.

Q. What have you to say about the evidence of Jani and Ganpat that the *puranpoli* had a somewhat bitter taste and that

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you had gone out for *dhatura* seeds? Is it true that the three took their meals together?

A. Yes, what Jani said about myself, Bulki and Jakhai having taken food together on *shimga* evening in front of Bulki's hut is correct. There was no talk then about *puranpoli* having tasted bitter.

Q. Ganpat says that he saw you going to bring *dhatura* leaves. Is this true?

A. No. Ganpat speaks false. He never met me nor did I speak to him that I was going to bring *dhatura* leaves.

Q. What have you to say about the evidence for the prosecution that you used generally to quarrel with Jakhai and that there was a quarrel on the day previous to *shimga*?

A. There never has been a quarrel between her and myself.

Q. Can you say how Jakhai and Bulki died?

A. I do not know. My mother-in-law died and I was seated taking hold of her. I do not know how Bulki died. I was sitting near Jakhai at that time.

Q. Have you anything more to say in this case?

A. I have nothing else to say."

In our opinion the examination of the appellant has been defective and there has been no practical compliance with the provisions of section 342, Criminal Procedure Code, the object of which, as explained in *Emperor v. Katay Kisan* (1), is to

(1) communicate to the accused, to the full extent that may be found necessary in each particular case, what is alleged against him in the evidence for the prosecution; and

(2) ascertain from him what explanation or defence, in law or in fact, he wishes to put forward in respect thereof.

The most important part of the prosecution evidence is that of Jani, which is directed to proving the administration by the appellant of the food containing the poison. Jani's evidence shows that the appellant brought the food in two plates, she gave one plate to Jakhai, and Jakhai and Bulki who ate the food from that plate died. She herself ate from the other plate and nothing happened to her. These circumstances are very much against the accused. It was necessary, therefore, in our

(1) 17 C. P. L. R. 113 at p. 118.

opinion to examine the accused and take her explanation with regard to them in detail. The appellant should have been asked the following questions or such of them as became necessary in view of her answers to previous questions: Whether she brought the food for herself and Jakhai; Whether she brought it in two separate plates; whether she gave one plate to Jakhai; whether there was *puranpoli* in the plate; whether Jakhai and Bulki ate the *puranpoli* and other food from that plate; whether she herself ate from the other plate; whether there was *puranpoli* in that plate and whether she ate that *puranpoli*. She should have been told that under the circumstances stated above presumptions arose that Jakhai and Bulki must have died of eating the food in the plate brought by her for Jakhai, and that the poison must have been put into the food by her, and she should have been asked whether she had any explanation to offer in this connection or as to why Jakhai and Bulki died under these circumstances while nothing happened to herself.

It is contended by the learned Standing Counsel for the Crown that when an accused person is asked the general question: "Have you anything more to say in this case", as by the Sessions Judge in the present case, or "You have heard the prosecution witnesses against you, what have you to say", as by the Committing Magistrate, there is a sufficient compliance with the provisions of section 342, Criminal Procedure Code, as it is open to the accused in answer to such questions to explain all matters which appear to be against him in the evidence, even though his attention has not been drawn to them by specific questions. It is possible that under certain circumstances—as in the case of an accused person of advanced education and information—such a question may be deemed a sufficient compliance with the provisions of section 342 but in this case, as in most cases, the accused is an ignorant person who cannot be expected to know or understand what particular parts of the evidence are, or are likely to be considered by the Court to be, against her: and it was necessary that her attention should have been directed to all the vital parts of the evidence against her. Even where an accused person

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is capable of understanding what circumstances appear against him, when several details of the evidence form the subject of this examination he may be led to think that other details on which he has not been examined have not been considered to be of any importance by the Court, and he may think it unnecessary to offer any explanation in respect thereof. We consider that the provisions of section 342 are mandatory and non-compliance with them vitiates the trial; *Ghulla v. Emperor* (2) *Emperor v. Savalya Atma Pasty* (3). We set aside the conviction and sentence and direct a re-trial.

The Sub Assistant Surgeon should now be questioned in connection with the arsenic found in the viscera of the two deceased women.

In concluding this judgment we express our strong disapproval of the course followed by the investigating Police Officer in connection with the arrest of the accused in this case. He commenced the investigation at 3 P. M. on the 28th March 1918 and closed it for the day at 12 midnight. All this time was taken up with the examination of witnesses in connection with the inquest on Jakhai's body. At the end of the record of this day's proceeding, the Investigating Police Officer writes:

"Suspicion which arises is that death was due to the poison caused by *dhatūra* seeds."

The examination of the witnesses, one of whom was *Musammāt Tani*, shows that he suspected her of having administered the poison. He then commenced the inquest on Bulki and examined Tani a second time. This inquest and the investigation were closed at 3 A. M. on the 29th March 1918 with these remarks:—

"As the woman's death has been caused with *dhatūra* seeds I sent the corpse to *Morai* for *post mortem* examination."

It is clear that the Investigating Officer had the fullest justification for arresting Tani at 3 A. M. on the 29th March 1918. So far as he was concerned there was no doubt left that Tani had committed the offence. She was, however, not formally arrested till 6-30 P. M. on the 31st March 1918. Why she was not arrested earlier

appears from the case diary No. 2 for 29th March 1918. The Investigating Officer writes therein at page 47:

"I will not register the crime under section 302, Indian Penal Code, until I get a reply from the Sub Assistant Surgeon; and as the remand of Police custody would not be obtained consequent on the arrest of Tani, but another of jail custody would be granted, I, therefore, postponed her arrest on the ground that it may not impede all those necessary particulars which are to come to light in future."

It is again clear from this that the Investigating Officer then considered that Tani should be arrested, but he refrained from doing what he knew he should have done because, if he did so, she would be removed from his custody. If he had arrested the accused and thought it necessary to have her in his custody for a longer time than the 24 hours prescribed by section 61, it was open to him to get an order under section 167 from the Magistrate for further detention in Police custody, but he would have had to give reasons for asking for such an order. Apparently he considered that he had none. In these circumstances we consider that his deliberate failure to make a formal arrest was nothing but a circumvention of the salutary provisions of the Criminal Procedure Code with regard to the custody of accused persons by the Police. We purposely use the expression "formal arrest" because it is difficult to believe that Tani was free from all restraint, or that she was not practically under arrest before 6-30 P. M. on the 31st March 1918, when she is recorded to have been arrested. On the 29th March 1918 the investigating Police Officer left Dhamangaon at 9 A. M.; and went to Rohankhed to investigate into another case, and returned to Dhamangaon at 3 P. M. Had he left Tani free during that time? In view of the evidence available to him at 3 A. M. on the 29th March 1918, he would have been very wrong if he had allowed her after that time to be free to go about as she pleased.

*Conviction set aside.
Retrial ordered.*

(2) 44 Ind. Cas. 184; 1 P. R. 1918 Cr.; 19 Cr. L. J. 280.

(3) 9 B. Cr. L. R. 356; 5 Cr. L. J. 332.

RAMZAN v. EMPEROR.

PUNJAB CHIEF COURT.

CRIMINAL APPEAL NO. 225 OF 1918.

May 30, 1918.

Present:—Mr. Justice Chevis and Mr. Justice Martineau.

RAMZAN—ACCUSED—APPELLANT
versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 84—Unsoundness of mind, what amounts to—Offence committed under impulse.

Under section 84, Indian Penal Code, a person is exempt from criminal liability only if by reason of unsoundness of mind he is incapable of knowing the nature of the act done by him or that he is doing what is either wrong or contrary to law. It must, in other words, be shown that the cognitive faculties of the accused had been impaired by the unsoundness of his mind.

Appeal from the order of the Sessions Judge, Dera Ghazi-Khan, dated the 17th December 1917.

JUDGMENT.—Ramzan has been convicted of the murder of his wife, *Musammât Zohran*, and sentenced to transportation for life. He appeals. It is admitted that Ramzan killed his wife, inflicting six wounds with an axe. It appears that a neighbour named Gulu heard cries coming from Ramzan's house and on looking through a window saw Ramzan striking his wife with an axe. Information was sent to the *Zaildar*, who came to the spot and had the injured woman and the appellant sent to Kot Mithan, where *Musammât Zohran* died the next day from the injuries she had received. Before her death her statement was recorded, in which she said that she had been massaging her husband's head, that she then spread his bedding for him, that she put a cooking pot on the fire and that she was talking to her husband when he suddenly attacked her with an axe which was lying by him. She said that he had done this in a fit of insanity. The evidence of the Assistant Surgeon shows that the appellant exhibited no signs of insanity during the time in which he was kept under observation in the jail. There is, however, proof that he had been suffering from melancholia for four or five years, that he had been under the treatment of a Hakim named Muhammad Alam and got well, that he had a fresh attack two or three months before the occurrence and again went to Muhammad Alam for treatment and that

he returned home about three days before the occurrence. Ramzan appears to have been on good terms with his wife and appears to have killed her under a sudden homicidal impulse without any sane motive.

Dealing with the question of law the learned Sessions Judge has held that the existence of such an impulse will not suffice to absolve the appellant from criminal liability, and that section 84, Indian Penal Code, will not apply to the case, unless it is shown that the appellant's cognitive faculties had been impaired by the unsoundness of his mind. This is a correct view of law and is supported by *Queen Empress v. Kader Nasyer Shah* (1), to which the lower Court has referred. Under section 84, Indian Penal Code, a person is exempt from criminal liability only if by reason of unsoundness of mind he is incapable of knowing the nature of the act done by him or that he is doing what is either wrong or contrary to law. In the present case, as the learned Sessions Judge has pointed out, there is no evidence to show that Ramzan was subject to any delusions, or that when he attacked his wife he was ignorant of the nature of his act or did not know that he was doing what was wrong. On the contrary, it appears that after the commission of the crime he asked pardon for what he had done. The case is, therefore, not covered by section 84, Indian Penal Code, and we hold that Ramzan has been rightly convicted of murder and we dismiss the appeal. But having regard to the fact that he was suffering from mental derangement, we direct that the record be forwarded to His Honour the Lieutenant-Governor with our recommendation that the case be dealt with by the Local Government under section 401, Criminal Procedure Code, in such manner as it thinks fit.

Appeal dismissed.

(1) 23 C. 604; 12 Ind. Dec. (N. S.) 401.

GAJADHAR V. EMPEROR.

ALLAHABAD HIGH COURT.
CRIMINAL REVISION No. 604 OF 1918.

September 7, 1918.

Present:—Mr. Justice Tudball.

GAJADHAR—APPLICANT

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 195—Sanction for prosecution—Petty theft committed thirty-eight years previously, denial of—Sanction, whether should be granted.

Sanction was granted for the prosecution of the accused for perjury in respect of a statement made by him in which he had denied the fact of his having been convicted of petty theft thirty-eight years previously at the age of fourteen:

Held, that the fact which the accused had denied was not relevant to the trial before the Magistrate, and that, therefore, this was not a fit case in which sanction should have been granted.

Criminal revision from an order of the District Magistrate of Fatehpur.

Mr. E. A. Howard, for the Applicant.

Mr. Lalit Mohan Banerji (Government Pleader) for Mr. R. Malcolmson (Assistant Government Advocate), for the Crown.

JUDGMENT.—The facts of this case are as follows:—Some thirty-eight years ago the applicant Gajadhar was convicted on a charge of theft under section 380 of the Indian Penal Code and was sentenced to three months' rigorous imprisonment and a fine of Rs. 5. In the current year he made a complaint against the opposite party Haribua Chamar. In cross-examination he was asked "whether he had been convicted in Khaki Baba's theft case and sentenced to three months' rigorous imprisonment. His reply was no." Haribua Chamar applied to the Magistrate for sanction to prosecute Gajadhar for perjury, in that he had falsely stated that he had not been sentenced to three months' rigorous imprisonment in Khaki Baba's theft case. That sanction has been granted and it was upheld on appeal by the District Magistrate. Gajadhar has come to this Court on revision. It has been shown by the production of a public register that Gajadhar was convicted in a theft case some thirty-eight years ago and sentenced to three months' rigorous imprisonment and a fine. The record has been destroyed and there is apparently nothing to show who was the complainant in that case, and as the matter stands the register apparently does not prove that Gajadhar was sentenced to three months'

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rigorous imprisonment in Khaki Baba's theft case. Even supposing, however, that he did falsely deny this conviction, it is obvious that the Magistrate trying the case ought, in simple justice, to have refused to allow such a question to be put to the witness. The fact that at the age of fourteen the man was convicted of petty theft (while nothing has been shown against him in respect to the intervening years) was quite irrelevant to the trial before the Magistrate. Such a conviction would not be considered by any Court even if Gajadhar had been upon his trial for a subsequent offence. Nor is it fair or just to throw into a man's teeth a petty theft committed by him when he was but a boy. It is difficult to understand how any Magistrate could grant sanction to a private person to prosecute another in circumstances like this, and it is impossible for me to understand the frame of mind of the District Magistrate when he upheld such an order on appeal. It would be obviously persecution, not prosecution, to allow any such trial to go on. I allow the application. I set aside the order of the Court below.

Application allowed.

PUNJAB CHIEF COURT.

CRIMINAL APPEAL No. 464 OF 1918.

November 4, 1918.

Present:—Mr Justice Scott-Smith and Mr. Justice Martineau.

EMPEROR—APPELLANT

versus

Musammât RURI—RESPONDENT.

Penal Code (Act XLV of 1860), s. 494—Bigamy—Christian wife's conversion to Islam, whether dissolves marriage—Law applicable—Subsequent marriage, whether bigamous—Criminal Procedure Code (Act V of 1898), ss 198, 204, 215—Complaint at suggestion of Police—Issue of process to accused, whether necessary—Commitment to Sessions, whether can be quashed by Sessions Court.

A Christian marriage is not dissolved by the apostasy of one of the parties. [p. 496, col. 2.]

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Where, therefore, the accused, a Christian wife, renounced Christianity and embraced Islam and then married a Muhammadan:

Held, that according to the Christian marriage law, which was the law applicable to the case, the first marriage was not dissolved and, therefore, the subsequent marriage was bigamous. [p. 496, col. 1.]

Emperor v. Antony, 8 Ind. Cas. 572; 33 M. 371; 11 Cr. L. J. 682 and *Madras High Court Proceedings*, 8th November 1866; 3 M. H. C. R. App. 7, 1 Weir 561; distinguished.

Ram Kumari, *In the matter of*, 18 C. 264; 9 Ind. Dec. (N. S.) 176 and *Jamna Devi v. Mul Raj*, 49 P. R. 1907; 83 P. L. R. 1908; 110 P. W. R. 1907, followed.

The fact that the complaint in respect of an offence under section 494, Indian Penal Code, is written at the suggestion of the Police does not contravene the provisions of section 198 of the Criminal Procedure Code. [p. 496, col. 1.]

Where on a case being called the accused present themselves before the Magistrate, there is no necessity of issuing process to them under section 204 of the Criminal Procedure Code and the mere omission to issue process in such a case does not render the commitment of the accused to the Court of Session illegal. [p. 496, col. 1.]

A commitment once made can only be quashed by the High Court under section 215 of the Criminal Procedure Code. [p. 496, col. 1.]

Appeal from the order of the Sessions Judge, Lyallpur, dated the 10th May 1918; acquitting the respondent.

FACTS appear from the judgment.

Diwan Ram Lal (for the Government Advocate), for the Crown.—The learned Sessions Judge was wrong in saying that the proceedings were vitiated by irregularities committed by the Magistrate. In fact, there were no irregularities. The complaint was written by Labhu, the husband of the girl, and addressed to the District Magistrate. The fact that the Superintendent of Police made an endorsement on it made no difference. All that section 198 of the Criminal Procedure Code wanted, was that the person affected should be a willing party. Once the Court became seized of the case, having been satisfied that the complainant was willing to proceed, he was out of it altogether and the case could proceed without him.

As for the fact that the Magistrate did not take the statement of the complainant and did not issue process to the accused, there was no necessity for doing so as the accused was already before the Court. If any irregularities were committed at all, they were not material and were curable by section 537 read with section 215 of the Criminal Procedure Code.

The real point at issue was whether the

marriage of a Christian wife was dissolved by her embracing Islam. The parties were Christians and were governed by Christian Law, according to which a marriage was indissoluble except by death or divorce. The Christian wife could not be absolved of all liabilities towards her Christian husband by the mere fact of renouncing Christianity. *Ram Kumari*, *In the matter of* (1) held that a Hindu wife who embraced Islam and then married a Muhammadan was guilty of an offence under section 494, Indian Penal Code, because according to Hindu Law apostasy did not dissolve marriage. In *Emperor v. Lazar* (2) an Indian Christian who had a Christian wife living and who married a Hindu woman according to Hindu rites was held to have committed bigamy. Again *Jamna Devi v. Mul Raj* (3) laid down the principle that the rights of a Hindu husband were not affected in any way by the conversion to Islam of his wife and she could not, therefore, refuse to live with him. On the analogy of all these rulings, *Musammatt Ruri*'s first marriage was not dissolved by her conversion and, therefore, she was guilty of bigamy in marrying Fazal Din.

Dr. Shuja-ud-din (for Mr. Abdul Rashid), for the Respondent.—The procedure adopted by the Magistrate was illegal, because the offence is non-cognizable and not within the jurisdiction of any Court except upon complaint by the person aggrieved by such offence; section 198, Criminal Procedure Code. The person aggrieved in respect of bigamy is the husband of the woman and no other, *Deputy Legal Remembrancer v. Sarma Kahmi* (4). In this case the husband did not lodge any formal complaint. The petition written at the suggestion of the Superintendent of Police was not a "complaint" within the meaning of the Code. The accused was sent to the Magistrate in Police custody and the whole procedure was that of a *challan* case. The Police had no jurisdiction to

(1) 18 C. 264; 9 Ind. Dec. (N. S.) 176.

(2) 30 M. 550; 2 M. L. T. 345; 17 M. L. J. 476; 6 Cr. L. J. 338.

(3) 49 P. R. 1907; 83 P. L. R. 1908; 110 P. W. R. 1907.

(4) 26 C. 335; 13 Ind. Dec. (N. S.) 818.

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take cognizance of the matter: they ought to have directed the complainant to seek his remedy in a Court of law.

Again, the provisions of sections 200 and 204 of the Criminal Procedure Code were not complied with by the Magistrate. It was his duty to examine the complainant on oath and then to issue process to the accused. The provisions of the sections were obligatory in their nature and the learned Counsel for the Crown was wrong in saying that the word 'shall' in these sections did not carry the idea of mandate. The non-observance by the Magistrate of these sections was not a mere irregularity curable by section 537 of the Code, but an illegality going to the very root of the matter and vitiated the whole trial.

On the merits, too, the case for the accused was a strong one. In order to secure a conviction the prosecution must prove that the second marriage was void by reason of the subsistence of the first according to the law applicable to the accused. That was the important point. The law applicable is the personal law of the accused. The accused is a Muhammadan, therefore the law applicable is the Muhammadan Law, according to which a Christian's conversion to Islam has the effect of dissolving the Christian marriage. Ameer Ali's Muhammadan Law, 3rd Edition, Volume II, page 427. All that a convert is required to do is to give her husband, through the Qazi, the option of embracing Islam—if he agrees, well and good, otherwise the earlier marriage is dissolved. In this case the civil law of the land did not allow the accused to seek the help of a Court in asking the previous husband to adopt her new faith and the other side could at best urge that she ought to have waited for the period of *iddat*. The marriage contracted during *iddat* may at the most be irregular but was not illegal and the fact remained that conversion to Islam had dissolved the first marriage. The rulings cited by the other side were distinguishable, as they were all cases of conversion from Hinduism according to which a marriage was absolutely indissoluble—not even by death or divorce. The passage relied upon in *Emperor v. Lazar* (2) was *obiter dictum* and did not affect the point at issue. On the other hand the case

of *Emperor v. Antony* (5) was on all fours with the present case and following *Madras High Court Proceedings*, 8th November 1866 (6), it held that conversion dissolved marriage. The learned Sessions Judge was right in holding that the accused had committed no offence.

Diwan Ram Lal replied.

JUDGMENT.—This is an appeal by the Local Government from an order of the Sessions Judge of Lyallpur acquitting *Musammât Ruri* of an offence under section 494, Indian Penal Code.

The facts are not in dispute. *Musammât Ruri* was the wife of the complainant Labhu. They were Christian and were married according to the Christian rites. Some months ago *Musammât Ruri* left her aunt's house where she had been staying, became a Muhammadan, and married Fazl Din. She was found by Labhu at Fazl Din's house and taken to the *thana* at Gojra, where Fazl Din followed them. The Police sent the parties to the *thana* at Toba Tek Singh, and from there to the Superintendent of Police at Lyallpur. Labhu had a complaint written at the suggestion of the Superintendent, who forwarded it with a slip to the District Magistrate, and the latter sent the case to Mr. Phillips, Honorary Magistrate, who after holding an inquiry committed *Musammât Ruri* and Fazl Din to the Sessions Court for trial. The learned Sessions Judge acquitted both the accused. The grounds on which he has acquitted *Musammât Ruri*, with whose case alone we are concerned, are:—

(1) that the provisions of section 198, Criminal Procedure Code, were not complied with, the machinery of law having been set in motion, not by Labhu, but by the Police, who treated the case as though it were a cognizable one, the accused persons having been practically under custody from the time when they were taken to Toba Tek Singh,

(2) that the Magistrate did not follow the procedure laid down in sections 200 and 204 of the Code, and

(5) 8 Ind. Cas. 572; 33 M. 371; 11 Cr. L. J. 632.

(6) 3 M. H. C. R. App. 7; 1 Weir 561.

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(3) that according to the Muhammadan Law *Musammât Ruri's* marriage to Labhu was dissolved by her conversion to Islam, and she was, therefore, not guilty of bigamy in marrying Fazl Din.

With regard to the first point, we think it is clear that the Magistrate took cognizance of the case on the complaint of Labhu. The fact that it was at the suggestion of the Police that Labhu had the complaint written is immaterial. We hold that there has been no contravention of the provisions of section 193 of the Criminal Procedure Code.

As to the second point, the learned Sessions Judge is mistaken in thinking that the Committing Magistrate started the inquiry without examining the complainant. The record shows on the contrary that the first thing the Magistrate did when the case came before him was to take the statement of the complainant. As to the issuing of process to the accused under section 204, this was unnecessary as the accused were already present when the case came before the Magistrate. The procedure followed by the Magistrate was perfectly regular, and we may note that even if there had been such an irregularity as the learned Sessions Judge thinks there was in the magisterial inquiry, this would not have vitiated the trial in the Sessions Court. The commitment to that Court held good and under section 215 of the Code could not have been quashed except by this Court.

As regards the third point the lower Court has erred in applying the Muhammadan Law to the case. As Labhu and his wife were Christians and were married according to Christian rites, the law applicable is obviously the Christian marriage law, under which a marriage is indissoluble except by death or divorce.

Counsel for the respondent relies on *Emperor v. Antony* (5) and *Madras High Court Proceedings*, 8th November 1866 (6), but those were cases of a Hindu convert to Christianity marrying a Christian woman and then relapsing into Hinduism and marrying a Hindu woman, and the *ratio decidendi* was that a convert from Hinduism re-acquires his right to be a polygamist on ceasing to be a Christian and becoming a Hindu again.

Those rulings are not in point in the present case, which is one of a Christian woman (not alleged to be a convert) becoming a Muhammadan. The law not allowing a plurality of husbands, the respondent's second marriage, having been contracted while her first marriage subsisted, was invalid.

In *Ram Kumari*, *In the matter of* (1) and *Jamna Devi v. Mul Raj* (3) it has been held that a marriage between Hindus is not dissolved by one of the parties thereto embracing Islam, the matrimonial bond being regarded by the Hindu Law as indissoluble. Those authorities are applicable here, the principle being the same where the parties to the first marriage were Christians. Neither in the case of Christians nor in the case of Hindus is the marriage dissolved by the apostasy of one of the parties. *Musammât Ruri* cannot by renouncing the Christian religion cast off the obligations which she contracted at the time of her marriage to Labhu.

We hold, therefore, that *Musammât Ruri's* marriage to Labhu was not dissolved by her becoming a Muhammadan, and that by marrying Fazl Din she committed an offence under section 494, Indian Penal Code.

We accept the appeal and convict *Musammât Ruri* of an offence under that section, and sentence her to three months' simple imprisonment.

Appeal accepted.

UPENDRA NATH BHATTACHARJEE v. PRASANNA KUMAR GHOSH.

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 532 OF 1918.

August 6, 1918.

Present :—Mr. Justice Teunon and
Mr. Justice Cuming.UPENDRA NATH BHATTACHARJEE—
1ST PARTY—PETITIONER

versus

PRASANNA KUMAR GHOSH AND OTHERS
—2ND PARTY—OPPOSITE PARTIES.

Criminal Procedure Code (Act V of 1898), ss. 145, 146—Possession of fishery extending over several miles, dispute as to—Magistrate unable to satisfy himself as to possession of whole fishery—Procedure—Local investigation, whether necessary in every case.

In a proceeding under section 145, Criminal Procedure Code, regarding the possession of a fishery extending over several miles in length, if on the evidence the Magistrate is unable to satisfy himself as to the possession of the whole length in question, he should ascertain, so far as he can, the possession of some portion or portions thereof. As to the portion of which he is able to say "so and so is in possession" he should proceed under section 145, Criminal Procedure Code, and only as to the remainder should he proceed under section 46, Criminal Procedure Code. [p. 498, col. 2; p. 499, col. 1.]

There is no hard and fast rule of law that in every case under section 45, Criminal Procedure Code, a local investigation must be held, whether the parties desire it or not [p. 499, col. 1.]

A Magistrate who attaches the property in dispute under section 145, Criminal Procedure Code, without holding a local investigation, cannot be said to have exercised his jurisdiction erroneously. [p. 499, col. 1.]

In a proceeding under section 145, Criminal Procedure Code, the Magistrate attached the property in dispute under section 146, Criminal Procedure Code, on a finding arrived at by him which was expressed in these terms: "It is very difficult to come to a decision about the possession of the whole *jalkar* in dispute from the evidence adduced".

Held, that although "difficulty" was not synonymous with "impossibility" as contemplated by the second part of section 145 (1), Criminal Procedure Code, yet the judgment of the Magistrate might be read as meaning that on the evidence adduced, he was unable to satisfy himself as to which of the contending parties was in possession of the property in question. [p. 498, col. 2.]

FACTS appear from the judgment.

Mr. Gibbons, Advocate-General (with him Babus Manmatha Nath Mukherjee and Urukramdas Chakrabarty), for the Petitioner.—The question is whether the Court below has failed to exercise a jurisdiction vested in him by law in holding that, on the evidence adduced by the parties, it is difficult for him to come to a finding as to which party was in actual possession of

the disputed property within the two months next before the institution of the proceeding under section 145, Criminal Procedure Code. The section provides that the Magistrate can attach the disputed property under section 146, Criminal Procedure Code, only when he is unable to satisfy himself as to the possession of either party. As the learned Magistrate has not come to any finding according to the provisions of section 146 (1), Criminal Procedure Code, he is not competent to attach the property. Refers to *Somnath Madhavi, In re* (1) and *Sanganbasawa, In re* (2). The learned Magistrate says: "It is difficult for him to come to a decision as to the actual possession of either party." When he finds that difficulty in his way, he should have ordered a local enquiry before proceeding to attach the property under section 146. Refers to *Sheikh Mansar Ali v. Muliullah* (3) and *Sheobalak Rai v. Bhagwat Panday* (4). In a case like this where the Magistrate cannot come to a definite conclusion because it is difficult for him to do so, it is the duty of the Magistrate to surmount the difficulty by ordering a local investigation in the manner laid down in section 145, Criminal Procedure Code. If that course were taken, the report of the investigating officer, which would have been a very important piece of evidence in the case, would have enabled the learned Magistrate to come to a definite finding on the question of possession. The Magistrate has also found that on the evidence he could not come to a decision as to the possession of the whole of the *jalkar* which extends over six miles in length. If that were so, he should have at least made some attempt to ascertain which party was in possession of what portion of the *jalkar*.

Babu Dasarathi Sanyal (with him Babu Debendra Narayan Bhattacharjee), for the Opposite Parties.—The order of attachment made by the learned Magistrate under section 146 (1) of the Code of Criminal Procedure is perfectly right and proper and it cannot be said that he has in any way erred in the exercise of his jurisdiction.

(1) 6 Bom. L. R. 723; 1 Cr. L. J. 832.

(2) 7 Bom. L. R. 18; 2 Cr. L. J. 28.

(3) 12 C. W. N. 896; 8 Cr. L. J. 202.

(4) 15 Ind. Cas. 486; 40 C. 105; 16 C. W. N. 1052; 13 Cr. L. J. 486.

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The decision of the learned Magistrate cannot be said to have been vitiated by the mere fact that in ordering attachment the Magistrate has not quoted the wording of section 146 (1) of the Criminal Procedure Code. The order means in substance that having regard to the conflicting nature of oral and documentary evidence produced in the case he was unable to satisfy himself as to the possession of either party. The Magistrate having ordered the attachment of the property for the reason that he finds great difficulty in finding the possession of the *jalkar*, he cannot be said to have failed to exercise a jurisdiction vested in him by law. As regards the cases reported as *Somnath Madhavji, In re* (1) and *Sanganbasawa, In re* (2) referred to in support of the case for the petitioner, my submission is that those cases have no bearing at all upon this case because there the Magistrate without deciding the case upon possession decided the case upon the rights of the parties and so the High Court held that the Magistrate had no jurisdiction to do so. As regards the cases reported as *Sheikh Mansur Ali v. Matiullah* (3) and *Sheobalak Rai v. Bhagwat Panday* (4), I submit that the facts of those cases do not apply to this case and those cases, therefore, are no authorities for the proposition that upon the facts and under the circumstances of this case the Magistrate should have ordered a local investigation. In those cases regular procedure was not followed by the Magistrate and the parties were not allowed an opportunity to produce evidence, and so it was held that the Magistrate ought to have granted time to allow regular proceedings to be followed or he might have informed himself of the facts of the case either by local investigation under section 148, Criminal Procedure Code, or in other ways. But in this case the parties did produce evidence and on that evidence the Magistrate could not decide the case and, therefore, he was fully competent to attach the property.

Mr. Gibbons, in reply.—The judgment of the learned Magistrate is one from which it is very difficult to say what he really means. The Magistrate cannot say that there is an insurmountable difficulty in his way in coming to a definite conclusion unless he resorts to all available means for getting rid of the difficulty.

JUDGMENT.—This Rule arises out of proceedings taken under Chapter XII of the Code of Criminal Procedure. In the order initiating the proceeding the subject-matter of the dispute is described as a fishery in the river Amra extending from a point named Bara Peer Dara on the north and a village Anantapur on the south. After a hearing extending over some 14 days the conclusion arrived at by the Magistrate is expressed in these terms:—"It is very difficult to come to a decision about the possession of the whole *jalkar* in dispute from the evidence adduced." This finding is attacked in the first place on the ground that "difficult" is not synonymous with "impossibility" and that the finding therefore does not satisfy the provisions of the second branch of section 146 (1), Criminal Procedure Code. No doubt it is the case that difficulty is not necessarily synonymous with impossibility, but we think that in the present case we may read the Magistrate's judgment as meaning that on the evidence adduced he was unable to satisfy himself as to which of the contending parties was in possession of the property in question. But a further difficulty arises, inasmuch as he says that he is unable to come to a decision about the possession of the "whole of the *jalkar*" which extends over a stretch of river some six miles in length. His difficulty in this connection appears to have arisen in part from the fact that both parties sought to extend their boundaries. The first party wished to extend their possession to some point on the south spoken of as Kabra Daha and two points on the north named Malpuria and Gena Dahas. The second party similarly desired to extend their possession from Anantapur on the south to a point called Itagahati which appears to be towards the north of Bara Peer Dara. But if on the evidence the Magistrate was unable to satisfy himself as to the possession of the whole of the six miles in question, that did not relieve him from the duty of proceeding further and ascertaining, in so far as he could, the possession of some portion or portions thereof. As to the portion of which he was able to say "so and so is in possession", he should have proceeded under section 145, Criminal Procedure Code, and only as to the re-

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mainder should he have proceeded under section 146, Criminal Procedure Code.

We may note further that it has been suggested that the Magistrate should have proceeded under the provisions of section 148, Criminal Procedure Code, to have a local investigation, and in support of that contention reference has been made to the case reported as *Sheikh Mansar Ali v. Matiullah* (3). But we do not read that decision as laying down a hard and fast rule of law that in every case a local investigation must be held, whether the parties desire that such local inquiry should be held or not. In the present case notwithstanding the fact that the hearing extended over 14 days neither party, it appears, prayed to the Magistrate that a local enquiry should be had. We cannot, therefore, say that in this case the Magistrate has erroneously exercised his discretion in not holding such a local investigation. But when the case goes back and further proceedings, if any, are taken, and if a local investigation will for instance assist in the determination of the points Bura Peer Dara, Mulpuria, Gena Daba, Kabra Daba and Itagahati, obviously it will be desirable that such investigation should be had.

For the reasons we have given we make this Rule absolute and set aside the order complained of. If a dispute likely to occasion a breach of the peace still exists it will be open to the District Magistrate to take such further proceedings as he may consider necessary.

Rule made absolute.

ALLAHABAD HIGH COURT.
CRIMINAL REVISION No. 557 OF 1918.
September 23, 1918.

Present:—Mr. Justice Tindball.
RAM PRASAD—APPLICANT
versus.

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 195, 439, 476—Civil Procedure Code (Act V of 1908), s. 115—Sanction for prosecution granted by Civil Court—Revision—High Court, power of interference of.

The High Court has no power under section 433 of the Criminal Procedure Code to set aside an

order made by a Court of Small Causes directing the prosecution of a decree-holder for perjury in respect of a statement made by him before that Court, nor can such an order be interfered with under section 115 of the Civil Procedure Code. [p. 500, col. 1.]

Criminal revision from an order of the Cantonment Magistrate, Meerut.

Mr. Satya Chandra Mukerji, for the Applicant.

Mr. Lalit Mohan Banerji (Government Pleader), for Mr. R. Malcomson (Assistant Government Advocate), for the Crown.

JUDGMENT.—The facts out of which this revision on the criminal side has arisen are as follows:—Pending in the Court of the Cantonment Magistrate of Meerut in his capacity as a Small Cause Court was an execution case. The decree-holder was directed to deposit the diet money of his judgment-debtor who was about to be arrested. He was ordered to do so within three days and the order was passed on the 9th of July 1918. The 10th, 11th and 12th of July were holidays, so that the only two days on which he could possibly deposit the money were the 9th and the 13th of the month. On the 15th of the month he made a complaint to the Cantonment Magistrate that although he had tendered the money to the Civil Ahlmad Mul Chand, the latter had refused to take it and had made it impossible for him, the decree-holder, to comply with the order. On the 15th of July the Cantonment Magistrate made the following report to the Collector for orders: "The Civil Ahlmad Mul Chand admits that the decree-holder tendered the fees but that he, Mul Chand, did not accept them at the instigation of the Chaprasi Sharfu who, it appears, is related to the defendant." Assuming that this report is correct, and there is absolutely no reason to doubt it, on the 15th of July the Civil Ahlmad Mul Chand did admit to the Cantonment Magistrate that the money had been offered to him and that he had refused to take it. I gather that it was the Cantonment Magistrate's object in making this report to get the Ahlmad punished. On the 30th of July the Collector wrote an order which goes to show that Mul Chand at his departmental enquiry had not admitted that the money had been tendered to him. Though this is not really stated in the order, it is

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a natural inference from the language of that order, for the Collector came to the conclusion that the charge made against Mul Chand was untrue and he sent the papers back to the Cantonment Magistrate with the following remarks: "If you agree with me, I think that you should recommend the prosecution of the decree-holder under section 182 of the Indian Penal Code as reckless complaints of this kind are far too common, and I think that it is our duty to protect our subordinate officials from them." On receipt of this the Cantonment Magistrate passed his order of the 31st of July 1918, which the applicant Ram Prasad now seeks to have revised in this Court. In that order the Cantonment Magistrate remarked as follows:—"In consequence I reported Mul Chand to the Collector, who has enquired into the case and finds that the complaint is a false one. I concur in the Collector's finding and I, therefore, sanction the prosecution of Ram Prasad under section 182 of the Indian Penal Code under the provisions of section 195 of the Code of Criminal Procedure." These are the facts as they stand before me, I have not the slightest hesitation in saying that if sitting as a Criminal Court I had power to revise this order, I should at once set it aside in view of the Cantonment Magistrate's order of the 15th of July 1918, mentioned above, but it seems to me that I have no authority or jurisdiction whatsoever sitting on the criminal side to interfere with this order. It amounts to a complaint made by a Civil Court against a certain person for having given to that Court false information in regard to a certain matter. The order cannot be brought to this Court on the criminal side. At the utmost it could be brought up before this Court on the civil side and even in that aspect also it would be impossible to interfere under section 115 of the Code of Civil Procedure. The order I am afraid will stand, not because I would not set it aside, but because I am unable to do so. The application is rejected.

Application dismissed.

CALCUTTA HIGH COURT.

CRIMINAL REFERENCE NO. 1 OF 1918.

February 13, 1918.

Present:—Justice Sir Charles Chitty, Kt., and Mr. Justice Smither.

EMPEROR—PROSECUTOR

versus

ASGAR MANDAL AND OTHERS—ACCUSED.

Criminal Procedure Code (Act V of 1898), s. 307—Sessions trial—Judge disagreeing with verdict of Jury—Reference to High Court—Verdict supported by evidence, effect of.

Where in a trial before the Court of Session the Judge, disagreeing with the verdict of "not guilty" returned by the Jury, referred the case to the High Court under section 307, Criminal Procedure Code:—

Held, that as there was evidence on the record which would support the conclusion arrived at by the Jury, though there was evidence also the other way, the verdict of the Jury could not be said to be perverse or erroneous; that on the contrary it may have been correct, so that the accused must be acquitted. [p. 501, col. 1; p. 502, col. 1.]

Reference made by the Sessions Judge, Rajshahye, dated the 2nd January 1918.

Babus *Dasarathi Sanyal* and *Debendra Narain Bhattacharjee*, for the Accused.

Mr. Orr, for the Crown.

JUDGMENT.—In this case, five accused persons Asgar Mandal, Nasir Pramanik, Mahir Pramanik, Masir and Rahim Baksh were put on their trial before the Sessions Judge of Rajshahye and a Jury on charges under sections 147, 148, 326, 307, 326/109 and 326/149, Indian Penal Code. The Jury returned a unanimous verdict of "not guilty" on all the charges. As the charges under sections 147, 148 and 149, Indian Penal Code, turned upon the question of possession of the land where the occurrence took place and the evidence on that point was conflicting, the learned Judge accepted the verdict with regard to those charges and acquitted all the accused of offences under sections 147, 148 and 149. This had the effect of acquitting Masir and Rahim Baksh altogether. The learned Judge was of opinion that the verdict on the charges under sections 326, 307 and 326/109 was erroneous. He has accordingly referred the case of the three accused Asgar Mandal, Nasir Pramanik and Mahir Pramanik to this Court for decision under section 307, Criminal Procedure Code.

The case for the prosecution was that in the village of Chak Mahadeb there

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were two factions, the co sharers-in-interest in that village being on bad terms. The party headed by Elahi Bux (P. W. No. 1) claimed to have been in possession of a small piece of land, on which a cow-shed had existed up to two-years ago and which since then had been cultivated by them by growing *ole*, *man* and other vegetables. The other party headed by the accused Nasir Pramanik claimed to have been in exclusive possession of this piece of land and they alleged that they had on the Wednesday before the occurrence in question erected a hut on that land. The prosecution case was that it was only on Friday, i. e., the day of the occurrence, that the accused's party came to erect the hut bringing poles, ropes and axes in order to put it up. Undoubtedly a dispute arose with regard to the erection of the hut, and, according to the prosecution case, Asgar Mandal, who was with Nasir Pramanik and his party, struck at Karim Baksh (P. W. No. 2) and felled him to the ground.

The injury inflicted was somewhat serious. Karim Baksh was in hospital for over a month, and at one time his life was in danger and his declaration was accordingly recorded by a Magistrate. The medical evidence shows that, though the injury to his head was cured, he was suffering from facial paralysis which will probably be permanent and his left ear which was cut in two will always bear the scar.

The prosecution version of the story indicated an unprovoked attack by Asgar Mandal on Karim Baksh, who was doing no more than taking hold of a post and preventing the accused's party from erecting the hut. That, however, depends on which party was in possession. Now, though this question of possession was not clear upon the evidence, still evidence was given on both sides with regard to it and the question was rightly left to the Jury by the Judge. It may be, therefore, that the Jury considered that the possession of Nasir and his party had been established. There was certainly evidence on the record which would account for such a conclusion, though there was evidence also the other way.

Assuming that the Jury was of opinion

that possession was with the accused, the question would arise, and that would also be within the province of the Jury to decide, whether the accused were exercising a right of private defence. The right of private defence of property would extend to the causing of hurt by Asgar Mandal on any person who was committing one of certain offences with regard to that property. The offence in this particular case would be, no doubt, that of mischief, and would fall within the section. The evidence shows that Karim Baksh was wounded while he was actually attempting to remove the post. If that was so, the right of private defence against such mischief, would continue as long as Karim Baksh continued in the commission of that mischief and the Jury may have thought that that was the case here. Subject to the provisions of section 99, which lays down that the right of private defence in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence, the right of private defence would extend to the voluntarily causing to the wrong doer a harm such as was caused in this case. So far as Karim Baksh was concerned, the act of Asgar had the effect of defending the property against his possible wrongful act. Can it be said that that right was so exceeded as to make Asgar's attack on Karim an offence? It appears to us to be a matter of some difficulty. It is certainly not clear that it was an offence. The question was left—and properly left—to the Jury and they came to the conclusion, if we may judge by the verdict of not guilty, that it was not. It appears impossible to say that that verdict was clearly and undoubtedly wrong. It would appear that so far as Karim Baksh was concerned, the defence of the property succeeded; but, so far as the other members of that party were concerned, it would appear that they went on with what they were doing and either pulled down the hut if it was completely erected, (as to which there is some doubt) or, at any rate, removed the posts and other portions of it and threw the *chals* into the tank. The defence, therefore, of the whole property cannot be said to have been altogether successful.

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Taking this view of the case, we must hold that the verdict of the Jury cannot be said to be perverse or erroneous; on the contrary, it may have been correct.

It is not necessary to discuss the question whether the act of Asgar was abetted by Nasir and Mahir, having regard to the view which we have taken of the act of Asgar Mandal himself. We accordingly acquit all the three accused.

Accused acquitted.

ALLAHABAD HIGH COURT.

CRIMINAL APPEAL No. 636 OF 1918.

October 23, 1918.

Present:—Mr. Justice Piggott and Mr. Justice Walsh.

DULLI—ACCUSED—APPELLANT
versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 302—Murder—Death caused by lathis—Blows inflicted by several accused—Offence—Criminal Procedure Code (Act V of 1898), ss. 423, 439—Acquittal of accused—Revision—High Court, power of interference of—Appeal by accused—Appellate Court, power of.

Where several persons attack another with lathis and cause his death, they are all guilty of the offence of murder. [p. 503, col. 1.]

Where a trial has ended in the complete acquittal of the accused person, it is not open to the High Court in the exercise of its revisional jurisdiction to convict him of any offence. The utmost that it can do, in the absence of an appeal against the acquittal by the properly constituted authorities, is to order a new trial. [p. 503, cols. 1 & 2.]

An appeal against a conviction, however, opens out the entire case, and the Appellate Court, being empowered to alter the finding by section 423 (1) (b) of the Criminal Procedure Code, may record a conviction in respect of an offence of which the trial Court has found the accused not guilty. [p. 503, col. 2.]

Criminal appeal from an order of the Sessions Judge, Ghazipur.

Mr. Lalit Mohan Banerji (Government Pleader), for the Crown.

JUDGMENT.—In this case Dulli Kurmi was tried upon a number of charges, one of which was a charge of robbery, incorrectly framed under section 397 of the Indian Penal Code, which section, as this Court has repeatedly remarked, does not in itself constitute any offence but merely conveys a direction to the Court in the matter of

sentence in respect of certain aggravated forms of robbery or dacoity, while there was also a charge of murder under section 302 of the Indian Penal Code. The facts deposed to by the prosecution witnesses are as follows:—The complainant Sehdu was sleeping in his field to watch over the crop which was ripe or ripening. Shortly before dawn, three men entered the field and proceeded to plunder it of its crop. Sehdu came upon them after they had cut a certain amount of the crop and had made it into bundles for convenience of removal. The thieves set upon him and he shouted for help. He himself received severe injuries from the lathis of the thieves and his neighbour Charittar, who pluckily came to his rescue, was felled to the ground and received such injuries that he died on the spot. The medical evidence shows that Charittar's head had been terribly shattered by a number of blows, which the evidence proves must have been inflicted by the lathis of the thieves. Sehdu's evidence is corroborated by Muhammad Ali and Gopi; each of these men names the thieves who committed this offence and positively identifies the accused Dulli as having been one of them. There was practically no defence, beyond a bare denial and a plea of *alibi* wholly unsupported by evidence. Moreover Dulli was nowhere to be found when the Police enquiry into this matter was taken up, and he has offered no reasonable or credible explanation of his absence from his home and from the neighbourhood for several months following the affray in which Charittar lost his life. He has appealed against his conviction by the Sessions Court, but his participation in the offence or offences committed under the circumstances above stated is established by overwhelming evidence. The learned Sessions Judge upon this evidence, which he accepted as true, came to the conclusion that the thieves could not be convicted of robbery, because the hurts caused to Sehdu and Charittar had not been inflicted in carrying away or in attempting to carry away the crop which had been cut from Sehdu's field. He may be justified in his opinion that when they inflicted these injuries, the thieves were merely resisting their own arrest and had abandoned any intention of remov-

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ing the stolen property, and in that case no conviction of robbery can be recorded. Further, the learned Sessions Judge, by a somewhat involved process of reasoning into which it does not seem necessary for us to enter in detail, arrived at the conclusion that the men who inflicted these injuries upon Charittar neither intended to cause his death nor knew that they were likely to do so. He has accordingly acquitted Dulli of the charge under section 302 of the Indian Penal Code and has convicted him of offences punishable under sections 325 and 382 of the same Code. The sentences which he has passed are substantial; but nevertheless the learned Judge of this Court, before whom his petition of appeal came up for consideration was of opinion that the order of acquittal on the charge of murder required to be considered by this Court in the exercise of its revisional jurisdiction. Notice has gone to Dulli to show cause and the whole matter is now before us.

On the facts of the case we are unhesitatingly of opinion that Dulli was guilty of the murder of Charittar and liable to punishment under section 302 of the Indian Penal Code. The nature of the injuries observed at the *post mortem* examination puts it beyond doubt that the men who inflicted those injuries intended at the time to cause death, or such injury as they must have known to be likely to result in death. The mere fact that it was impossible for the witnesses to say which of the three robbers inflicted any particular injury on the person of the deceased is, under the circumstances of this case, wholly irrelevant. They were all three of them striking him with *lathis* and between them they caused his death in the manner already stated. They are all of them equally guilty of the offence of murder.

We have had to consider one further question, namely, the limitation imposed upon the revisional jurisdiction of this Court by the fourth clause of section 439 of the Code of Criminal Procedure. There is some difference of legal opinion on this point. There is no doubt whatever that, when a trial has ended in the complete acquittal of the accused person, it is not open to this Court in the exercise of its revisional jurisdiction to convict him of any offence. The utmost

that this Court can do, in the absence of an appeal against the acquittal by the properly constituted authorities, is to order a new trial. It is, however, open to argument whether this clause is intended to apply to cases in which an accused, who has been tried upon more than one charge under the provisions of section 235 or 236 of the Code of Criminal Procedure, has been acquitted upon one charge but convicted upon another. In the present case this question does not arise for determination. We have before us an appeal by Dulli against his conviction, as well as the notice of enhancement issued by this Court. It is, therefore, open to us to exercise any of the powers conferred by section 423 (1) (b) of the Code of Criminal Procedure, as well as any of the powers specified under section 439 of the same Code. It has repeatedly been held by various High Courts that an appeal against the conviction opens out the entire case, and that the Appellate Court, being empowered to alter the finding by section 423 (1) (b) above referred to, may record a conviction in respect of an offence of which the trial Court has found the accused not guilty. It is quite true that under this section, considered by itself, the finding can only be altered without enhancement of the sentence; but the power to enhance the sentence is separately conferred upon this Court by section 439 of the Code of Criminal Procedure. It follows that in the case now before us there can be no question that we have authority to record a conviction under section 302 of the Indian Penal Code and to pass an appropriate sentence. Accordingly we dismiss the appeal of Dulli. We alter the conviction of the said appellant from one under section 325 of the Indian Penal Code to one under section 302 of the same Code, and we enhance the sentence by passing upon Dulli the minimum sentence which the law authorises us to pass in respect of the offence of which we have found him guilty; that is to say, we sentence him to undergo transportation for life. This sentence will run concurrently with the sentence passed by the learned Sessions Judge on the conviction under section 382 of the Indian Penal Code.

Sentence enhanced,

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CALCUTTA HIGH COURT.

CRIMINAL APPEAL No. 138 of 1918.

May 17, 1918.

Present:—Sir Lancelot Sanderson, Kt., Chief Justice, and Mr. Justice Beashcroft.

AH FOONG CHINAMAN—

APPELLANT ;

versus

EMPEROR—RESPONDENT.

Evidence Act (I of 1872), ss. 25, 30—Excise Officer, whether Police Officer—Confession, admissibility of, against co-accused—Statement made by accused exculpating himself, whether confession—Criminal Procedure Code (Act V of 1898), s. 362—Magistrate, duty of.

Excise Officers cannot be said to be Police Officers, so that a confession made to an Excise Officer is not inadmissible in evidence under section 25 of the Evidence Act. [p. 506, col. 2.]

In order that a confession made by one of several accused may be taken into consideration under section 30 of the Evidence Act against his co-accused, it is not necessary that the confession should be one in which the maker of it persists up to and at the time of the trial [p. 506, col. 2.]

A confession, made before a case comes up for trial but withdrawn at the time of the trial, would still be admissible against the other accused under section 30 of the Evidence Act. [p. 506, col. 2.]

But under section 30 of the Evidence Act, the Court cannot take into consideration statements made by one of several accused against his co-accused, where such statements are consistent with an attempt on the part of the maker of them to exculpate himself from the charge which has been or which is likely to be made against him. For the purpose of seeing whether statements made by an accused are confessions or not it is essential, first of all, to consider the nature of the offence with which the accused has been charged or is likely to be charged, and secondly, the whole of the statements must be read for the purpose of seeing whether in the opinion of the Court they are confessions or not. [p. 507, col. 1.]

Statements made by an accused which are consistent with an attempt on his part to exculpate himself from the charge which has been or which is likely to be made against him cannot be regarded as confessions. [p. 507, col. 1.]

It is the duty of the Magistrate in a case which comes within section 362, Criminal Procedure Code, to take a note of all the material facts stated by a witness, whether they appear in the course of the examination-in-chief or in the course of the cross-examination. [p. 509, col. 1.]

Criminal appeal against an order of the Chief Presidency Magistrate, Calcutta, dated the 1st March 1918.

Messrs. C. R. Das, C. C. Das, Babus Atulya Charan Bose and Narayan Chandra Kar, for the Appellant.

The Advocate General and Babus Dasarathi Sanyal, Ram Taran Chatterjee and Gyan Chandra Guha, for the Respondent.

JUDGMENT.

SANDERSON, C. J.—This is an appeal by Ah Foong Chinaman, who was charged along with two others with an alleged offence under section 9, clauses (c) and (d) of the Opium Act of 1878. The appellant was called the third accused in the Trial Court.

The facts of this case may be shortly stated as follows:—The Excise Officers apparently had got information about a contemplated dealing with some opium and having engaged two Taxi Cabs they proceeded to a place called Ghusrury, and having stopped at a certain place near the Durga they waited; and presently another Taxi Cab drove up, and the Excise Officers ran out and seized the persons who were in that Taxi Cab—one was the first accused who was sitting inside the Taxi Cab; the other was the second accused who was the driver of the Taxi Cab. They then found inside the Taxi Cab three gunny bags:—the first accused was sitting in the cab with his feet either on or over the bags. The bags were taken out and opened in the presence of the first and the second accused, as I understand the evidence on the record, and they were found to contain opium; it appears that the total amount of the opium was about 52 seers. I ought perhaps to have stated that this was on the 14th of November 1917, and the time the Taxi Cab drove up near the Durga at Ghusrury was, according to the evidence of the Inspector of Excise, about 10 o'clock at night.

The first and the second accused made statements to the Excise Officers.

The first accused according to the evidence of the Inspector of Excise said, "he was at New Market that evening and was called by a Chinaman to a house, he said, he could point out. He went with the Chinaman to the house and saw two other coolies there. This Chinaman gave these three bags to the three coolies and asked the first accused and the other two coolies to go to Free School Street with the Chinaman. When they all got there they found the Taxi Cab waiting there. Under instructions of the Chinaman they put the bags into the car and the first accused was asked to go in this Taxi, and he did so and came to Ghusrury. The second accused stated that he was at Free School

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Street at 8 P. M., where the Chinaman came with 3 coolies and asked him to take the bags to Ghusray with this cooly, the first accused. Both accused said they would point out the Chinaman. The second accused also stated that the Chinaman said that on his return from Ghusray this cooly would point out the Chinaman's house who would pay the fair, etc." It was stated in the evidence that the cooly was wearing clothes—I think he was wearing a Dbuti and a shirt, and learned Counsel described him as dressed like a Babu. The first and the second accused were arrested and they were taken by the Excise Officers to a place, No. 5, Alimuddin Street, where the opium was deposited and placed under lock and key for safety. Then the following facts may be taken from the Inspector's evidence: "Then we all with the accused went to Chandney. The first accused showed us the way. Then he took us to Temple Street and asked to stop the car there. Then he took us to Gumgar Lane."—[Gumgar Lane is a lane which runs at right angles with Temple Street and seems to connect with Temple Street on the south and Chandni Chowk Street on the north] "and pointed out a house. We had got out of the car in Temple Street. Petty Officer Ram N. Lal went with the two accused and stood near the door of 2, Gumgar Lane."—That is, a house on the east side of the Gumgar Lane, not very far from the southern end of the Gumgar Lane—"I, with Sub-Inspector B. C. Banerjee, stood about 3 or 4 yards from the door. After a minute or two, the third accused, i.e., the present appellant, opened the door. No one called out. The car was 12 or 15 yards from the door of No. 2, and 5 or 6 yards from a room in that house. The third accused opened the Sudder door of 2, Gumgar Lane, and said in Hindustani *Pauhunchaya*"—which has been translated by the assistance of the learned Counsel at the Bar and also with the help of my learned brother to mean, Have you caused it to arrive or, it may mean, have you got there and have you come back. "The first and the second accused were in front of the door and he addressed them. Thereupon, Ram N. Lal arrested him. I went up and saw the third accused drop some papers which he had in his hand, I picked

them up. They were 1 note of Rs. 100 and 10 of Rs. 10 notes, Rs. 200 notes altogether. We took all the accused inside No. 2 and searched it but found nothing." I do not think I need read the cross-examination except this, "we passed ahead of Gumgar Lane and stopped a few paces to the east of it. The Chinaman's house is to the left in Gumgar Lane entering from Temple Street"—that I think must be a mistake and must be to the right side as you enter from Temple Street—"The first two accused came up with Ram Narain and almost immediately the third accused; Chinaman, appeared. He was arrested as soon as he said *Pauhunchaya*. The two accused never knocked at the door before the third accused came. The third accused denied the whole thing. M. Ibrahim gave his address as 7 Chandney Chowk. He attended Court with subpoena on the 16th November. There are no windows on the Temple Street side of the Chinaman's house."

Now, those are the facts. The evidence of the Inspector is corroborated by the Sub-Inspector and also by Ram Narain Lal.

Then came a witness whose evidence has been the subject of comment by the learned Counsel for the appellant and by the learned Advocate General. It is not long and I propose to read it: "My name is Muhammad Ibrahim. I am by occupation Hide Broker. My maternal uncle lives at 1, Gumgar Lane. I know third accused. He lives at No. 2 opposite my uncle's house. I have known third accused for 5 or 6 months. I remember the day the Inspector arrested third accused about 2 months ago. But the Inspector and Sub-Inspector were not dressed as they are now. I saw the motor later. About 7-30 or 8 P. M., as I stepped out of my house on the same night of the arrest I saw the 3rd accused with three coolies, one of them the first accused, coming out of the third accused's house. All three coolies had baskets on their heads, each basket containing a bag of this colour tied like this (Exhibits I to III). They went towards Temple Street Hospital. I told this Inspector about that at about 12 P. M. At that time I saw two motor cars. This was after I had returned from the Dewali Mela and was purchasing cigarettes from a Panwala. I then saw two motor

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cars and the accused in custody and I enquired what was the matter. I was told opium had been seized at Ghusray. I asked, was it in gunny bags. The Inspector asked how I knew. Then I made the statement above-mentioned to him." The cross-examination is as follows:—"I get commission for sales from my employer Keramat. I don't keep accounts. I live with my uncle. The motor was to the east of the Lane." The cross-examination commenced on the 7th of February and was continued on the 8th—"All coolies do not have baskets. I had no talk ever with these accused. The Mela lasted three days. I was going off and on all three days." There were four sentences taken down on the first day of the cross-examination and four sentences on the second day of the cross-examination—that is the whole of the record of the cross-examination.

I think I have stated all the facts upon which the prosecution relies. I should also refer to the fact that when the Excise Officers went to Gumgar Lane on this night, one of the important points was that the third accused came out without any summons as if he were expecting the return of the first and the second accused and that he had in his hand notes which amounted to Rs. 200; and addressing the first and the second accused he immediately said *Paunhchaya*. The third accused was arrested and he was subsequently charged with the offence to which I have referred. The three accused were tried jointly for the alleged offence before the learned Magistrate.

The 1st accused was convicted, the second was acquitted the third accused was convicted and he alone has appealed to this Court.

The 1st accused was sentenced to 6 months' rigorous imprisonment and the appellant was sentenced to one year's rigorous imprisonment.

Now, there have been several points raised in this case on behalf of the appellant, with which I must deal—some of which in my judgment are not good ones, and some of which are good.

The learned Magistrate has relied to a large extent upon the statements made by the first and the second accused as being matters which he was entitled to take into

consideration as against the third accused, the appellant in this case. He has also relied upon the evidence of the 4th prosecution witness, M. Ebrahim.

The first important ground upon which the learned Counsel for the appellant has relied is that the learned Magistrate was wrong in taking into consideration the statements of the first two accused against the appellant. I propose to deal with that question first.

One of the points Mr. Das; the learned Counsel for the appellant, urged was that, assuming that these two statements of the first and the second accused were confessions, they were not admissible in evidence, inasmuch as they were made to people who were in reality Police Officers, although not called Police Officers; and that consequently under the provisions of section 25 of the Evidence Act, these statements ought not to have been admitted. In my judgment that is not a good point. I do not think it is possible that the Excise Officers in this case could be said to be Police Officers and that the statements made by the first and the second accused were not admissible by reason of the fact that they were made to Police Officers.

Another point raised by the learned Counsel was that inasmuch as the first and the second accused had at the trial made statements which were quite inconsistent with those which they were alleged to have made to the Excise Officer, the statements in question should not be admitted under section 30 of the Evidence Act. The language of section 30 which is material to this point is—"the Court may take into consideration such confession as against such other person as well as against the person who makes such confession." As I understand, the learned Counsel's point was that in order that the confession should be admissible it must be a confession in which the maker of it persists upto and at the time of the trial, and that if he had made a confession before the case came up for trial and withdrew it and did not continue to make the confession at the time of the trial then it would not be admissible. I do not think that point is a good one. I think the meaning of the section is clear, the wording is that "when more persons than one are being tried jointly

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for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such other person as well as against the person who makes such confession." I think the use of the word "makes" in the present tense there does not mean anything more than this—that it may be taken into consideration as against such other person as well as against the maker of such confession. I think that is the common sense view of the construction of the section and the ground upon which the learned Counsel relied was not a good one.

Now, I come to a more substantial ground. The learned Counsel argued that these statements made by the first and the second accused were not confessions at all. For the purpose of seeing whether they are confessions or not, it is essential, first of all, to consider the nature of the offence with which the accused had been charged or were likely to be charged. The second matter is that the whole of the statements must be read for the purpose of seeing whether in the opinion of the Court they are confessions or not—whatever I say in this case is confined to the particular statements which were made in this case, and having regard to the facts of this case; and, it is not necessary for me to say more than this, that having read these statements more than once and considered the points put forward by the learned Advocate-General and the learned Counsel for the appellant, my learned brother and I are agreed that these statements are not confessions. Speaking for myself, I think they are consistent with an attempt on the part of the makers of the statements to exculpate themselves from the charge which had been or which was likely to be made against them, and, consequently I think that they ought not to have been taken into consideration against the appellant.

Then with regard to the other matter upon which the learned Magistrate relied, namely, the evidence of M. Ebrahim, my learned brother and I have come to the conclusion that it would not be safe for us to rely upon the evidence of this man. Judging as far as we are able from the record which is before us, it is quite clear

that the learned Magistrate understood his evidence to be to this effect that at 7-30 or 8 in the evening on the date of the occurrence, this witness was going out of a house which was opposite to No. 2, Gumgar Lane, and as he came out he saw the appellant with three coolies carrying bags in baskets on their heads and that he was in a good position to see exactly what was taking place. In order to make my meaning clear, I will read a few sentences from the learned Magistrate's judgment. "Mohammed Ebrahim, a Hide Broker, states that he lived at 1, Gumgar Lane"—(which is opposite to No. 2, Gumgar Lane) "and knew the third accused for 5 or 6 months, and that on the day of his arrest about 7-30 or 8 P. M. he saw the third accused come out of his house with the first accused and two coolies; each of the three latter was carrying a basket in which was a sack like those containing the opium." Then he described how the party went towards Temple Street. Then he said: "M. Ebrahim in his evidence stated he lived at 1, Gumgar Lane. The defence have called a woman named Caldem, who says she lives there and he does not. Fakiruddin the landlord supports her. He, however, stated to me that it was a large house so that it was quite possible that other people live there without his being aware of it."

Now, the first point to which I wish to draw attention is this:—The Magistrate says that M. Ebrahim stated that he lived at No. 1, Gumgar Lane. I do not find in his evidence anything to justify that conclusion. What he did say was "my maternal uncle lives at 1, Gumgar Lane;" and, the evidence of the first prosecution witness, the Inspector, was that M. Ebrahim gave his address as 7, Chandney Chaw, which is a street to the north of Gumgar Lane. It may be that the witness intended that the Magistrate should believe that he lived at 1, Gumgar Lane, and it is obvious to my mind that the Magistrate was under the impression that this is what he had stated—I quite appreciate what the learned Advocate-General said about the maternal uncle and the paternal uncle:—but even then I do not think that that justifies the conclusion that the learned Magistrate has come to, namely, that this

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witness lived at 1, Gumgar Lane. I think that is a serious matter when we are considering the evidence of this witness. The record shows that he did not live at 1, Gumgar Lane, but that he lived at 7, Chandney Chawk. If it be true that he was in fact coming out of the house where he lived, *viz.*, 7, Chandney Chawk and that he was endeavouring to lead the Court to believe that he then could see what the third accused was doing opposite to the 2, Gumgar Lane, then I think that we should come to the conclusion that the witness should not be relied on.

In those circumstances, having regard to the fact that we are of opinion that the statements made by the 1st and 2nd accused to the Excise Officers ought not to have been taken into consideration against the appellant and having regard to the fact that we think that the evidence of the 4th prosecution witness, M. Ebrahim, ought not to be relied on, and having regard to the state of the evidence on the record, the question arises, ought this conviction to stand.

There are certain material facts still left. They are the facts—assuming them to be proved by the prosecution—that the first and the second accused were found in possession of opium, that they went with the Excise Officers to No. 2, Gumgar Lane, that the third accused came out without any knocking or summons, that he had Rs. 200 in his hand, and that addressing the first and the second accused he immediately said, "Paunhchay". Although these facts may give rise to grave suspicion in our minds as to whether the third accused was innocent of the offence charged against him, there is a doubt arising in our mind for this reason, that it may be that the third accused was never in possession of the opium, and it may be that he never took any part in the transport, and it may be that he was only a person who was to pay the remuneration which had been agreed upon in respect of the transport of the opium. If that view is a possible view, and if that view is consistent with the evidence which remains in this case after we have eliminated the statements of the first and second accused and the evidence given by the fourth prosecution witness, then I think it is right for

the Court to say that the appellant ought to get the benefit of the doubt and this conviction ought to be quashed.

I desire to make one or two observations about the method of procedure followed in this case.

It seems obvious to us that there have been irregularities in the procedure in this case. Section 312 of the Criminal Procedure Code provides as follows: "For the purpose of enabling the accused to explain any circumstances appearing in the evidence against him, the Court may, at any stage of any enquiry or trial, without previously warning the accused, put such questions to him as the Court considers necessary and shall, for the purpose aforesaid, question him generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence." It does not appear that the procedure which is there laid down was carried out in this case; I quite agree with what the learned Advocate General said that inasmuch as the first and second accused put in written statements, with regard to these accused there would not be so much in that point. So also with regard to the third accused, it may be that in this case he may not have been prejudiced by this procedure not having been carried out. But to my mind that is no excuse for not carrying out the plain provisions of the Code of Criminal Procedure.

Another matter to which I wish to refer is that my learned brother and I think that the record of the evidence in this case is not satisfactory and the Court has been placed in a position of difficulty by reason of that fact. Section 362 of the Code of Criminal Procedure Code, which is applicable to this case, provides that: "In every case in which a Presidency Magistrate imposes a fine exceeding two hundred rupees, or imprisonment for a term exceeding six months, he shall either take down the evidence of the witnesses with his own hand, or cause it to be taken down in writing from his dictation in open Court. All evidence so taken down shall be signed by the Magistrate and shall form part of the record." With regard to the evidence of M. Ebrahim, the learned Counsel for the appellant stated

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that the record of the cross-examination was unsatisfactory and incomplete. He alleged that the third accused was defended by a learned Pleader of position, and that he had a note of the cross-examination by that learned Pleader; and, we adopted the somewhat unusual course of looking at the note of the learned Pleader's cross-examination which was taken, as I understand, by his junior. For the purpose of seeing, whether it was substantially accurate—we compared the note of the evidence-in-chief with that on the record and, we found that there was substantially no difference between the evidence-in-chief as recorded by the Magistrate and the evidence-in-chief as taken down by the learned Pleader. But when we came to look at the cross-examination we found there was a serious difference. I have already pointed out that the only note the Magistrate had of the cross-examination was in our opinion unsatisfactory—it consisted of 8 sentences of the cross-examination which took place on two days, and the learned Pleader's note of it occupied two pages. Several material facts were referred to in the learned Pleader's note of the cross-examination, of which there is no sign in the learned Magistrate's note.

Now, I wish to draw attention to the fact that it is the duty of the Magistrate in a case which comes within section 362 to take a note of all the material facts, whether they appear in the course of the examination-in-chief or in the course of the cross-examination; and, in this case it was especially necessary, because this was the only independent witness, the other witnesses being Excise Officers (I say nothing whatever against them, but they were the people who were engaged in the arrest of this man), and it was also especially necessary in such a case as this where there was an appeal upon facts; and it is impossible for the Court to deal with these cases, unless the learned Magistrate in the first instance takes a full and proper note of all the material facts. I wish to say that we have not formed an opinion about the inadequacy of this note solely from the fact that we looked at the learned Pleader's note and compared it with the record of the evidence by the Magistrate. We looked at the Pleader's

note, because we thought that the record which was before us, in itself bore sufficient evidence that the record was not satisfactory. But for that we should not have looked at the learned Pleader's note. When we thought, judging from the record itself, that it was not satisfactory then we looked at the learned Pleader's note, and our impression was confirmed by that note.

The result is that this appeal should be allowed, the conviction of, and the sentence passed on, the appellant set aside, and if in custody, he should be discharged or if on bail, his bail-bond should be discharged.

BACHCROFT, J.—It is not necessary for me to say much, as I agree substantially with the remarks made by the learned Chief Justice.

With reference to witness No. 4, I need only say that it seems to me to be clear that he desired to give the Court the impression that he lived at 1, Gumgar Lane. He gave the Magistrate that impression; and, it is also clear to my mind that he gave the defence that impression, who took steps to call a witness to prove that he did not live at that house, whose evidence would not have been relevant for any other purpose.

Then, one remark I should like to make with reference to the procedure adopted in connection with accused No. 2, who was acquitted. The Magistrate charged him on the 15th of February. Between that date and the completion of the trial I can see nothing in the evidence which would tend in any way to minimise the effect of the evidence as against that accused. The only thing on the record, namely, the accused's own written statement, would rather go against him, as that is in some respects obviously false. That being so, and the Magistrate considering the evidence not sufficient at the end of the trial to convict this person, he ought not in my opinion to have charged him with this offence. If the evidence was not sufficient at the end of the trial, it was equally insufficient on the 15th of February. The course which the Magistrate ought to have taken was to discharge the accused and to examine him as a witness in the case.

Appeal allowed.

MUHAMMAD DIN v. EMPEROR.

PUNJAB CHIEF COURT.

CRIMINAL PETITION No. 772 OF 1918.

November 28, 1918.

Present:—Mr. Justice Shadi Lal.

MUHAMMAD DIN—CONVICT—PETITIONER

versus

EMPEROR THROUGH GANDA MAL—

COMPLAINANT—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 423 (1), (4), 522—Order restoring property to person entitled thereto, nature of—Appellate Court, whether can pass order.

An order under section 522, Criminal Procedure Code, directing the restoration of immoveable property to the person entitled thereto, cannot be regarded as a consequential or incidental order within the purview of section 423 (1), clause (4) of the Code.

An Appellate Court is not competent to make an order under section 522, Criminal Procedure Code, directing the restoration of immoveable property to the person entitled thereto, where the trial Court has for some reason or other refrained from taking action under the aforesaid section.

Bhagbat Shaha v. Siddique Ostagar, 16 Ind. Cas. 176; 39 C. 1050; 16 C. W. N. 811; 13 Cr. L. J. 603, followed.

Ujir Sheikh v. Syed Ali Sheikh, 30 Ind. Cas. 159; 19 C. W. N. 990; 16 Cr. L. J. 607; *Manki v. Bhagwanti*, 27 A. 415; A. W. N. (1905) 19; 2 A. L. J. 64; 2 Cr. L. J. 24, distinguished.

Petition, under section 439 of the Criminal Procedure Code, for revision of the order of the District Magistrate, Sialkot, dated the 10th May 1918, affirming that of the Magistrate, 3rd Class, Daska, District Sialkot, dated the 25th March 1918, convicting the petitioner.

Mr. Zafrylla Khan, for the Petitioner.

Mr. Ganpat Rai, for the Crown.

JUDGMENT.—The sole question for consideration is whether the Appellate Court was competent to make an order under section 522, Criminal Procedure Code, directing the restoration of the possession of immoveable property to the person entitled thereto, when the trial Court had for some reason or other refrained from taking action under the aforesaid section. Now, a Division Bench judgment of the Calcutta High Court in *Bhagbat Shaha v. Siddique Ostagar* (1) answers that question in the negative, and no authority has been cited on the other side which lays down that an Appellate Court can pass an order of that character. The learned Judges of the Calcutta High Court hold that such an order cannot be regarded as a conse-

(1) 16 Ind. Cas. 176; 39 C. 1050; 16 C. W. N. 811; 13 Cr. L. J. 603.

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quential or incidental order within the purview of section 423 (1), clause (4), Criminal Procedure Code; and this view is, in their opinion, supported by the fact that the Legislature considered it necessary to enact a special section in order to confer the necessary authority upon a Criminal Court so that it may exercise the power of restoring possession.

The matter is not entirely free from doubt, but I am not prepared to dissent from the view taken by the Calcutta Court. The judgment in *Ujir Sheikh v. Syed Ali Sheikh* (2), relied upon by Mr. Ganpat Rai, lays down that an Appellate Court can set aside an order made by the Court of first instance under section 522; but this judgment has obviously no bearing upon the question before me. The same remarks apply to the judgment of the Allahabad High Court in *Manki v. Bhagwanti* (3).

Accordingly I accept the application for revision so far as to quash the order of the District Magistrate directing the restoration of the possession of the property. In all other matters the application for revision is rejected.

Petition partly accepted.

(2) 30 Ind. Cas. 159; 19 C. W. N. 990; 16 Cr. L. J. 607.

(3) 27 A. 415; A. W. N. (1905) 19; 2 A. L. J. 64; 2 Cr. L. J. 24.

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 660 OF 1918.

July 29, 1918.

Present:—Mr. Justice Richardson and Justice Sir Syed Shamsul Huda, Kt.

Sheikh GHULAM RASUL AND OTHERS—

PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 110—Criminal Tribes Act (III of 1911), s. 4—Security for good behaviour—Proceedings against person registered under Criminal Tribes Act, legality of—Magistrate, discretion of, exercise of—Proceeding, pending—High Court, power of interference of.

Proceedings under section 110, Criminal Procedure Code, against persons who have been registered under section 4 and the following sections of the Criminal Tribes Act, are not illegal. [p. 511, col. 2.]

Per Huda, J.—Such proceedings, though not illegal, are inexpedient. [p. 512, col. 2.]

Per Richardson, J.—In every case under section 110, Criminal Procedure Code, there is a question of discretion whether the person proceeded against should or should not be bound down to be of good

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behaviour. The fact that the persons proceeded against are already registered under the Criminal Tribes Act, may be a factor and an important factor which the Magistrate should take into consideration before he makes any order against them under section 110, Criminal Procedure Code. [p. 511, col. 2; p. 512, col. 1.]

The High Court does not, as a rule, interfere in any pending proceeding unless there is some strong ground for intervening. [p. 512, col. 1.]

FACTS appear from the judgment.

Babu Manmohan Nath Mukherjee (with him Babu Panna Lal Chatterjee), for the Petitioners.—The fact that these persons have been registered under the Criminal Tribes Act is sufficient to quash proceedings taken against them under section 110, Criminal Procedure Code. The fact that such persons have been registered shows that they have given security for good behaviour in future, and bonds of the worst possible kind have been taken from them and their movements are being watched. If proceedings under section 110 are taken against them, they would not be able to furnish security under that section.

[RICHARDSON, J.—Do you mean to say that proceedings under section 110 are illegal?]

Yes, my Lord, I say so. The proceedings are not only illegal and without jurisdiction but are also inexpedient.

Act III of 1911 has been enacted to prevent repetition of crimes and not for harassing men.

[RICHARDSON, J.—But if the Code distinctly says that certain persons are to furnish security and if they cannot furnish security they are to be sent to jail?]

In *Rajendra Narayan Singh v. Emperor* (1) it is laid down that if it is made to appear to your Lordships that proceedings are merely to harass the men, then your Lordships would interfere in those cases. There was a difference in that case between Mr. Justice Chowdhury and Mr. Justice Imam. In this case, what further object would be gained by binding down such people and asking security from them knowing fully well that all the members of their family are registered under the Criminal Tribes Act and the meaning of such registration is to prevent them from committing dacoity and so forth? It was never intended by section 110, Criminal Procedure Code, that when certain restrictions have been placed upon a certain per-

(1) 18 Ind. Cas. 149; 17 C. W. N. 238; 16 C. L. J. 487, 14 Cr. L. J. 5.

son he should be bound down and proceedings under section 110 should be drawn up against him. I refer your Lordships to section 24 of the Act.

[RICHARDSON, J.—Section 3 of the Criminal Tribes Act (III of 1911) refers to the whole gang.]

Mr. Orr, for the Crown, was not called upon.

JUDGMENT.

RICHARDSON, J.—The petitioners are persons against whom proceedings have been taken under section 110, Criminal Procedure Code. A Rule was issued upon the District Magistrate to show cause why those proceedings should not be quashed on the grounds, *firstly*, that in consideration of certain proceedings under the Criminal Tribes Act and of the result of the inquiries made into certain cases of alleged dacoity, there was no material disclosed in the Police report on which the proceedings under section 110, Criminal Procedure Code, could be based and, *secondly*, that in view of the sentences of imprisonment which the petitioners Nos. 1, 11, 12, 14 and 15 are undergoing under the provisions of the Criminal Tribes Act the proceedings under section 110, Criminal Procedure Code, against them cannot stand.

In his argument before us to-day the learned Pleader for the petitioners has confined himself to those petitioners who have been registered under section 4 and the following sections of the Criminal Tribes Act. Moreover, he has confined himself to contending that those petitioners cannot or ought not, having been so registered, to be proceeded against under section 110. The learned Pleader concedes that there is no express provision in the Criminal Tribes Act or in any other Act which has the effect of making it illegal for the Magistrate having jurisdiction to proceed under section 110, Criminal Procedure Code, to so proceed against a person who has been registered under the Criminal Tribes Act. He has argued, however, that once a man has been registered under the Criminal Tribes Act the authorities have so much control over his movements and his conduct that it is entirely superfluous to take proceedings against him under section 110, Criminal Procedure Code. Now, in every case there is a question of discretion whether the person proceeded against under section 110 should or should

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not be bound down to be of good behaviour under that section. The fact that the persons proceeded against are already registered under the Criminal Tribes Act may be a factor, and an important factor, which the Magistrate should take into consideration before he makes any order against them under section 110. But, in my opinion, we should be going beyond our duty as Judges. We should be elevating ourselves into a Legislature if we were to lay it down as a fixed, and immutable rule—a rule from which there can be no departure under any circumstances or whatever the circumstances of a particular case may be—that a man who has once been registered under the Criminal Tribes Act cannot be proceeded against under section 110, Criminal Procedure Code. The proceedings which we are asked to quash are proceedings pending before the Court below. This Court has, as a rule, refrained from interfering with any pending proceeding unless there was some strong ground for intervening. The facts of the present case have not been gone into in the Court below and evidence has not been taken; when evidence is taken other matters may come to light which are not now before us. In the circumstances, in my opinion, it would not be right for us to interfere at the present stage. The Magistrate will, no doubt, consider the facts of the case of each of the petitioners before passing any order against him under section 110. At this moment, it is not for us to say that he will not exercise his discretion properly and reasonably. In my opinion, therefore, this Rule should, in the present stage of the proceedings, be discharged.

HODA, J.—It seems to me that there are essential differences between persons against whom action is contemplated by the Criminal Tribes Act and those who come within the purview of section 110 of the Criminal Procedure Code. The former Act contemplates joint action against a group of persons forming a tribe, gang or class, whereas the latter contemplates action against individuals. The group of persons contemplated by the Criminal Tribes Act are persons addicted to the systematic commission of non-bailable offences generally, whereas the individuals against whom action

under section 110 of the Criminal Procedure Code may be taken are persons who habitually commit the particular offences mentioned in the section and persons who are so desperate and dangerous as to render their being at large without security hazardous to the community.

It will thus appear that the mere fact that a group of persons have been registered under the Criminal Tribes Act would not necessarily render the individual members of it liable to be proceeded against under section 110 of the Criminal Procedure Code and *vice versa*. It cannot, therefore, be said that, as a matter of law, action under section 110, Criminal Procedure Code, cannot be taken against a person registered under the Criminal Tribes Act, and I agree in holding that the present proceedings under section 110 of the Criminal Procedure Code against those who have already been registered, as belonging to a criminal tribe, are not illegal. I have, however, been very much impressed by the arguments put forward before us regarding the expediency of taking such a proceeding. It seems to me that as soon as a man is brought under the Criminal Tribes Act, the control obtained over his movements under that Act should ordinarily be sufficient to attain the objects aimed at by proceedings under section 110, Criminal Procedure Code, and it should not be necessary to proceed further against such a person under that section. One objection to the adoption of such proceedings is this. Having been declared a member of a criminal tribe, it is unlikely that any one would stand surety for such a person and the inevitable consequence would be imprisonment for failure to furnish security. Section 110, Criminal Procedure Code, I need hardly say is not meant to be a penal provision but is a preventive measure. I would have been prepared as a matter of expediency to quash these proceedings, but the evidence has not been gone into and we are not aware of any special circumstances that may exist for taking these proceedings. I, therefore, agree with my learned brother that at the present stage it would be inexpedient for this Court to interfere with the order complained of.

Rule discharged.

NAKCHHED V. ANGAD.

ODDH JUDICIAL COMMISSIONER'S
COURT.

SECOND CIVIL APPEAL NO. 76 OF 1917.

July 11, 1917.

Present:—Mr. Lindsay, J. C.

NAKCHHED AND OTHERS—DEFENDANTS—
APPELLANTS

versus

ANGAD AND OTHERS—PLAINTIFFS—
RESPONDENTS.

*Pre-emption suit—Price entered in sale-deed, fictitious
plea as to—Prima facie case made out by pre-emptor
—Burden of proof.*

Where a pre-emptor pleads that the price entered in the sale-deed is fictitious and is able to put forward a *prima facie* case to that effect, the burden of proving that that price represents the real price of the property is thrown on the vendee. [p. 513, col. 1.]

Appeal against the order of the District Judge, Gonda, dated the 15th December 1916, affirming that of the Munsif, Utraula (Gonda), dated the 15th December 1916.

Mr. Basdeo Lal, for the Appellants.

The Hon'ble Mr. Gokaran Nath Misra and Mr. Harkaran Nath Misra, for Respondents Nos. 1 and 2.

JUDGMENT.—This appeal has arisen out of a suit for pre-emption. The appellants here are the purchasers. The document of sale was executed on the 30th of January 1915 and purports to convey to the vendees a 6 pies share in a village called Lohrauli. According to the terms of the deed the consideration for this sale was a sum of Rs. 1,400 which was made up of four items. The plaintiffs came into Court alleging their right to pre-empt and further pleading that the price entered in the document was fictitious. It was the plaintiffs' case that the property transferred by this deed was not worth anything like the sum of Rs. 1,400. The Courts below have come to the conclusion that the price stated in the deed is fictitious, and with that finding of fact I agree. It is quite clear that the plaintiffs-pre-emptors were able to put forward a *prima facie* case which threw upon the other side the burden of proving that the money entered in the deed represented the real price of the property. It is argued that the decision of the Courts below ought to be revised here on account of their misunderstanding of the effect of certain documents to which I will now refer.

In this sale-deed it was stated that out of the fourteen hundred rupees an item of Rs. 675 5-5 was due to the purchasers on a mortgage held by them, dated the 5th of July 1911. It is recited that this mortgage deed was with possession and the sum just mentioned was stated to be due in respect of the balance of principal and interest. The Courts below have found that this item is entirely fictitious. It is a most extraordinary circumstance that when the burden of proof was thus shifted to the purchasers they failed to put into Court either the original document of mortgage, dated the 5th of July 1911, or a certified copy of it. The learned Advocate who appears here for the appellants was under the impression that a certified copy of this mortgage was on the record, but I find that this is not so. The result, therefore, is that we really know nothing about this mortgage of the 5th July 1911. Probably there was such a document, inasmuch as we find a reference in the sale deed to the pages of the register in the Sub-Registrar's Office on which the document was copied at the time of registration, but the fact remains that neither the document itself nor any copy of it was before the Court so as to enable it to form any opinion as to whether any money was or could be due on account of principal or interest or both.

The defendants could have summoned the original document from the vendors, for the story is that this document was returned to them, and in default of its being produced they could have given secondary evidence. So far, therefore, as we are concerned with this item the judgment of the Court below appears to me to be quite correct. I can see no reason for disturbing it. The next items to be referred to are one item of Rs. 400 and one item of Rs. 125-5-4. It is stated in the sale-deed that these two sums are owing to two persons Badri and Ram Sunder under mortgages with possession executed in their favour and the arrangement come to between the vendors and the purchasers was that these two mortgages were to be discharged. One of these mortgagees Badri appeared in Court and produced a receipt for the full amount of these sums, that is, Rs. 528-5-4. He further deposes that the mortgage-deeds had been returned to the

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purchasers after the money was received. He also produced a receipt which the Courts below have rejected on the ground that it was not registered.

It has been argued here that the statement of Badri ought to be accepted as sufficient proof that the money was paid to him, but it seems to me to be clear that if the pre-emptor is to be entitled to stand in the shoes of the purchasers, he is entitled to have the mortgages discharged, and the fact that they had been discharged could only be proved by proper evidence. The production of an unregistered receipt does not, I think, amount to legal proof that the mortgages in favour of Badri and Ram Sunder had been lawfully discharged, and again there is only the statement of one of the mortgagees, namely, Badri, to the effect that the money had been received. Here again the appellants seem to have been singularly negligent in the matter of prosecuting their case. Badri deposed that these mortgages had been returned to the purchasers. Why they were not produced before the Court is not explained. If the purchasers had produced the original mortgage deeds, then no doubt it might have been held in their favour that these two sums had been paid and the mortgages had been redeemed.

But if parties do not choose to produce the best evidence, in their favour, they cannot complain if the decision of the Court is given against them. In the absence of this evidence, which it was incumbent upon these defendants-appellants to produce, it seems to me that the judgment of the Court below is correct. I am satisfied, therefore, that there is no ground upon which I can interfere with the decision of the Court below. The price was fictitiously entered. The Courts have arrived at what they held to be the genuine price of the property and they have directed the redemption of the two mortgages in favour of Badri and Ram Sunder, the balance of the pre-emption money being handed over to the purchasers. These are the only grounds which I have been called upon to consider. I decide them all against the appellants and dismiss the appeal with costs.

Appeal dismissed.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 495 of 1916.

March 20, 1918.

Present:—Mr. Justice Shah and Mr. Justice Marten.

HANSRAJ LADDASHET—PLAINTIFF

—APPELLANT

versus

ANANT PADMANABH BHATT

AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 92—Religious Endowments Act (XX of 1863), s. 14, scope of—Suit to recover trust property from persons claiming as trustees, maintainability of.

Plaintiff, who claimed to be the representative of the original donor of a Hindu temple and to be interested in the property dedicated to the temple and also claimed to be the Muktesar appointed by the Temple Committee in place of the defendants, sued the latter for (a) possession of what should be found to be the trust property on enquiry by the Court; (b) an account of the trust property, both capital and income, come to the hands of the defendants; (c) an account of all expenses properly incurred by the defendants; and (d) damages for breach of trust. The defendants claimed to be trustees entitled to hold the property from generation to generation subject to the due fulfilment of the trust:

Held, that the suit, being one practically for the removal of the defendants from their position as trustees, for the restoration of the trust property to the plaintiff as the Muktesar appointed by the Temple Committee, for taking accounts and for damages for breach of trust, was governed by section 92 of the Civil Procedure Code and could only be brought in conformity with the provisions of that section. [p. 516, col. 1; p. 519, col. 1.]

Per Marten, J.—There is much which is in common between section 92 of the Civil Procedure Code and section 14 of the Religious Endowments Act, but the former is substantially the wider section and provides *inter alia* for settling a scheme which is a jurisdiction of a very wide and beneficial nature. A plaintiff may proceed for appropriate relief under either section, and the opening words of section 92 (2) of the Civil Procedure Code mean only that if he elects to proceed under the Religious Endowments Act he is not to be prevented from so doing by section 92. [p. 518, col. 1.]

Second appeal from the decision of the District Judge, Karwar, in Appeal No. 192 of 1913, reversing the decree passed by the Subordinate Judge, Kumta, in Civil Suit No. 238 of 1911.

Messrs. G. P. Murdeshwar and Nilkanth Atmaram, for the Appellant.

Messrs. G. S. Mulgaokar and A. A. Pais, for Respondents Nos. 1 to 7.

JUDGMENT.

SHAH, J.—The question of law that arises in this second appeal is whether the plaint.

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iff's suit is barred by the provisions of section 92 of the Code of Civil Procedure.

The plaintiff filed his suit in the Court of the Second Class Subordinate Judge at Kumta in the District of Kanara. The suit relates to a public Hindu temple known as the Gopal Krishna Temple of Gore. The plaintiff claims to be the representative of the original donor, Damodar Sheth, who purchased certain lands from one Ramkrishnabhatta and endowed the temple therewith, and to be interested in the property dedicated to the temple. He also claims to be a Muktesar appointed by the Temple Committee duly constituted for the Kumta Taluka under the Religious Endowments Act, XX of 1863, read with Bombay Act VII of 1865. The defendants Nos. 1 to 7 are the representatives of Ramkrishnabhatta, the original owner of the lands, and defendants Nos. 8 and 9 are the representatives of another family, who with the defendants Nos. 1 to 7 claimed to be the hereditary Archakas of the temple.

The plaintiff has set forth briefly the history of the endowment in the plaint and alleged that Ramkrishnabhatta accepted the endowment for the temple as a trustee and undertook to perform the services in the temple as an Archaka, that he was appointed a Muktesar by the Temple Committee, that subsequently defendants Nos. 1, 8 and 9 were appointed Muktesars, that they were ultimately dismissed from their office as Muktesars, and that he himself was appointed a Muktesar in November 1910. He has further alleged in the plaint as follows:—

"In addition to the lands which have been from times immemorial in the possession of all the defendants as worshippers for purposes of *nandadeep*, worship and food offerings, although defendants Nos. 1 to 9 are liable to deliver over possession of the *tastik* due to the God, and the possession of the moveable and immoveable properties charitably given by the above-mentioned and other persons and although they are liable to make good the loss caused by them to the God and to pay the value of the articles appertaining to the buildings of the God's right and appropriated by them for their own use and to deliver the balance of the principal and interest after deducting from the income of the God the actual expenses incurred

together with an account (in respect of the same), they did not do so although demand for them was made ever since 1910."

He prayed for

(a) possession of all the lands that may on inquiry be found to belong to the God,

(b) mesne profits,

(c) accounts, and balance that may be found due after deducting the expenses in respect of the profits of the land, the income in respect of *karnika* and *tastik*, etc., due to the God, and the value of the property appropriated by the defendants out of the God's property, since their appointments as Muktesars to the date of the suit,

(d) Rs. 1,000 as damages for the wrongful acts of defendants Nos. 1 to 9, and

(e) for the moveable property of the God in the possession of defendants Nos. 1 to 9.

Defendant No. 10 was stated to have been appointed a co-Muktesar with him but not to have been given the usual Sanad of his appointment and was joined as a defendant formally. This fact need not be noticed further as it does not touch the point which we have to consider.

Apart from the defence on the merits which it is not necessary to notice for our present purpose, it was contended by defendant No. 1 that the effect of the documents referred to in the plaint was that the property was to continue in his family from generation to generation and that his family was to receive the profits, and to perform the daily and occasional *viniyogas* and ear festival from generation to generation. He pleaded that he did not hold the lands as a Muktesar of the temple and that he had not neglected to perform the services, and that the suit was not maintainable in virtue of the provisions of section 92 of the Code of Civil Procedure.

In the trial Court several issues were raised including the issues as to section 92 of the Code of Civil Procedure and section 14 of the Religious Endowments Act. The trial Court was of opinion that the claim as to damages was covered by section 92 of the Code or section 14 of Act XX of 1863, and was quite distinct from the other claims.

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As to the rest of the suit, the trial Court held that it was not a suit contemplated by either of the two sections and that it was maintainable. On the merits it held that the defendant No. 1 had committed a breach of the trust. It passed a decree allowing the defendants to continue as trustees and to remain in possession of the property on certain terms.

Both parties were dissatisfied with this decree and preferred cross-appeals to the District Court of Kanara. The preliminary question as to the jurisdiction was raised before that Court, which held that the suit was barred by section 92 of the Code of Civil Procedure. Accordingly the plaintiff's suit was dismissed.

In the appeal before us the learned Pleader for the plaintiff has questioned the correctness of this view, mainly on the ground that the suit is to recover possession of the trust property from persons, who are in the position of strangers, after they are properly dismissed by the Temple Committee from their office as Muktesars.

From the allegations in the plaint and the nature of the reliefs claimed it is clear that the suit is one contemplated by section 92, Civil Procedure Code. It is common ground that the trust was created for public purposes of a religious nature. The plaintiff also alleges a breach of trust. The relief as to account is clearly covered by clause (d) of section 92, sub-section (1). The relief as to possession also involves an inquiry as to what are trust properties. Taking the plaint as a whole it seems to me that it is a suit for the removal of the defendants from their position as trustees, for the restoration of the trust property to the plaintiff as the Muktesar appointed by the Temple Committee, for taking accounts, and for damages for their wrongful acts as trustees. Such a suit would be clearly within the scope of section 92 of the Code. The character of the suit is not changed either by omitting the prayer as to damages as distinct from other prayers, as suggested by the trial Court, or by omitting the prayer for accounts and for the balance that may be found due, as suggested by Mr. Murdeshwar for the appellant here. The plaint must be taken as a whole for the

purpose of determining the question of jurisdiction and whether we look to the allegations in the plaint or to the reliefs claimed, it is clear that the suit is one contemplated by section 92 of the Code.

This is not a suit against strangers as contended by Mr. Murdeshwar. It is not necessary to refer to the decisions cited by him. The question is whether in the present suit the defendants are in the position of strangers. In my opinion they are not. They are really trustees under the documents referred to in the plaint, and they claim to be trustees entitled to hold the lands from generation to generation subject to the due fulfilment of the trust. This position they came to occupy quite independently of their being Muktesars appointed by the Temple Committee and they are not strangers claiming to hold the lands adversely to the trust, though they may not agree as to their obligations under the trust.

It is contended on behalf of the plaintiff that in virtue of their having accepted the office of Muktesars they ceased to be trustees and that having been properly dismissed from that office they were in the position of strangers. It is not alleged in this case that they accepted the trust and acquired the right to hold the property from generation to generation subject to the trust as Muktesars. No authority is cited in support of the view that a Muktesar cannot be a hereditary trustee independently of his Muktesarship and I do not see anything either in the scheme of the Religious Endowments Act or in its provisions which lend support to such a position.

The suit being of a character contemplated by section 92 it cannot be entertained by the Second Class Subordinate Judge. Sub-section (2) of section 92 clearly provides that save as provided by the Religious Endowments Act, 1863, no suit claiming any of the reliefs specified in sub-section (1) shall be instituted in respect of any such trust as is therein referred to except in conformity with the provisions of that sub-section. Admittedly the present suit is not brought in conformity with the provisions of sub-section (1) and cannot, therefore, be entertained.

It is also clear that the present suit is not filed as provided by the Religious En-

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dowments Act. It is not filed in the District Court as provided by that Act, and the leave required by section 18 of the Act is not obtained. It is not necessary to express any opinion as to whether the plaintiff can file a suit under the Religious Endowments Act as a person interested in the temple in the performance of the worship or service thereof and in the trust relating thereto after obtaining the leave of the District Court under section 18 and whether under the circumstances the reliefs that he can get in a suit under section 14 of the Act will be sufficient to meet the requirements of the trust. It is clear, however, that any suit filed in accordance with the provisions of the Religious Endowments Act will not be open to the objection based on the provisions of section 92 of the Code of Civil Procedure.

It remains to notice the argument urged on behalf of the plaintiff that a suit filed by a properly appointed Muktesar to recover the property which is held by the ex-Muktesars who have been properly dismissed from their office by the Temple Committee, does not fall under section 14 of the Act. The decision in *Virasami Nayudu v. Subba Rau* (1) is relied upon in support of the argument. This argument does not help the plaintiff in this suit, as it is a suit not merely by a Muktesar but by a person who also claims to be interested in the temple and its worship or service. The defendants, as I have pointed out, are not merely ex-Muktesars but also hereditary trustees. The Temple Committee have no jurisdiction to remove such trustees. It is not alleged that the defendants were trustees whose nomination was vested in or might be exercised by or would be subject to the confirmation of the Government or any public officer as provided by section 3 of the Religious Endowments Act. The defendants would be trustees contemplated by section 4 of the Act. Under the circumstances it would not be easy to hold that section 14 would not apply to a suit like the present suit, if it were filed in the proper Court with the necessary leave. But on the facts of this case it is not necessary to pursue the point any further.

(1) 6 M. 54; 6 Ind. Jur. 629; 2 Ind. Dec. (N. S. 316,

The result, therefore, is that the appellant's contention must be disallowed and that the present suit must be held to be not maintainable in virtue of section 92 of the Code of Civil Procedure.

It is to be regretted that the present suit, which was filed in September 1911, has failed on a preliminary point and that the allegations as to the breach of trust and the misuse of the trust property cannot be dealt with on their merits.

Having regard to all the circumstances I think that each party should bear his own costs throughout.

I would, therefore, dismiss the appeal and confirm the decree of the lower Court except as to costs. Each party to bear his own costs throughout.

I agree with my learned brother that copies of the judgments and of the printed paper-book in this second appeal should be sent to the Advocate General in order that he may take such action as he thinks proper with reference to this trust. The Registrar may also furnish copies of such documents in the case as he may require before returning the record to the lower Appellate Court.

MARTIN, J.—The question before us is whether the lower Appellate Court was right in dismissing this suit on the preliminary point that it was not maintainable without the written consent of the Advocate-General under section 92 of the Civil Procedure Code.

It is clear that we have here a trust created for public purposes of a charitable or religious nature within the meaning of section 92. It is also clear that the Hindu temple in question and its endowments which are all situate in North Kanara, are within the operation of the Religious Endowments Act, 1863, but that the suit is not maintainable under section 14 of that Act as the requisite preliminary leave of the Court under section 18 has not been obtained. Consequently I think that in section 92 (2) of the Civil Procedure Code the opening words: "Save as provided by the Religious Endowments Act" may in effect be disregarded in the present case. I apply those words here as meaning: "Save in so far, if at all, as the plaintiff may institute his suit in accordance with the provisions of the Religious Endowments

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Act" and not as meaning that all suits within the operation of the Religious Endowments Act shall be brought as provided by that Act and that Act alone. There is much which is in common between the two sections, but section 92 is substantially the wider and provides *inter alia* for settling a scheme, which is a jurisdiction of a very wide and beneficial nature. I think, therefore, that a plaintiff may proceed for appropriate relief under either Act, and that the opening words in section 92 (2) only mean that if he elects to proceed under the Religious Endowments Act, he is not to be prevented from so doing by section 92.

Turning to the plaint in the present suit, it is hardly an artistic specimen of pleading and it derives no assistance from an indifferent English translation. But I think we can see what the parties were aiming at, and we get assistance in this respect from the course the case took at the trial. As I read the plaint, it in effect charges defendant No. 1 and others with breach of trust, and claims—

(1) an enquiry as to what the trust property now consists of;

(2) possession of what should be found to be the trust property as the result of that enquiry;

(3) an account of the trust property, both capital and income, come to the hands of defendants Nos. 1, 8, and 9 or any of them from 1889 (when the lands were released by the Collector on defendant No. 1 attaining his majority, see Exhibit 67) to date;

(4) an account of all expenses properly incurred by defendants Nos. 1, 8 and 9;

(5) damages for breach of trust.

The plaintiff sued as one of two co-Muktesars appointed by the Temple Committee in the place of defendants Nos. 1, 8 and 9, who had been dismissed "on account of their wrongful acts." The other co-Muktesar was alleged in paragraph 4 to be "under the constraining influence of the other defendants" and was accordingly added as defendant No. 10. The plaintiff also sued as heir of the original donor Damodar Shet (see plaint paragraph 2 and reply Exhibit 42, paragraph 9). Defendants Nos. 1, 2, 8 and 9 put in written statements and defendants Nos. 1 and 2, if not the others,

pleaded section 92 of the Civil Procedure Code in Bar. In his reply, Exhibit 42 (paragraphs 9 and 10), the plaintiff pleaded in effect that the suit was by a trustee against servants and dismissed trustees and that no consent under section 92 was necessary. At the trial only defendants Nos. 8 and 9 appeared, but issues Nos. 2 and 4 raised section 92 of the Civil Procedure Code and section 14 of the Religious Endowments Act respectively.

At the trial the trust was found by the learned trial Judge to be in a lamentable state. In paragraph 31 of his judgment the learned Judge stated as follows: "There is, in my opinion, abundant evidence to prove that defendant No. 1 has been guilty of serious neglect of duty and breach of trust, that amounts to sacrilege at least from a Hindu point of view towards the deity for whose *vinayogas* thousands of rupees had been sacrificed by Damodar Shet and his family and that defendant No. 1 was rightly dismissed from his trusteeship." The dismissal thus referred to was a sequel to a report by the Temple Committee, Exhibit 149, which, after finding that defendant No. 1 had appropriated temple lands to his own use and had removed stones and timber of the temple to build a house for himself elsewhere and that none of the defendants Nos. 1, 8 and 9 had kept any trust accounts, concluded as follows:—"It is apparent from this that Anant Padmanabh (defendant No. 1) has caused a great loss to the God for his self benefit. The other two Muktesars, as they belong to Anant Padmanabh's family, did not prevent him from doing that. From all this the Committee thinks that all the three are not fit to be the Muktesars of the temple."

The result, however, which the learned trial Judge arrived at was hardly calculated to remedy these gross breaches of trust or to put the trust on a proper footing. In paragraph 37 he found himself constrained by section 92 to dismiss the claim for damages or compensation as being outside his jurisdiction in the absence of the requisite consent of the Advocate-General. He, however, thought he had jurisdiction to deal with the rest of the case and eventually arrived at a conclusion which, I think, he had no power to do unless he was settling a scheme or administering the trust.

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The conclusion was in effect this. On defendants Nos. 1 and 2 undertaking to perform their religious duties in future, they were to remain trustees of the temple endowments but with a liability to be dismissed by the Temple Committee for future breach of duty. If, however, this undertaking was not given within six months, plaintiff could apply for possession and was then to be at liberty to appoint new trustees preferably from among the family of defendants Nos. 1 to 7.

The result of this decision was in effect to leave defendant No. 1 in possession of much of the alleged plunder and to restore this alleged fraudulent trustee to his office on a mere promise of future good behaviour. I use the word "alleged," because we are not now hearing the appeal on its merits. But the trial Judge found these allegations proved and having regard to the admission made by defendant No. 1 before the Temple Committee and to his non-appearance at the trial, it would seem unlikely that the findings of fact by the trial Judge are incorrect.

I have dealt with this judgment at some length, because it is absolutely inconsistent with the plaintiff's theory that the suit is one for ejectment by trustees against mere trespassers.

To my mind it seems clear that the Judge could give no directions about the future trusteeship without in effect administering or executing the charitable trusts. Further the suit was by one Muktesar alone, the other one being a defendant. This would cause no difficulty in a suit for execution of the charitable trusts. I think, however, it might cause difficulty in a mere ejectment suit, for the Court could hardly decree possession to one of two Muktesars, and could not settle any dispute between them except by administering the trust. In England this difficulty could be got over by an application to the Chancery Court administering the trust for leave to sue in the names of both trustees.

The conclusion, therefore, which I have arrived at is that the plaint is clearly within section 92, and that the relief granted at the trial is also within section 92.

Under these circumstances I can deal shortly with the somewhat narrower ground

relied on by the lower Appellate Court, *viz.*, that the suit was in effect a suit for the removal of a trustee, as the offices of trustee and Muktesar were in the present case distinct and the Temple Committee could not remove defendant No. 1 from the trusteeship. This point depends on the true effect of the four documents Exhibits 60, 61, 64 and 65 set out in paragraph 10 of the judgment of the trial Judge. These documents seem to me rather confused. They extend over some nine years and give interests both to Damodar and to Ramkrishna, and it is not easy to answer the question in whom was the legal ownership of the land upon trust for the God. Both Courts below have, however, held that Ramkrishna and his heirs became hereditary trustees, though the lower Appellate Court would appear to confine this trust to income, as it finds that the "tenant Ramkrishna became trustee of the *proceeds* of the land for the benefit of the God."

For the present purposes it seems to me unnecessary to determine the precise nature of this hereditary trust. It is sufficient, I think, to say that such a trust existed, and that defendant No. 1 was not and could not be removed from it by the Temple Committee when they dismissed him from his office of Muktesar.

I agree, therefore, with the lower Appellate Court in thinking that the suit was in effect a suit for, *inter alia*, the removal of a trustee.

The result is that the preliminary point under section 92 is, in my opinion, fatal to the plaintiff's suit and accordingly the appeal must be dismissed. I am, however, very dissatisfied with the position in which the trust is thus left after some seven years' litigation—a result which is largely due to the plaintiff's obstinacy in persisting that the consent of the Advocate-General was unnecessary. Further as a rule the Court insists on at least two trustees and does not direct delivery of possession of trust property to a single plaintiff as is claimed here. I think, therefore, that the best course in the interest of the trust is to direct that the case be laid before the Advocate General as representing charity for his consideration as to what steps, if any, should be taken by him in the matter of this trust. In the

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meanwhile the record will be retained in the High Court.

As regards costs we have a judicial discretion under section 35 of the Civil Procedure Code, although in our view the Court had no jurisdiction to hear the suit. I think on the whole that the proper order here is to direct that each party bear his own costs throughout. The actual order of this Court will be as indicated by my learned brother.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL No. 42 OF 1915 FROM ORIGINAL DECREE IN SUIT No. 664 OF 1914.

July 6, 1917.

Present:—Sir Lancelot Sanderson, Kt., Chief Justice, and Justice Sir John Woodroffe, Kt.
SUDHIR CHUNDER SETT AND ANOTHER—
PLAINTIFFS—APPELLANTS

versus

Syed ABDULLA-UL-MUSAVI AND OTHERS
—DEFENDANTS—RESPONDENTS.

Mortgage, suit on—Plea that fictitious property was included in deed to evade provisions of Registration Act—Burden of proof—Estoppel, whether can defeat provisions of Statute.

A mortgage-deed in which the properties hypothecated were stated to be a house in Calcutta and a small plot of rent-free land in Burdwan, was registered at Burdwan. In a suit on the mortgage the defendant, who was one of the representatives of the mortgagor, pleaded that the mortgage was invalid, having been registered at Burdwan where no such rent-free plot as mentioned in the mortgage ever existed or belonged to the mortgagor:

Held, that the onus lay upon the defendant to disprove the existence of the rent-free plot as described in the mortgage at the time when it was executed. [p. 525, col. 1.]

The general rule is that the principle of estoppel cannot be invoked to defeat the plain provisions of a Statute. [p. 524, col. 2.]

Semle.—Once the execution of a mortgage is proved, it is not open to those claiming under the mortgagor to allege or to adduce evidence to show that any of the properties purported to be mortgaged was either non-existent or not owned by the mortgagor at the date of the mortgage. [p. 524, col. 1.]

Appeal from the judgment and decree of Mr. Justice Greaves, dated the 15th March 1915.

FACTS of the case will appear from the following judgment of

GREAVES, J.—By a document, dated the 15th April 1902 and made between Syed Moulvi Sayad Saderuddin Ahmed and Sayadani

AimanaBibi of the one part and Mrinalini Dasi and Kadambini Dasi of the other part, Saderuddin and his wife Aimana mortgaged 10, Wellesley Square, Calcutta, and one *bigha* more or less of rent-free land in the village of Bohar proper in the district of Burdwan, whereof the four boundaries were, on the north, Belghoria tank, on the east, Mir Kamaladdin's land, on the west, a public road and on the south, Karim garden (the two properties as therein set forth being owned by and possessed by Aimana, she having got the same by gift from her husband) in consideration of an advance of Rs. 4,000 made to them by Kadambini and Mrinalini to secure such sum and interest at the rate of 12 annas per mensem. The execution of the mortgage was proved before me by Sarat Kinkar Mookerjee, a Pleader of Burdwan and one of the attesting witnesses, who also proved that the consideration-money passed in his presence and that he was present at the registration of the mortgage, the execution and registration of the mortgage both taking place at Burdwan. The mortgage document bears upon it the endorsements of various payments made from time to time on account of the principal moneys due thereunder amounting to Rs. 710, the last of such payments having been made on the 16th Sraban 1311, and this action is brought to enforce payment of the balance due under the mortgage. Kadambini died on the 6th September 1909 having by her last Will, dated the 30th August 1909 and proved on the 27th January 1910, appointed the plaintiff Sudhir Chandra Sett executor thereof and he and Mrinalini Dasi are the plaintiffs in this suit. The premises No. 10, Wellesley Square, were, on the 26th June 1902, mortgaged to Surendranath Srimani, defendant No. 5, to secure Rs. 1,000 and interest at the rate of 12 per cent.

On the 11th January 1903, Aimana assigned her interest in 10, Wellesley Square, to her son Abdul Wares who by an indenture, dated the 5th May 1911, (Exhibit C) conveyed his interest in 10, Wellesley Square, to Rakhal Das Mukhopadhyaya (defendant No. 6) absolutely. Saderuddin died on the 26th July 1905 leaving him surviving two widows, Aimana above-mentioned and Alema, who are both now dead. By Aimana he had one son, Abdul Wares

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before mentioned, who died on the 26th September, 1911 leaving a widow Ummay Syeda Khatoon the 2nd defendant, and the heirs of Abdul Wares are his widow and the defendants Nos. 1, 3 and 4. By his wife Alema, Saderuddin had three children, Abdulla, Afifa and Zakia who are the defendants Nos. 1, 3 and 4. Alema is now dead but she survived Aimana and Abdul Wares.

Service of the plaint was proved on the defendants Nos. 2, 3, 4, 5 and 6 but they put in no written statement and did not appear before me. The first defendant appeared and put in a written statement and contested the suit before me. By his written statement he denies that Saderuddin and Aimana had any rent-free land at Bohar as described in the mortgage and denies the existence of any such plot of land and submits that it was mentioned in the mortgage in fraud of the law of registration and that the registration was, therefore, invalid; he also denies that the premises No. 10, Wellesley Square, even belonged to Aimana and states that Zakia is dead and predeceased Abdul Wares. Other matters are referred to in the written statement but they are not material for the purposes of this decision.

It is proved in evidence before me that the 1st defendant Abdulla is in possession of 10, Wellesley Square, and that he has been in possession thereof since his father's death.

The following issues were settled, namely:—

(1) Was the Burdwan property mortgaged at all by the deed of the 15th April 1902?

(2) Is there any such property in existence as the Burdwan property purported to be mortgaged?

(3) Was the mortgaged property registered?

(4) Is the suit bad for non-joinder of parties?

(5) Was the mortgage executed by the mortgagors and was there any consideration?

With regard to issue (1) this issue was not raised by the written statement specifically but I ruled that it was a necessary issue, as I was bound to satisfy myself before passing a decree which would affect the property that it was in fact properly charged by the mortgage. In my opinion, upon the true construction of the mortgage

of the 15th April 1902, the Burdwan property is mortgaged to secure the sum referred to in the mortgage. The document is not artistically drawn, but it recites the two properties, namely, that at 10, Wellesley Square, and the Burdwan property, that they belong to Aimana, that the money to be lent was required to pay off a mortgage on 10, Wellesley Square, and on paying this off and redeeming the aforesaid Calcutta property from the mortgage they mortgage the same—the mortgage goes on to declare that the aforesaid two properties are not already charged or encumbered. In my opinion, upon the true construction of the whole document, the words "We mortgage the same" refer to as well the Burdwan property as the property at 10, Wellesley Square, and accordingly I decide the first issue by declaring that upon the true construction of the mortgage the Burdwan property was mortgaged by the deed or document of the 15th April 1902.

Before dealing with issues Nos. 2, 3 and 4 which are the main issues, I decide with regard to issue (5), upon the evidence of Sarat Kinkar Mookerjee above referred to which evidence I accept as entirely trustworthy, that the mortgage was executed by the mortgagors and that the full amount of the consideration, namely, Rs. 400 was paid by and on behalf of the mortgagees to the mortgagors, and I decide that the whole amount of principal, except a sum of Rs. 710 remains unpaid and unsatisfied and that the sum of Rs. 4,000 was lent and advanced as to Rs. 3,000 by Kadambini and as to Rs. 1,000 by Mrinalini.

With regard to issues Nos. 2 and 3, my own view, apart from authority, would be that once the execution of the mortgage is proved, it is not open to those claiming under the mortgagors to allege or adduce evidence to shew that any of the property purported to be mortgaged was either non-existent or not owned by the mortgagors at the date of the mortgage. Mortgagees who get a decree get it for what it is worth, and it may well be that having got a decree they may find themselves unable to execute it by reason of the non-existence of the property to which it relates or other reasons. Numerous cases were cited before me to shew that there

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can be no estoppel against an act of the Legislature, notably the cases of *Jagadbandhu Saha v. Radha Krishna Pal* (1), *Abdul Aziz v. Kanthu Mullick* (2) and *Madras Hindu Mutual Benefit Permanent Fund v. Ragava Chetti* (3), and of course this proposition is not open to doubt, but the principle of those cases does not seem to me applicable here. In the case of *Jagadbandhu Saha v. Radha Krishna Pal* (1), there was no registration at all and in the case of *Abdul Aziz v. Kanthu Mullick* (2), there was no registration on the part of the person who claimed to set up the estoppel and the case of *Madras Hindu Mutual Benefit Permanent Fund v. Ragava Chetti* (3) deals with the powers of an illegal association, but in view of the decision in *Joginee Mohun Chatterjee v. Bhoot Nath Ghosal* (4), where the express point which arises here was raised and decided against the view which I have expressed above although the point was left open on appeal: see *Jogini Mohan Chatterji v. Bhoot Nath Ghosal* (5), and also in view of the recent decision of the Privy Council in *Harendra Lal Roy Chowdhuri v. Srimati Hari Dasi Debi* (6), although in that case both mortgagor and mortgagee were parties to the fraud on the Registration Law, the principle of estoppel does not consequently apply. I do not decide this case on any principle of estoppel, but on the evidence which was given before me to prove the existence or non-existence of the land at Burdwan purported to be mortgaged. Evidence on this point (excluding that of the 1st plaintiff Sudhir Chandra Sett on this point which, in my opinion, is not admissible and which I allowed subject to objection and to which I do not propose to refer) was given on behalf of the plaintiffs by Mir Muhammad Shafi (witness No. 3), who stated that from a date some 7 years ago he lived at Bohar for 5 or 6 years, that he knew Belgoria tank, that there was land to the south which

belonged to Abdulla, son of Abdulla Meah, who was also known as Sudderuddin Ahmed. This witness stated in cross-examination that he was not a ryot of Sudderuddin; that there was a public road to the south of the tank and a road to the west but not for carriages or carts, and that he did not know if there was any rent-free land on the side of the tank. This witness was not a very satisfactory witness, and I cannot accept his evidence as throwing any light on the question I have to decide. The result is that apart from the mortgage itself, the plaintiff adduced no evidence to show the existence of the Burdwan property.

The burden of proof undoubtedly lay with the defendant No. 1 to disprove affirmatively the existence of this land in 1902. To establish this he gave evidence himself, stating that the boundaries as described made it physically impossible that so small a quantity as 1 *bigha* of land could be contained therein, that the land contiguous to Belgoria tank never belonged to his father, although Belgoria tank and the banks thereof which enclosed the tank and which were higher than the level of the ground did belong to him, the defendant No. 1—that he, the defendant No. 1, had no rent-free land adjoining the tank, that no public road lay to the west of Belgoria tank and that this was the state of things in 1902. In cross-examination this defendant stated that he was not prepared to question the correctness of the description of Belgoria tank in Exhibit C as being 2 *bighas* in extent and rent-free.

The other witness who gave evidence on this point on behalf of the defendant No. 1 was Shaik Abdul Latif, who stated that he had property at Bohar and was employed at the Bohar Branch Post Office, that he served under Sudderuddin for 6 or 7 years, that the tank was on rent-free land, but that no rent-free land adjoins the tank, and that to the south of the tank is the land of Abdul Haiy or Abdul Meah.

Both these witnesses were, in my opinion, reliable witnesses, and I accept their evidence as accurate. This being so, the only point which I have to decide is whether their evidence is sufficient to rebut the presumption raised by the mortgage that the mortgagors had at the date of the mortgage the land at Burdwan which

(1) 4 Ind. Cas. 414; 36 C. 920.

(2) 10 Ind. Cas. 467; 38 C. 512; 13 C. L. J. 693.

(3) 19 M. 200; 6 Ind. Dec. (N. S.) 844.

(4) 29 C. 654; 6 C. W. N. 856.

(5) 31 C. 146 at p. 149.

(6) 23 Ind. Cas. 637; 18 C. W. N. 817; 41 C. 972; 27 M. L. J. 80; 12 A. L. J. 774; 16 M. L. T. 6; (1914) M. W. N. 492; 1 L. W. 1050; 19 C. L. J. 434; 16 Bom. L. R. 400; 41 I. A. 110 (P. C.).

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they purported to mortgage and to establish affirmatively that no such land belonged in 1902 to the mortgagors.

The evidence on the point is not entirely convincing having regard to the fact that the mortgagors did own land in the neighbourhood and also Belgoria tank, but I am bound on the evidence before me to come to the conclusion that there was in fact no such land at Burdwan, the property of the mortgagors, as the mortgagors purported to mortgage by the document of April 15th, 1902, and that consequently the registration of the mortgage was bad. I should add that the plaintiff No. 1 stated that he had no documents of title in his possession relating to the Burdwan property.

The result is that I answer issues Nos. 2 and 3 in the negative.

In view of my decision it is not really necessary to decide issue No. 4, but, as evidence was called on the point, I think it right to say that I am satisfied that the lady who appeared before me in a Palki and was examined and cross-examined was not the defendant Zakia, and I accept the evidence of the defendant No. 1 and of Syed Abdul Razak that Zakia the daughter of Sudderuddin and Alima died in 1314, some 7 years ago, leaving as her heirs after the death of her husband Elias—who survived her—Syed Muhammad Mahmud and Khatoon Bibi, neither of whom are parties, and the defendants Nos. 1 and 3, although in view of the decision reported as *Davalata v. Bhimaji Dhondo* (7). I should not have been prepared to say that the suit was bad for non-joinder of parties. The result will be that the suit will be dismissed, but I make no order as to costs except for taxation of the costs of their respective attorneys as between solicitor and client against the plaintiffs and defendant No. 1.

Mr. N. Sircar (with him Mr. I. B. Sen), for the Appellants.

Mr. C. R. Das (with him Mr. D. N. Basu), for the Respondents.

JUDGMENT.

WOODROFFE, J.—This is a suit on a mortgage, dated the 15th of April 1902, executed by one Syed Moulvi Saderuddin Ahmed and his wife Sayadani Aimana Bibi in (7) 20 B. 338; 10 Ind. Dec. (N.S.) 787.

favour of Srimati Kadambini Dasi and Srimati Mrinalini Dasi. The 1st plaintiff is the sole executor of Srimati Kadambini Dasi. The mortgage was to secure the sum of Rs. 4,000 and the security was the house No. 10, Wellesley Square, in Calcutta, and a piece of rent-free land, one *bigha* in area, in Bohar in the district of Burdwan, butted and bounded in the manner stated in the first paragraph of the plaint.

The Muhammadan defendants are the representatives of the mortgagors. The defence of one of them is that his father, the mortgagor, and his step-mother, Sayadani Aimana Bibi, never had any rent-free land (measuring one *bigha* or otherwise) in Bohar in Pergana Ranibati in the District of Burdwan; as referred to in the first paragraph of the plaint and described in the deed of mortgage. He denies that there was any such plot of land, and suggests that it was a fictitious plot mentioned in the deed of mortgage in fraud of the law of registration and that the registration of the mortgage being invalid, the plaintiff cannot get relief in respect of the same. He further does not admit the receipt of consideration.

The issues were: Whether the suit was bad for non-joinder of parties. We are not concerned with this now. This was the fourth issue. The fifth issue raised the question whether the mortgage was executed by the mortgagors and there was any consideration. This issue was decided in favour of the plaintiffs by the learned Judge, and there has been nothing said against his decision on this point. There is no question in this appeal about the merits of the appellants' case.

The first issue raised the question whether the Burdwan property was mortgaged at all by the deed of the 15th of April 1902. This issue was decided in favour of the appellants, though the respondents here have sought to persuade us to hold that the learned Judge's decision was wrong. The mortgage (though, as the Judge pointed out, it might have been in some respects more clearly drawn) states that "the mortgagors executed this bond to the following effect:" It then sets out both the Calcutta and the Burdwan property, thereby indicating that both these properties were the subject of the

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mortgage. It then recites the ownership of these two properties and it states that neither of the properties are charged or encumbered by mortgage or attachment, which would be unnecessary if one of them was not intended to be mortgaged. Moreover, the case made is that the Burdwan property was inserted in order that the Registering Court of Burdwan might have jurisdiction by reason of the fact that one of the mortgaged properties was in that district. I am, therefore, of opinion that upon a true construction of the whole document, the Burdwan property was mortgaged.

There remain then the second and the third issues, namely, (second)—Was there any such property in existence as the Burdwan property purported to be mortgaged, and (third)—Was the mortgaged property registered?

These questions involve a determination of the contention whether the appellants can invoke any estoppel. Section 115 of the Evidence Act would *prima facie* apply, as there has been here a representation of fact and an alteration of position. The question arises—is an estoppel being invoked to defeat the provisions of a Statute, namely, the Registration Act? The learned Judge indicates that his own view, apart from authority, would be that once the execution of the mortgage was proved, it was not open to those claiming under the mortgagor to allege or to adduce evidence to show that any of the property purported to be mortgaged was either non-existent or not owned by the mortgagors at the date of the mortgage. But the learned Judge, by reason of the decision of the original Court in *Joginee Mohan Chatterjee v. Bhoot Nath Ghosal* (4) and in view of the recent Privy Council decision in *Harindra Lal Roy Chowdhuri v. Srimati Hari Das Debi* (6), decided that the principle of estoppel was not applicable. He has, however, himself pointed out that in the Privy Council case, both the mortgagor and the mortgagee were parties to a fraud on the Registration Law, and in the case reported as *Jogini Mohan Chatterji v. Bhoot Nath Ghosal* (5), Chief Justice Maulean expressed himself as disposed to take the view that the defendant was estopped, although the question was actually left open and not decided.

There can be no doubt about the general rule that the principle of estoppel cannot be invoked to defeat the plain provisions of a Statute in the sense in which that rule is properly understood. The question is, however, whether the estoppel has been invoked for such a purpose here. This is not like the cases cited in the judgment of the learned Judge in which there was either no registration at all, or in which it was alleged that both the mortgagor and mortgagee were parties to a fraud, nor is it a case of agreement. We cannot further assume that there was an attempt to defeat the Law of Registration except by also assuming that there was in fact no property in Burdwan, which is the point in question. If we assume that, there is an end of the case. If then it be said that to apply an estoppel would be to shut out the attempt of the defendants to prove the true facts, there is no reason why it should not be so shut out, unless we can say that we are applying the provisions of estoppel to defeat the provisions of a Statute. I am disposed to hold that the defendants are estopped: but it is not necessary to rely on this, as, on the evidence, my opinion is that the appellants should succeed.

The facts show that the mortgagor Syed Moulvi Saderuddin Ahmed was a man of property, position and character for honesty. There is no evidence of an intention on his part to commit fraud. What is shown is, that the document was to be registered in Calcutta, but a few days prior to registration Syed Moulvi Saderuddin Ahmed on account of ill-health of his wife was not able to come to Calcutta, and, therefore, in order to register the mortgage at Burdwan he included the property belonging to him, which was situated in Bohar in that district. It is admitted that he had other property in the neighbourhood. Therefore, the position is that he desired to found jurisdiction in the Burdwan Registration Court and that he actually had property in Burdwan available for that purpose. It is to my mind, therefore, inconceivable under these circumstances that the mortgagor should either deliberately or through carelessness insert in the mortgage-deed property he had not got,

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Then, upon the evidence, even if the defendants are not estopped, there is no question but that the statement in the mortgage is very strong evidence against them. No one is more likely to know whether the property is held by him and what is its position than the alleged owner, and the statement that there was such a property at Burdwan, and its boundaries are set out in the document signed by Syed Moulvi Saderuddin Ahmed and his wife. The onus, therefore, lay upon the defendants to disprove the existence of this land in 1902. The learned Judge in his judgment holds that the onus was on the defendants and states that the question was whether the evidence given for the defendants was sufficient to rebut the presumption raised by the mortgage that the mortgagors had at the date of the mortgage the land at Burdwan which they purported to mortgage, and to establish affirmatively that no such land belonged in 1902 to the mortgagors. The learned Judge on this says:—"The evidence on the point is not entirely convincing having regard to the fact that the mortgagors did own land in the neighbourhood and also Belgoria tank." Notwithstanding this, however, he held that he was bound by the evidence to come to the conclusion that there was in fact no such land at Burdwan. If, however, the evidence was not entirely convincing and the onus lay upon the defendants, the decision should upon the learned Judge's findings have been the other way. But apart from this, and upon examination of the evidence, I think that the defendants have not established that which lies upon them. Had the onus been upon the plaintiff, it may be conceded that it might be difficult to hold that he made out the existence of the land with the boundaries as stated. But that is not the case here. It starts with the strong evidence of the statement in the mortgage, and, I think, Mr. Sarkar has shown a case for identifying, to some extent at least, two of the boundaries; and, as regards another of the boundaries, the defendants' evidence would not appear to be true. In any case, I am not prepared to hold that the defendants have established that the mortgagors had no land at

Burdwan and that there was no such land as described in the mortgage. It may be that when the plaintiff endeavours to execute this mortgage decree, he may not be in a position to satisfactorily identify the boundaries of this land so as to enable him to sell the same either due to original misdescription or change in the surroundings during the past fifteen years. That is a different case from the one before us, which is whether or not the defendants have established that the mortgage is invalid by reason of the fact that there was no land at Burdwan.

In my opinion the respondents fail in this case: and I would answer the issues Nos. 2 and 3 in the affirmative, namely, that there was such property in existence at Burdwan as alleged and that the mortgage was properly registered. In the result the suit must be decreed. Mr. Sarkar on behalf of the appellants states that he is not seeking for a personal decree. Therefore, there must be a decree against the mortgaged premises only.

An objection was raised by Mr. Das on behalf of the respondents that there could be no decree against them until it was determined whether the decree could be sustained against the heirs of Zakia Bibi. But this contention is without basis, having regard to the fact that no personal decree is sought against anybody, but merely against the mortgaged property itself. As against the heirs of Zakia Bibi, if they desire to contest the plaintiffs' suit, then, in that case, they having been added after the determination of the suit in the first Court, evidence will have to be given, and a trial held as against them.

Upon these terms, in my opinion, the appeal should be decreed with costs as against the respondents except the heirs of Zakia, Mr. Sarkar on behalf of the appellants having agreed to pay the costs of one day's hearing to the heirs of Zakia Bibi. Mr. Sarkar's client will pay the costs of the guardian *ad litem* of the daughter of the 2nd defendant and may add them to his own costs. The plaintiff is entitled to his costs in the first Court against all the defendants appearing in that Court.

SANDERSON, C. J.—I concur.

Appeal decreed.

ANANT SINGH v. KALKA SINGH.

OUDH JUDICIAL COMMISSIONER'S
COURT.

CIVIL MISCELLANEOUS APPEAL NO. 39 OF 1917.

September 3, 1917.

Present :—Mr. Lindsay, J. C.

ANANT SINGH AND ANOTHER—OBJECTORS

—APPELLANTS

versus

KALKA SINGH AND OTHERS—OPPOSITE PARTY

—RESPONDENTS.

*Provincial Insolvency Act (III of 1907), ss. 2, 13—
Joint family property, undivided share in, whether
“property”—Receiver, appointment of.*

A Receiver cannot be appointed under section 13 of the Provincial Insolvency Act in respect of an insolvent's undivided share in the property of the joint family of which he is a member. Such undivided share is not “property” as defined in section 2 of the Act.

Appeal against the order of the District Judge, Sitapur, dated the 13th April 1917.

Mr. A. P. Sen, for the Appellants.

Babu Basudeo Lal, for Respondents Nos. 4, 6, 7 and 8.

JUDGMENT.—This appeal is directed against an order made by the District Judge of Sitapur in his insolvency jurisdiction. It appears that the opposite party Kalka Singh filed an application to be adjudged insolvent. His application was accepted and an adjudication order was passed. It was made to appear to the Court below that the chief property of the insolvent consists of an area of 400 *kham bighas* of land, which he held as a *guzaradar*. The learned Judge in his judgment refers to a decision of this Court, in which it was held that this property which was granted to the grandfather of the insolvent was granted for the maintenance of the family and was not alienable and in that judgment, a copy of which has been produced before me, I find that we refused to recognise alienations made in favour of mortgagees. What the learned Judge in his order says is this. His argument is that the usufruct of the property was transferred to the insolvent and that this usufruct may be alienated for the purpose of paying off his debt, subject to any rights which his sons may have to be maintained out of the property; and taking this view of the law he has directed the appointment of a Receiver and ordered him to take over this property and arrange for a lease of the same. The contention in appeal here is that it was not competent to the Court to

order the appointment of a Receiver for the purpose of dealing with property which is joint family property and, further, property which has been declared to be incapable of alienation. It seems to me that this objection must prevail. Looking at the definition of the term “property” in the Provincial Insolvency Act (Act III of 1907), section 2, we find that it includes property over which or the profits of which any person has a disposing power which he may exercise for his own benefit. If it is the fact, and it does not seem to be disputed, that Kalka has got 8 sons who with him constitute a joint family, then it is impossible to describe any portion of this 400 *bighas* area or the usufruct of 400 *bighas* as property within the meaning of the definition just quoted. The case from the legal point of view is very much the same as the case in which it has been held that a guardian of the property of an infant member of a joint Hindu family cannot properly be appointed in respect of the infant's interest in the joint family property, because the interest is not individual property and, therefore, not property with which the guardian, if appointed, would have anything to do; on similar principles it seems that a Receiver cannot be appointed in respect of the undivided share of the property of a member of a joint Hindu family. Further it may be pointed out that to vest the property in a Receiver and to direct the Receiver to grant a lease of the same is to treat this property as being capable of alienation. It has already been decided that it is not. On this ground, too, I think the order of the Court below is not correct. I allow the appeal and set aside the order of the Court below. I make no order as to costs. 0

Appeal allowed.

DURGA PRASAD SINGH v. TREBINI SINGH.

PRIVY COUNCIL.

— APPEAL FROM THE CALCUTTA HIGH COURT.

July 26, 1918.

Present:—Lord Shaw, Lord Phillimore, Bart.,

Sir John Edge and Mr. Ameer Ali.

Raja DURGA PRASHAD SINGH—

PLAINTIFF—APPELLANT

versus

TREBINI SINGH AND OTHERS—

DEFENDANTS—RESPONDENTS.

Bengal land law—Ghatwali tenure—Rights of ghatwal and his family over property subject to tenure, nature of.

In the Zemindari of Kharakpur in Bengal the *ghatwali* tenure is ordinarily hereditary, the estate descending to such male member of the family as the Zemindar approves as competent, and it is the right of the family, so long as they have male members competent to perform the duties, to have one or more of them appointed *ghatwals*, but the incidents of the tenure are not such as to give the family any rights over the property while it is in the hands of the *ghatwal*. [p. 550, cols. 1 & 2.]

Where the Zemindar on being released from the performance of *ghatwali* duties gave a *pattah* to four *ghatwals*, members of a family, granting the lands (which were till then subject to the *ghatwali* tenure) in perpetuity at an annual fixed *jama*:

Held, that the members of the family other than the four grantees took no beneficiary interest in the lands granted. [p. 532, col. 2]

Appeal from a judgment and decree of the High Court, at Calcutta, affirming a judgment and decree of a Subordinate Judge.

FACTS.—In 1873 the Zemindar of Kharakpur, Raja Lela Nund Singh, who was released from the performance of the Ghatwali duties, granted a Mokurari Pattah of certain lands to four persons, who were till then the Ghatwals of the lands granted. By a sale deed, dated the 9th April 1907, the plaintiff-appellant purchased certain shares in the Mokurari lands from persons who alleged that they or their predecessors and the four grantees were members of the same family, that the Ghatwali lands had been in their family from time immemorial, and that the Mokurari grant was made to the said grantees on behalf of the family. The plaintiff sued on the 15th March 1908 to eject the first nine respondents to whom the interest of the grantees had passed. The Subordinate Judge dismissed the suit, holding that the four Mokuraridars alone were the owners of the Mokurari lands. On appeal the High Court affirmed that decree, holding that the plaintiff had failed to prove that his vendors had any title to the Mokurari

lands or that they had possession thereof ever since 1873. The plaintiff thereupon appealed to His Majesty in Council.

Messrs. Upjohn, K. O., DeGruyther, K. O., and J. M. Parikh, for the Appellant.—The Mokurari lands were before the grant Ghatwali lands, which had been in the family of the plaintiff's vendors and the grantees from time immemorial. The Zemindar appointed Ghatwals from the members of the family, which had the right to ask the Zemindar to appoint a fit person or persons as Ghatwals. The Ghatwals for the time being held the lands on behalf of the family. The Mokurari was granted to the four persons who happened to be the Ghatwals at the time of the grant. They took the grant on behalf of all the members of the family. The Ekarnama of 1872 showed that the lands had been ancestral Ghatwali lands of the family, and that though the grant was made to four members of the family all the members of the family had an interest in the grant. *The Rumford Market Case*, *Keech v. Sandford* (1) was relied on. Reference was made to *Raja Lelanund Sing Bahadoor v. Government of Bengal* (2) and *Raja Lilanand Singh Bahadur v. Thakur Munorunjun Singh* (3). The Court below had not appreciated the plaintiff's evidence. There was reliable evidence to establish that the plaintiff's vendors received their shares of the profits of the village and that they had held *kamat* lands. The Ekarnama of 1873, which was a declaration against the interest of, or one by an occupier qualifying his estate, established the general claim of the family, and the plaintiff was, therefore, entitled to recover at least that 1-anna share.

Mr. Dube, for the Respondents.—There were concurrent findings of fact that the plaintiff's vendors had no title and that they had never held possession of the Mokurari lands; and these findings should not be disturbed: *Sajjad Husain v. Abid Husain* (4). The Mitakshara Law of inherit-

(1) 2 White & Tudor's L. O. in Eq. 703.

(2) 6 M. I. A. 101; 4 W. R. (P. O.) 77; 1 Sar. P. O. J. 505; 1 Suth. P. C. J. 248; 19 E. R. 38.

(3) 1 A. Sup. Vol. 181; 13 B. L. R. 124; 3 Sar. P. C. J. 238.

(4) 16 Ind. Cas. 197; 39 I. A. 156; 34 A. 455; 14 Bom. L. R. 1055; 16 O. W. N. 839; 23 M. L. J. 210; 10 A. L. J. 364; 16 O. L. J. 613; 12 M. L. T. 361; (1912) M. W. N. 976; 15 O. C. 271 (P. C.).

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ance was not applicable to Ghatwali tenure and the Ghatwali lands were not divisible as contended by the plaintiff: *Nilmoni Singh Deo v. Bakranath Singh* (5), *Anundo Rai v. Kali Prasad Singh* (6), *Kali Perhad v. Anand Roy* (7) and *Ohhatradhari Singh v. Saraswati Kumari* (8). The title to the lands was in the four grantees. The Courts below have agreed in finding that the plaintiff's vendors had never enjoyed the lands since 1873, and that the suit was, therefore, barred by limitation.

Mr. DeGruyther, K. C., replied.

JUDGMENT.

LORD PHILLIMORE.—The suit to which this appeal relates is brought to recover certain lands formerly held under Ghatwali tenure in the Zemindari of Kharkapur in Bengal.

These lands were originally held by the Zemindar under the ruling power upon terms that the Zemindar should perform by himself or his tenants the duty of guarding the Ghats or passes against marauders and preserve the peace of the district, and discharge other Police services.

In the year 1838 the Government, being of opinion that these duties could be, and indeed were being, better performed by their own officers, and that the Government was entitled to resume these lands, as the services for the performance of which they were originally held were no longer needed, claimed to resume them accordingly.

Litigation ensued, and the Government was successful in the Courts in India, but the decision was reversed on appeal to the Privy Council, and the Raja Zemindar was quieted in his possession.

The case was decided in 1855, and is reported as *Raja Lelanund Sing Bahadoor v. Government of Bengal* (2).

As it was still possible that the Government might insist upon the Zemindar performing certain of the original duties, a compromise was entered into, and a settlement was arrived at by which the Zemindar paid a *jama* of Rs. 10,000 per annum,

and was released from further performance of these duties.

Thereupon he in turn endeavoured to resume their tenures from the several Ghatwals on the ground that their services were no longer required. This led to much litigation with varied fortune. In two cases reported together in the Supplemental Volume of Indian Appeals, page 151, the first being *Raja Lilanand Singh Bahadur v. Thakur Munorunjun Singh* (3), the Ghatwals were successful both in India and before the Privy Council. In a third case heard at the same time the Ghatwal got better success before the Privy Council than he had in India. These cases were decided in 1873. Further, it appears from the judgment of the Subordinate Judge that there were some other cases, apparently not reported, in which the judgments in India were in favour of the Zemindar but the decisions in the Privy Council in favour of the Ghatwals.

In the case of the particular lands now in dispute, they were held by four Ghatwals and the decision went against them and in favour of the Zemindar in the High Court at Calcutta, and they appear to have neglected to appeal in time; but on learning that other Ghatwals in a similar position had been successful before the Privy Council, they became dissatisfied and were endeavouring to see if they could not by some means re-open the question when a compromise was arrived at, and the Zemindar gave a *pattah* to the four Ghatwals granting the lands in perpetuity at an annual uniform *jama* of Rs. 1,031.

This *pattah* is dated the 6th July 1873. The grantees Dharmu Roy, Chaman Roy, Gokul Roy and Mangal Roy are described in it as former Ghatwals of the Mouzahs named in the *pattah*, and it is recited that "the said Mouzahs, original with dependency, had from the time of the former Rajas been in the possession and occupation of you and your ancestors by virtue of Ghatwali right." The litigation and the agreement of the parties to come to an amicable settlement are then recited, and the Raja proceeds to make the grant in the following words: "Therefore, I have made in favour of you the permanent *Is-tamrari Mukurari* settlement in perpetuity descendible to progeny and generation after

(5) 9 I. A. 104; 9 C. 187; 5 Shome L. R. 68; 4 Sar. P. C. J. 335; 4 Ind. Dec. (N. S.) 777.

(6) 10 C. 677; 5 Ind. Dec. (N. S.) 455.

(7) 15 I. A. 18; 15 C. 471; 12 Ind. Jur. 172; 5 Sar. P. C. J. 121; 7 Ind. Dec. (N. S.) 898.

(8) 22 C. 156; 11 Ind. Dec. (N. S.) 105.

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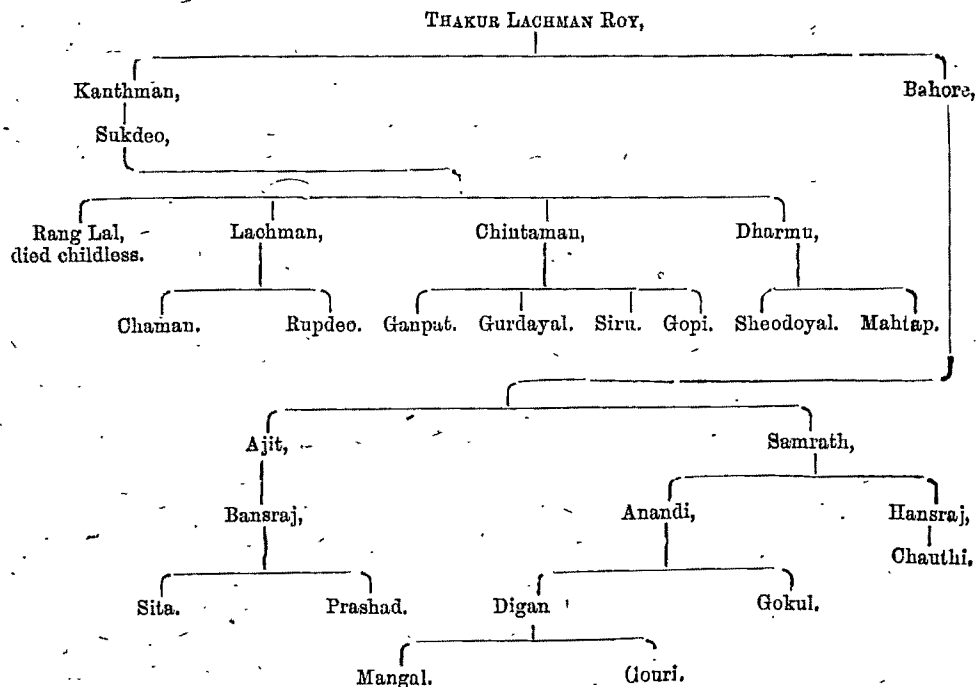
generation in respect of Mouzba Khādwa, etc., original with dependencies in existence from before.....at an annual uniform *jama* of Rs. 1,031.

The four grantees thereafter dealt with the property as their own as property held by each severally, in respect of his 4-anna share, as a member of a Hindu family holding jointly with his sons and grandsons.

The four grantees, as managers or Kartas of a Hindu family, jointly made mortgages and leases, and in particular, in the year 1884 they, with their sons and other descendants, executed two mortgages in favour of Shitabi Singh. Upon these mortgages decrees were ultimately obtained, and the villages were sold in execution to the first party defendants, whose representatives are the respondents appearing before the Board to support the judgments under appeal. Delivery of possession was made on the 6th March 1897. It should be added that since the date of delivery

the first party defendants or their predecessors have been in possession.

The case made for the plaintiff-appellant accepts a large part of that of the defendants-respondents. The *pattah* is admitted, as also are the apparent title thereby created in favour of the four grantees, Dharmu, Chaman, Gokul and Mangal, the title deduced from them to the first party defendants, and the possession by the latter from the date of delivery upon the sale. The case made is that the *pattah* was granted to the four grantees as representatives of one great family descended from a common ancestor, and that all the male descendants have beneficiary interests in the several Mouzahs according to their respective shares *per stirpes*, and that the plaintiff is the assignee of interests of several of these descendants in respect of shares amounting to 7-annas and a fraction or nearly half. A short pedigree will show the origin and nature of the several interests which he claims to have bought:—



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On the assumption made on behalf of plaintiff, Rupdeo, a brother of Chaman, and his descendants have a claim in some beneficiary share, presumably a 1-anna share, Chintaman, brother of Dharmu and uncle of Chaman, and his descendants would have a 2-anna share; in the other line, Ajit and his descendants would have a 4-anna share and Chauthi and his descendants a 2-anna share. The plaintiff has bought up all these shares, except those of some of the descendants of Chauthi.

Lachman Roy, the common ancestor, flourished about 1750. He was probably in his day the Ghatwal. His son Bahore was Ghatwal; so was Bahore's son Ajit. Sakhdeo, the grandson by the other line, was Ghatwal apparently with Bahore, and later on with the latter's grandson Anandi. In 1854, Digan, father of Mangal, was Ghatwal in conjunction with some member of the other line, probably Dharmu, and then in 1864, when the Zemindar sought to eject them, the four grantees were the Ghatwals.

The plaintiff suggests that they were chosen as the representatives of the several branch families and held their shares of the family estate on behalf of all the male members. This case is rested upon three grounds; the nature of the Ghatwali tenure as determined by the several decisions of the Privy Council, the alleged enjoyment by the beneficiaries of their respective shares from the grant of the *pattah* to the sale by the Court, and upon an Ekrarnama executed on the 22nd September 1873, that is, between two and three months after the *pattah*.

As regards the first ground there are several decisions of the High Court and of this Board on the nature of this tenure.

Some have been already cited, and in addition special reference may be made to *Nilmoni Singh Deo v. Bakranath Singh* (5), decided in 1882, a case not so much in point as the Ghatwali lands were in another Zemindari, and to *Kali Pershad v. Anand Roy* (7), decided in 1887, concerning other lands in the Zemindari of Kharakpore.

The result of the decisions is that the Ghatwali tenure is ordinarily hereditary, the estate descending to such male member of the family as the Zemindar approves as competent, and that it is the right of the family so long as they have male

members competent to perform the duties to have one or more of them appointed Ghatwals. It was certainly an advantage to the whole family that one of their members should hold the office and the tenure. He could put other members of the family into minor offices and grant them subordinate interests commonly called *jotes*, and he could and would generally provide for the family in the manner expected of its head. But this is a long way off making him a trustee for the family or treating the Ghatwali estate as possessed by the family and reducing the Ghatwal to the position of Karta or managing head of the family. Their Lordships do not find that the incidents of Ghatwali tenure are such as to give the family any rights over the property while it is in the hands of the Ghatwal and they find themselves upon this point in full agreement with the Courts in India. So far, therefore, if the assumption were to be made that the scheme of the *pattah* was to preserve family rights, there would still be no reason for holding that they extended so as to give any beneficiary interest in the Mauzabs to the male members of the family other than the actual grantees.

The plaintiff, however, relied upon an ancestral actual possession and the receipt of their share of the rents and profits by his vendors or their predecessors-in-title, and he called several witnesses to depose to this. He laboured under an initial difficulty in stating what those shares were, as they had been variously stated in his plaint and in a previous plaint in a suit brought by his vendors in March 1898 and discontinued by them, it was said, on account of poverty, and again differently stated in other proceedings. But it is unnecessary to discuss this matter at length. The Subordinate Judge who saw and heard the witnesses for the plaintiff did not accept their testimony, and the High Court saw no reason for differing from him. It was contended on behalf of the plaintiff that the Judges of the High Court made no independent examination of this evidence and that their Lordships are, therefore, not bound to treat the case as one of concurrent findings of fact, and their Lordships permitted the Counsel for the plaintiff to read and

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comment upon this evidence. But the result is that their Lordships see no reason for differing from the judgment of the Subordinate Judge upon this point: and it must be taken that the plaintiff did not succeed in proving that his vendors or their predecessors-in-title were ever in possession or in the enjoyment of shares in the rents and profits since the grant of the *pattah*.

There remains for consideration the argument for the plaintiff founded upon the *Ekrarnama*. This argument was rejected by the Subordinate Judge and by the High Court, and their Lordships, as it will be seen, have come to the same conclusion in the end. But the point is not altogether easy to decide, for there is *prima facie* some weight in the contentions founded upon this document.

The grantor is one of the four grantees under the *pattah*, Dharmu Roy. He describes himself as son and heir of Sukhdeo Roy and recites that the four Mouzahs form an ancestral Ghatwali Mahal, which have "since olden times been in our possession and occupation." He then recites that the Rajah had taken possession of them and done away with the Ghatwali tenure and that thereafter by amicable settlement the Mouzahs were obtained "under a *Mokurari pattah*, at an annual *jama* of Company's Rs. 1,031 in the name of the four grantees."

The document proceeds as follows:—

"As this Mahal is our old ancestral Ghatwali, and although our names are recorded in the Government Office, etc., yet all the heirs who are the heirs of the common ancestor, have been in equal possession thereof in the *Moffusil*, and all the heirs have been and are supported and maintained thereby in the *Moffusil*, and whereas one set of these *Moffusil* co-sharers, namely, Ganpat Roy, Gurdayal Roy, Gopi Roy and Sri Roy, the four brothers and the own nephews of me, Dharmu Roy is not satisfied unless their names are recorded or they obtain a deed, therefore, of my own accord and free will, with a view to put a stop to disputes in future, I do hereby make a valid declaration and give out in writing that, after paying the

rent mentioned in the said *Mokurari pattah* and the village and Court expenses, Ganpat Roy, Gurdayal Roy, Gopi Roy and Sri Roy shall get 1-anna share out of the share of me, Dharmu Roy and the said four brothers will divide equally amongst themselves the said 1-anna share; that although the names of us, the said *Mokuraridars*, are recorded in the *Suddar Serishta* of the said Rajah Saheb, still the said Ganpat Roy and others, the four brothers, shall always continue to hold possession in the *Moffusil* to the extent of 1-anna share, and that all the co-sharers and co-partners shall have to pay all expenses which have been incurred in obtaining the *Mokurari pattah* of the aforesaid Mouzahs, as also the expenses which may be incurred in future in connection therewith, in proportion to their respective shares."

The other three grantees were witnesses to the execution.

It appears that when the document was presented for registration, Dharmu opposed the registration stating that he had not executed the deed and that he did not know how to write, but that eventually it was registered under an order of the District Judge. Dharmu, however, was illiterate and had signed by the pen of a scribe.

It could not be disputed that this document constituted an admissible and relevant piece of evidence, and that both the recitals and the operative part have to be considered. But the two do not stand upon the same footing. The recital that all the heirs of the common ancestor have been in equal possession of the Mouzahs is larger than is necessary for the operative part of the deed; and it may be that whereas Dharmu was content to settle a 1-anna share for the benefit of the sons of his deceased brother, and the deed in its operative part was, therefore, a true expression of his will and rightly registered, yet that he being illiterate had not understood or intended the terms of the recital or that his co-grantees did not approve of them, and that this was the explanation of the opposition to the registration.

The draughtsman may have thought it expedient to insert something in the nature of a consideration so as to take the deed

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out of the category of voluntary settlements and he may have been carelessly or wrongly instructed.

The learned Subordinate Judge endeavoured to cut the knot by inferring that some other members of the family fraudulently introduced this recital. But there is no warranty in the evidence for inferring fraud and no suggestion of it appears to have been made to any of the plaintiff's witnesses. All that can be said is that it is possible that such was the case.

There is, however, a stronger comment which was also made by the Subordinate Judge, and that is that the recital is not only larger than the operative part, but inconsistent with it. On any theory of descent *per stirpes* the descendants of Sukhdeo would have an 8-anna share and each of the four sons a 2-anna share. The four sons of Chintaman in whose favour the deed is made would have their father's 2-annas and Dharmu would have 2 annas and no more. But he is parting with a 1-anna share only and keeping 3, on the theory, for himself.

The suggestion made on behalf of the plaintiff to meet this difficulty was that it was intended, that the other grantee of the Sukhdeo line, Chaman, son of Lachman, should give out of his 4 annas a second anna to the sons of Chintaman, and apparently that Dharmu and Chaman should further contribute a 1-anna share each for their brother Rang Lal, who was then living and ultimately died childless.

On this theory Chaman would further have to denude himself of another anna share to his brother Rupdeo whose descendants are some of the vendors to the plaintiff.

Ingenious as these suggestions are, they are without warrant in the evidence or the documents and wholly fanciful.

This being so, the recital in the Ekrarnama, though not without weight and not to be wholly put aside as a piece of evidence, cannot, in their Lordships' opinion, as it did not in the opinion of the Subordinate Judge, or in that of the High Court, outweigh the mass of evidence, which makes against the very difficult legal title which the plaintiff seeks to establish.

It remains, however, to consider the operative part of the document, which is in terms a grant of a 1-anna share to the sons of Chintaman, through whom among others the plaintiff claims, and to see whether, though the plaintiff fails in his claim to the larger share (7-anna and a fraction) of the estate, he yet could succeed in respect of a 1-anna share. Many answers have been made to this claim. It is not that put forward by the plaintiff in his plaint. He did not rely upon the Ekrarnama as a conveyance of this 1-anna share, but as a declaration against interest, or one by an occupier, qualifying his estate, establishing the general claim of the family. The document was conditional only. If, as is probably the right construction, the *pattah* is a grant to the four grantees, each taking in respect of their separate shares as members of a joint Hindu family with their sons and grandsons, Dharmu could not convey away a part of his estate to the prejudice of the other members of his joint family, and the deed could only operate *quoad* his life-interest, which has expired.

It was suggested as an answer to this last argument that it would be within the authority of the *karta* or head of a family to make compromises.

But the one conclusive answer to any case in respect of this 1-anna share is the Statute of Limitations. The learned Subordinate Judge in his very careful judgment considered this plea, but upon the whole rejected it on the ground that the suit was instituted on the 16th March 1908, and the date from which the twelve years began to run was when the auction-purchasers took delivery of possession, that is, the 6th March 1897. And the High Court in the view which it took of the case found it unnecessary to express any opinion upon this plea.

Inasmuch, however, as none of the vendors to the plaintiff or their predecessors-in-title have been in possession of any shares in the property including therein this 1-anna share, it must be taken that the Statute began to run at least from the time when the sons of Chintaman did not receive the benefits which the Ekrarnama purported

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to give them, that is, from the year 1873.

Upon the whole, therefore, the plaintiff has failed to prove title to any portion of the property in suit, and the decrees of the Subordinate Judge and the High Court dismissing his suit were right, and their Lordships will humbly recommend His Majesty that the appeal should be dismissed with costs.

Appeal dismissed.

Solicitor for the Appellant: Mr. E. Dalgado.

Solicitors for the Respondents: Messrs. Watkins & Hunter.

PATNA HIGH COURT.

CIVIL REVISION No. 110 OF 1918.

November 6, 1918.

Present:—Sir Dawson Miller, Kt., Chief Justice, and Mr. Justice Mullick.

Sheikh FAZLUR RAHMAN AND OTHERS

—APPLICANTS

versus

Sheikh KALI MUZAFFAR—

RESPONDENT.

Administration suit, decree in, directing administration under supervision of Court—Court, power of, to grant allowances to beneficiaries pending administration—Discretion, exercise of.

Where the administration of an estate is being carried on under the supervision of a Court, that Court has power, in a proper case, to grant an allowance, pending the administration, to any of the parties who will eventually be entitled to share in the property. That power ought, however, to be exercised with proper discretion and having regard to the claims that are likely to be made upon the estate, and the Court ought not to grant to any of the beneficiaries properties by way of an allowance unless it is satisfied that the assets will be sufficient to satisfy the creditors. [p. 134, col. 2.]

Mr. Khurshed Hasnain, for the Appellants.

Mr. Nurul Hasan, for the Respondent.

JUDGMENT.

MILLER, C. J.—This is an application on behalf of the representatives of some of the children of the late *Musammât Bibi Fasihan* in the course of administration pro-

ceedings in respect of her estate. It appears that she died leaving 4 daughters and 3 sons. To some of them she had by deeds of gift transferred certain portions of her property. The validity of these deeds of gift was called in question by the remaining heirs and after some litigation all of them were set aside and this Court ordered, in view of the somewhat complicated circumstances that had arisen by reason of the dealings with the shares which had been given to some of the children by the deeds of gift, that the whole estate should be administered under the supervision of the Court and directed a preliminary decree to be drawn up in accordance with that decision. In the course of the administration proceedings a Receiver was appointed and from time to time various applications were made to the District Judge under whose charge and supervision the estate was being administered. On the 23rd March 1918, Kali Muzaffar, one of the sons of *Musammât Fasihan Bibi* whose share of the estate was a 7-anna share and who had incurred certain costs in connection with an appeal from the decision of this Court to the Privy Council, applied to the District Judge by petition that those costs should be advanced to him out of his share and charged to his account and further that an allowance should be paid to him pending the administration of the estate. In the result the learned District Judge ordered that the costs incurred by Kali Muzaffar in prosecuting his appeal to the Privy Council from the decision of this Court might be advanced to him and charged to his account out of the share which would ultimately come to him when the estate had been administered. With regard to the allowance he said: "Receiver should submit a scheme for the payment of the debts due by the estate and an estimate of the mesne profits due by and to each party in order that it may be possible to fix the amount of the allowance." In pursuance of that order a report was made by the Receiver, which dealt with the assets and liabilities of the estate which was a large one, amounting to some 10 lakhs. The report also dealt with the mesne profits which Kali Muzaffar and one or two of the other heirs had received out of that portion of the estate which they had been dealing with under the deeds of gift and

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before the deeds were set aside. It appeared from that report, which was not final as the assets and liabilities had not then been entirely ascertained, that there would be due from Kali Muzaffar to the estate a sum of something between Rs. 70,000 and Rs. 90,000 in round figures. It further appeared, as far as can be ascertained at present, that making a liberal estimate for the debts and liabilities of the estate, something like 7 or 8 lakhs (take it at 7 lakhs) would be left representing the assets distributable amongst the various heirs. Of this sum Kali Muzaffar will be entitled to a 7-annas share. Out of that 7-annas share he will have to pay a sum of not less than Rs. 73,000 and not more than Rs. 94,000. Taking it even at a lakh, that would leave Kali Muzaffar's share at something like 2 lakhs and in the meantime, of course, he would be entitled to the interest on that property in addition to the capital which will eventually become his. In these circumstances the learned Judge, having received the report and presumably considered it, made another order on the 10th April 1918 when the previous petition was considered together with a petition made by the other members of the family dealing with various matters. In the course of that order he stated that an allowance of Rs. 400 a month be made to Kali Muzaffar for the present and added: "It does not seem possible to grant an allowance to the other parties at present." The other parties who were apparently asking for an allowance were the daughters of the deceased lady. The learned Judge allowed the application of Kali Muzaffar fixing his allowance at Rs. 400 and refused the application on behalf of the daughters. We have been asked by the petitioners to say that this order made by the learned Judge was without jurisdiction or that under the provisions of section 115 of the Civil Procedure Code was made illegally or contained some material irregularity. In the alternative the petitioners ask us to say that an allowance should also be made to the three daughters who have moved this Court.

The ground upon which we are asked to exercise our powers of revision are those which I have already stated. It is contended that under the preliminary decree the Court has no power to order any

portions of the assets to be distributed at all, but merely has power to make enquiries in order to ascertain what the liabilities were and what the shares of each of the claimants of this estate are after the debts have been ascertained. I cannot accept that interpretation of the decree which has been put before us, for this reason. By the order of this Court a general administration of the estate was ordered and the case was sent down to the District Judge to prepare a decree in accordance with those directions. Whilst it is quite true that the great bulk of the different paragraphs in the decree deals merely with enquiries that have got to be made and accounts which have to be taken as to the ascertainment of the debts and the shares of the different heirs and as to their rights and liabilities, it was nevertheless a decree made in an administration suit and it is provided in that decree that the Commissioner or the parties or any of them are at liberty to apply to the Court for the appointment of a Receiver or for other directions from time to time as they may be advised. A Receiver has been appointed and the administration of this estate is apparently taking longer than was anticipated, and I can see no reason why any of the parties who will eventually be entitled to share in the property should not apply to the Court under whose direction the estate is being administered, asking that they should be granted an allowance, certainly not a very excessive allowance, pending the time when they will come into their own. It seems to me that that is one of the powers which the Court exercising control over the administration of the estate is certainly entitled to exercise. I quite agree that that power ought to be exercised with proper discretion and having regard to the claims that are likely to be made upon the estate, and that the Court ought not to grant to any of the beneficiaries properties by way of an allowance unless it is satisfied that the assets will be sufficient to satisfy the creditors. Having regard to the report of the Receiver which I have already referred to it, seems to me that it is quite clear that the share of Kali Muzaffar will be able to bear the liability that may attach to it in respect of this advance of Rs. 400 per month. It seems

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clear that if he gets his share of the income that share of income alone will be in excess of Rs. 400 per month, and moreover the order which was made was merely an order that he should be paid that sum for the present. If owing to the administration being protracted or for any other reason it should appear to any of the parties interested that this allowance should cease, they will certainly be entitled to make another application to the District Judge and he can then consider the question in the light of the altered circumstances which may have arisen.

The alternative suggested by the applicants is that the whole of the assets of this estate should be locked up in the pocket of the Receiver and not a penny piece should be paid to anybody whatever their ultimate rights thereto may be, until the whole of the somewhat complicated set of circumstances has been ascertained and everybody's definite share has been apportioned. If that were so, it would follow that those who were certainly entitled to share in this estate might be kept out of their only means of subsistence for a considerable time, and I have no hesitation whatever in coming to the conclusion that the administrator has ample power to make an order such as this and there is no lack of jurisdiction nor is there any illegality or irregularity in the order which has been made.

The other question which we have been asked to decide is that if Kali Muzaffar is granted an allowance, then the three surviving daughters ought also to be granted a similar allowance. This is a matter for the discretion of the learned Judge. He is not bound in any case to grant an allowance to any one of the parties and no doubt he has exercised his discretion in this matter, and speaking for myself I can see very good reason why Kali Muzaffar, one of the sons who probably is dependent upon the income of his mother's property for his livelihood, should be granted a small allowance such as this merely for his everyday expenses, whereas the daughters who are married have other means of subsistence and there is nothing to show that they are in immediate want or necessity. That is one of the reasons which I imagine affected the decision of the learned Judge in coming to the conclusion at which he arrived,

In any case I do not think that this Court sitting in revision ought to substitute its own discretion for that of the Court below in such matters where discretion has to be exercised. That being so, it seems to me that this application must fail and ought to be dismissed with costs. Hearing fee two gold mohurs.

At the same time it does appear that the Receiver, who was appointed by the decree to make enquiries and take accounts and ascertain the assets and liabilities of this estate and the shares of the different heirs, was ordered to have his enquiries and accounts and other matters completed and present a certificate ready for inspection by the parties by the 31st March 1918. We are now in November, and it does not appear that the accounts have been completed and it is impossible to say how far from completion they are even at the present moment. This has been put before us as a grievance on behalf of the applicants. It is not a matter with which we are in a position to deal, not knowing what the actual facts are, nor would it be a matter with which we would be entitled to deal in an application of this sort. At the same time in dismissing this application I think perhaps it might be advisable to bring this matter to the notice of the District Judge in order that he may, so far as he can, take steps either on his own initiative or if an application should be made to him by the parties to see that this administration is pushed on without any unnecessary delay.

MULLICK, J.—I agree.

Application dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 113 OF 1917.

September 10, 1917.

Present:—Mr. Lindsay, J. C.

Musammatt SHEORAJA—DEFENDANT No. 3—

APPELLANT

versus

DEBI DIN—PLAINTIFF,

SURAJ DIN AND ANOTHER—DEFENDANTS

Nos. 1 AND 2—RESPONDENTS.

Court Fees Act (VII of 1870), s. 7 (iv) (v)—Mortgage

KISHORI MOHAN TALAPATRA v. OSI PRAMANICK.

suit—Exemption of property from liability—Appeal—Court-fee payable.

The plea raised by one of the defendants to a mortgage suit was that certain property, which was alleged to be covered by the mortgage-deed, was not liable to be sold in execution of the mortgage decree by reason of certain transfers which had been made in his favour before the mortgage-deed in suit was executed. The trial Court held a part of this property to be liable for the mortgage debt. The defendant appealed:

Held, that the appellant was bound to pay *ad valorem* Court-fee on the memorandum of appeal.

Appeal from the decree of the Subordinate Judge, Rae Bareilly, dated the 6th June 1917.

Syed Ali Mohammad, for the Appellant.

Syed Zahur Ahmad, for the Respondents.

JUDGMENT.—I have heard the learned Counsel in support of his objection to the office report in this case regarding the question of Court-fee. The matter is a simple one. The suit was a suit on a mortgage and the appellant here was impleaded as one of the defendants. Her plea was that certain lands, which are said to be covered by the mortgage-deed, were not liable to be sold in execution of the mortgage decree by reason of certain transfers which had been made to her before the mortgage-deed in suit was executed. The Court below has held a part of the property to which this appellant lays claim to be liable for the mortgage debt, and now she comes here in appeal claiming that the Court below ought to have exempted from the operation of the decree an area of 109 *bighas*. Only a Court-fee of Rs. 15 was paid in respect of the relief claimed in appeal. The office reports that an *ad valorem* fee is chargeable and has cited three decisions of this Court and a decision of the Madras High Court reported as *Venkappa v. Narasimha* (1). It has been argued here that the relief which the appellant is asking here is in the nature of a declaratory relief. But I do not think that argument can be maintained, for clearly consequential relief is also aimed at, namely, the exemption of the property from sale in pursuance of this mortgage decree. The whole matter has been discussed in a fairly recent ruling of their

Lordships of the Madras High Court. [See the case reported as *Kesavarapu Ramakrishna Reddi v. Kotta Kota Reddi* (2) which is a Full Bench ruling.] That has been followed by the Calcutta High Court in another ruling to be found reported as *Jugal Pershad Singh v. Parbhu Narain Jha* (3). The authorities are all against the contention which is put forward by Mr. Ali Mohammad, Counsel for the appellant. I hold that the office report is correct and that there is a deficiency of Rs. 65. Mr. Ali Mohammad states that he is ready to deposit this amount. Let it be received. The appeal will be admitted on payment of the deficiency in the Court-fee.

Order accordingly.

(2) 30 M. 96; 1 M. L. T. 311; 16 M. L. J. 458 (F. B.).
(3) 8 Ind. Cas. 1145; 37 C. 914.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1655
OF 1916.

July 23, 1918.

Present:—Mr. Justice Newbould
and Mr. Justice Panton.

KISHORI MOHAN TALAPATRA—

PLAINTIFF—APPELLANT

versus

OSI PRAMANICK AND OTHERS—

DEFENDANTS—RESPONDENTS.

Landlord and tenant—Co-sharer landlords—Decree for entire rent passed in suit by one co-sharer landlord to which other co-sharers were parties—Suit, subsequent, by defendant landlord, maintainability of—Joint tenant, whether liable for whole rent—Tenant, death of—Rent, claim for, barred against some heirs, whether can be enforced against others.

In a suit for rent brought by one of the co-sharer landlords, making the other co-sharer landlord a *pro forma* defendant, a decree was passed for the entire rent in favour of both the landlords in respect of their respective shares. The defendant co-sharer landlord, being unwilling to recognise one of the judgment-debtors as his tenant, refused to accept that decree and brought a separate suit for his share of the rent for the same period:

Held, that so long as the previous decree stood, he could not obtain a second decree for the same arrears of rent and that if he was unwilling to recognise one of the judgment-debtors in the previous suit as his tenant he should have contested that suit. [p. 538, col. 1.]

(1) 10 M. 187; 3 Ind. Dec. (N. S.) 882,

KISHORI MOHAN TALAPATRA v. OSI PRAMANICK.

Although under certain circumstances one of several joint tenants may be made liable for the whole rent, yet where the claim for arrears of rent against some of the heirs of the original tenants is barred, the remaining heirs cannot be made separately liable for the entire rent. [p. 538, col. 2.]

Appeal against the decree of the Subordinate Judge, 1st Court, Pabna, dated the 17th April 1916, affirming that of the Munsif, 1st Court, Serajunj, dated the 29th June 1915.

FACTS appear from the judgment.

Babu Mohini Mohan Ohakerbutty (with him Babu Phanindra Kumar Sinha), for the Appellant.—The suit out of which this appeal arises is for the recovery of arrears of rent for the last 3 *kists* of 1317 B. S., for 1318 and 1319 B. S. and the first three *kists* of 1320 B. S. The plaintiff as common manager of Fatehpur Estate sues for 14-annas 1-ganda share of the total arrears, the remaining 1-anna 19-gandas share belonging to *pro forma* defendant No. 13.

The *pro forma* defendant Swarnamoyee Dasi brought a suit for the recovery of the arrears of rents of the *jote* for 1318 and 1319 B. S. In that suit the entire rents were claimed and the share of Swarnamoyee (1 anna 19 *gandas*) was decreed *ex parte* in her favour and the rest in favour of the co-sharers owing 14-annas 1-ganda share. The present plaintiff was made a party to that suit but he did not appear. The lower Courts have held that so long as the decree in the suit brought by Swarnamoyee stands and is not set aside, the present plaintiff cannot claim rents for the years 1318 and 1319 B. S.

The claim for the last three *kists* of the year 1317 B. S. has been dismissed, because some of the heirs of the original tenant have been brought on the record after the period of limitation. The claim for the first three *kists* of 1320 B. S. has only been decreed.

The lower Courts have dismissed my claim for the years 1318 and 1319 B. S. because the decree in the suit brought by Swarnamoyee, my co sharer landlord has not been set aside. I was a *pro forma* defendant in that suit. I did not pray for any relief in that suit. It is doubtful if I can at all execute that decree.

[NEWBOULD, J.—The decree is allowed to stand and if you get a decree, then there will be two decrees in a case.]

If I execute that decree the tenant, who has purchased part of the holding, might say that there was recognition. I may not recognise him because he is a man of my co-sharer. Moreover, the decree is now barred and it is doubtful whether a defendant can execute a decree against the other defendants. In equity and good conscience I am entitled to a decree for my share of the rent.

As to my claim for 1317 B. S., the lower Appellate Court has dismissed my claim relying on a case reported as *Kashi Kinkar Sen v. Satyendra Nath Bhadro* (1). There are also cases which are in my favour. Referred to *Jogendra Nath Roy v. Nagendra Narain Nandi* (2).

I am at least entitled to a money-decree. Referred to *Chamatkarini Dasi v. Triguna Nath Sardar* (3).

JUDGMENT.—The plaintiff in this suit is common manager on behalf of Zemindars and Putnidars owning shares totalling 14-annas 1-ganda in an estate. The *pro forma* defendants own the remaining 1-anna 19-gandas share. He brought the suit out of which this appeal arises to recover rents from the principal defendants for the last three *kists* of the year 1317 B. S., for the whole of the years 1318 and 1319 B. S. and for the first three *kists* of the year 1320 B. S. He claimed Rs. 757.11.9 as his share of the rent and in the alternative asked that a decree might be passed for Rs. 862.14.3 for the 16-annas rent, awarding him his share. He was granted a decree for rent of the three *kists* of the year 1320 B. S. only, the decree being for the 16-annas rent for this period. He appealed without success to the Subordinate Judge of Pabna and has now preferred this second appeal to this Court, his contention being that his claim for rents of the years 1317, 1318 and 1319 should have been allowed.

As regards the arrears of the years 1318 and 1319 B. S., it appears that the *pro*

(1) 7 Ind. Cas. 840; 15 C. W. N. 191; 12 C. L. J. 642.

(2) 11 C. W. N. 1026.

(3) 19 Ind. Cas. 989; 17 C. W. N. 833.

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forma defendant Swarnamoyee Dasya previously brought a suit for these some arrears making the plaintiff in this suit a *pro forma* defendant. In that suit a decree was passed for the entire rent in favour of Swarnamoyee and the plaintiff in respect of their respective shares. The plaintiff in the present suit is unwilling to execute that decree, because one of the judgment-debtors claims to have purchased part of the holding and the plaintiff refuses to recognise this transfer. The plaintiff might have avoided this difficulty by contesting that suit but as long as that decree stands, he cannot obtain a second decree for the same arrears of rent.

The claim for rent of the last three *kists* of 1317 B. S. has been dismissed on the ground that it is barred by limitation. Four of the heirs of the original tenants of the holding were omitted from the list of principal defendants when the plaint was filed and were subsequently added as defendants after the period of limitation for this portion of the claim had expired. Both the lower Courts have held, on the authority of the decision in *Kashi Kinkar Sen v. Satyendra Nath Bhadro* (1), that as the claim against these defendants is barred the remaining tenant defendants cannot be made separately liable for the entire rent. This decision was followed in the ruling *Shaik Sahed v. Krishna Mohan Basak* (4), to which one of us was a party. The case of *Jogendra Nath Roy v. Nagendra Narain Nandi* (2), on which the learned Pleader for the appellant relies, was there distinguished on the ground that it did not appear to be the case of an inherited contract. Reliance is also placed on the decision in *Chamatkarini Dasi v. Triguna Nath Sardar* (3), as supporting the contention that the appellant was at least entitled to a money-decree against those tenants against whom the claim is not barred. But in that case a decree had been obtained against one of several joint tenants and the Court had not to determine whether that decree had been rightly granted but what was the effect of a sale under that decree. In the case mentioned above, *Shaik Sahed v. Krishna Mohan Basak* (4), a money-decree had been granted and it

was held that as there was no joint contract that decree must be set aside. Under certain circumstances one of several joint tenants may be made liable for the whole rent, but it has not been shown that the facts of the present case make it distinguishable from the two above mentioned cases in which the contrary was held. We accordingly hold that the lower Courts were right in dismissing this portion also of the plaintiff's claim.

These were the only two points argued at the hearing of the appeal. We hold that the appeal fails on both points and accordingly dismiss it. As the respondents did not appear we make no order as to costs.

Appeal dismissed.

OUDE JUDICIAL COMMISSIONER'S COURT,

FIRST CIVIL APPEAL NO. 3 OF 1918.

September 12, 1918.

Present:—Mr. Stuart, A. J. C., and

Pandit Kanhaiya Lal, A. J. C.

MAHRAJ LAL BIHARI AND OTHERS—

PLAINTIFFS—APPELLANTS

versus

ANJUMAN-UN-NISA AND OTHERS—

DEFENDANTS—RESPONDENTS.

Attestation of document, proof of—Evidence, conflicting, effect of—Court, discretion of.

Where there is one class of evidence showing that a document was properly attested and another class of evidence suggesting that it was not so, it is open to the Court on a consideration of the probabilities of the case to reject the one and accept the other. The fate of a document is not necessarily at the mercy of attesting witnesses. The mere fact that they repudiate their signatures or make statements suggesting that they attested at the instance of persons other than the executant or in his absence, does not invalidate the document, if it can be proved by evidence of a reliable character that they have given false testimony. [p. 539, col. 2; p. 540, col. 1.]

Appeal from the decree of the Subordinate Judge, Sitapur, dated the 29th November 1917.

The Hon'ble Pandit Gokaran Nath Misra and Babu Ohhail Bihari Lal, for the Appellants,

(4) 35 Ind. Cas, 563; 24 C. L. J. 371,

MAHRAJ LAL BIHARI v. ANJUMAN-UN-NISA.

Mr. *Haider Husain*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for foreclosure, brought by the plaintiffs-appellants in respect of a mortgage effected by *Fida Husain*, the ancestor of defendants Nos. 1 to 4, and *Raza Husain*, who is defendant No. 5. The appeal is illustrative of the difficulties which mortgagees experience in proving the due attestation of registered documents, the execution of which is incapable of being seriously disputed. As is usual in such cases, defendants Nos. 1 to 3 pleaded that they were not aware whether *Fida Husain* had executed the mortgage bond in suit. Defendants Nos. 4 and 5 absented themselves.

The Court below held that the mortgage bond in suit was not proved to have been duly attested in the manner required by law and passed a decree for money against defendants Nos. 1 to 5, regardless of the fact that defendants Nos. 1 to 4 were only impleaded as heirs.

The mortgage bond purports to have been attested by four witnesses, two of whom *Sher Andaz Khan* and *Ganesh Prasad*, as is also the scribe, are stated to be dead: the other two *Syed Zakir Husain* and *Syed Zahid Ali* are alive and have been examined. *Syed Zakir Husain* is related to *Raza Husain*. *Raza Husain* and *Fida Husain* were brothers. *Syed Zakir Husain* states that *Fida Husain* and *Raza Husain* did not sign the deed in his presence, that he attested the deed outside the Registration Office and that he did not remember whether the other attesting witnesses attested the deed in his presence or not. *Syed Zahid Ali* is similarly related to the wife of *Raza Husain*. He admits that the mortgage bond in suit was executed by *Fida Husain* and *Raza Husain*, and that he attested it. But he asserts that *Fida Husain* and *Raza Husain* did not sign the deed in his presence and that he must have signed the deed at their request, but was not sure of it. None of those witnesses was asked whether any personal acknowledgment was made to them by the executants: *Raghobar Dayal*, one of the plaintiffs in the suit, went into the witness-box and stated that the attesting witnesses, *Syed Zakir Husain*, *Syed Zahid*

Husain and *Ganesh Prasad*, attested the deed in his presence and that *Fida Husain* and *Raza Husain* signed it in his presence and the presence of these and other witnesses.

As pointed out in *Brahmadat Tewari v. Chauden Bibi* (1), the mere fact that the attesting witnesses to a document repudiate their signatures or make statements suggesting that they attested at the instance of persons other than the executant does not invalidate the document, if it can be proved by evidence of a reliable character that they have given false testimony. In discussing the evidence adduced in support of a Will, which was attested by four witnesses, two of whom had died and the other two deposed practically in favour of the objector, *Mookerjee and Beachcroft, JJ.*, observed: "This, however, does not compel the Court to pronounce against the Will. It was ruled...in the case of *Nubo Kishore Doss v. Joy Doorga Dossee* (2) that the mere fact that attesting witnesses to a Will have repudiated their signatures, does not invalidate the Will, if it can be proved by evidence of a reliable character that they have given false testimony. To the same effect is the decision of the Judicial Committee in *Cooper v. Bockett* (3). The principle is well settled that when the evidence of the attesting witnesses is vague, doubtful or even conflicting upon some material point, the Court may take into consideration the circumstances of the case and judge from them collectively whether the requirements of the Statute were complied with; in other words, the Court may, on consideration of the other evidence or of the whole circumstances of the case, come to the conclusion that their recollection is at fault, that their evidence is of a suspicious character or that they are wilfully misleading the Court, and accordingly disregard their testimony and pronounce in favour of the Will [*Young v. Richards* (4) and *Burgoyne v. Showler* (5)]." Where there is one class of evidence showing that a document was properly attested and another class of evidence suggesting that it was not so, it is open

(1) 34 Ind. Cas. 686; 20 C. W. N. 192 at p. 193.

(2) 22 W. R. 189.

(3) (1846) 13 E. R. 365; 4 Moo. P. C. 419; 10 Jur. 931.

(4) (1839) 2 Curt. 371.

(5) (1844) 1 Rob. 5.

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to the Court on a consideration of the probabilities of the case to reject the one and accept the other. The fate of a document is not necessarily at the mercy of attesting witnesses.

This case was moreover decided before Act XXVI of 1917 came into force. By that Act it has been provided that instruments of mortgage or gift, executed prior to the 1st January 1915, shall not be deemed to be invalid by reason only that any person, who purported to attest such instrument as a witness, did not see the executant sign it, provided that such person before signing his name on the instrument received from the executant a personal acknowledgment of his signature to the same. It is possible that the plaintiffs might be able to prove such a personal acknowledgment and we consider that an opportunity should be given to them to do so. The proof of such a personal acknowledgment might render an examination of the other evidence unnecessary.

We direct the Court below accordingly to determine, after taking such relevant evidence as the parties may adduce, whether the document in question was properly attested or, valid within the meaning of section 2 of Act XXVI of 1917. Three months' time will be allowed for return of the finding and 10 days from the date of the finding will be allowed to the parties for filing objections.

Issue remitted.

PRIVY COUNCIL.

APPEALS FROM THE ALLAHABAD HIGH COURT.
April 18, 1918.

Present:—Viscount Haldane, Lord Dunedin,
Lord Sumner, Sir John Edge and
Mr. Ameer Ali.

MEWA SINGH AND OTHERS—PLAINTIFFS—
APPELLANTS

versus

BASANT SINGH AND OTHERS—
DEFENDANTS—RESPONDENTS.

Hindu Law—Mitakshara—Succession—Reversioners,

claim by—Proof—Ejectment suit—Unnecessary parties, addition of, effect of.

Those who claim the property of a deceased separated Mitakshara Hindu as his reversionary heirs, must show that they are both his next heirs and within fourteen degrees. [p. 542, cols. 1 & 2.]

On the death of a separated Hindu, his estate was taken possession of by the defendants. The plaintiffs, fifty-nine in number, who claimed to be the reversionary heirs of the deceased, brought an action in ejectment, the scheme of which was to bring into Court a large number of persons more or less remotely akin in blood to the deceased, in the hope of ousting the defendants by a mass attack, and afterwards to assign the fruits of victory to the parties entitled by further litigation *inter se*.

Held, that such a plan embarrassed the Court as well as the opposite party and obscured the issues and was, therefore, much to be condemned. [p. 541, col. 1.]

Consolidated appeals from two decrees of the High Court of Allahabad, dated the 7th April 1913, reversing those of the Subordinate Judge, Saharanpur, dated the 29th May 1909.

FACTS.—The suits giving rise to the appeals were brought by the plaintiffs-appellants as the nearest reversioners (with the *pro forma* defendants) to the estate of a separated deceased Mitakshara Hindu, Nihal Singh, at the death of his surviving widow. The Subordinate Judge decreed the suits, but the High Court reversing those decrees dismissed them, holding that the plaintiffs had not proved the alleged relationship.

Messrs. Dunne, K. C., and Dube, for the Appellants, referred to the Punjab Land Revenue Act, 1887 (XVII of 1887), sections 31, 34 and 44; and *Ohuni Lal v. Nanda* (1) and submitted that the alleged relationship was proved.

Mr. De Gruyther, K. C. (with him Mr. E. B. Raikes), for the contesting Defendants-Respondents, referred to *Prathiyadi Bhayankaram v. Rangayya Appa Rao* (2) and submitted the plan of action was bad. The plaintiffs must allege and prove that they are the nearest reversioners within fourteen degrees, but their plaint contained no such allegations.

He was stopped.

Mr. Dunne, K. C., replied.

JUDGMENT.

LORD SUMNER.—The sole question in this appeal is whether the High Court of Judicature for the North-Western Provinces were

(1) 174 P. R. 1888.

(2) 18 Ind. Cas. 13; 17 O. L. J. 295; 13 M. L. T. 198; (1913) M. W. N. 191; 15 Bom. L. R. 463 (P. C.).

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wrong in holding that the plaintiffs had not proved their case. They reversed the decree of the Subordinate Judge; but, as he appears to have failed to deal with the real question, his conclusion need not be pursued. The plaintiffs sought declarations of their right to inherit certain properties in the districts of Amritsar and Saharanpur, which were in the defendants' possession. They claimed to be the reversionary heirs of one Tika Nihal Singh, who owned these properties till his death in 1864. The life-interests of his surviving widows did not determine till 1907. The question was one of fact and the burden of proof was on the plaintiffs. Their Counsel frankly admitted that their case must rest on certain family pedigrees—the other evidence, which had been put in, being inadmissible or inconclusive.

There were fifty-nine plaintiffs, and nearly twenty other parties in addition to the persons in possession were joined *pro forma*, as being members of the family, though they advanced no claims. The case was not one of the joint property of a Hindu family. If the case were proved, some one person or some few, standing in the same degree of genealogical propinquity, would alone succeed, but the scheme of the action has been to bring into Court a large number of persons, more or less remotely akin in blood, in the hope of ousting the defendants by a mass attack, and afterwards to assign the fruits of victory to the parties entitled by further litigation *inter se*. Such a plan is inconvenient and is much to be condemned. It is not a mere question of swollen expenses, which might be cured by an order to pay costs thrown away. The Court, as well as the opposite party, is embarrassed and the issues are obscured. The case can be disposed of on other grounds, but their Lordships do not think it right that this objectionable feature of the case should be passed over in silence.

Among the properties held by this very extensive family there were two, called, respectively, Wuin Puin and Raja Sansi; the former is one of the subjects of the present litigation, the latter is not. In 1865, when Raja Sansi was dealt with under the Revenue Settlement then proceeding in the Punjab, a *wajib ul-arz* was drawn up, which in the regular course embodied a *shajra*, or

pedigree, of its proprietors. This was put in by the defendants. About the same time and under similar circumstances a pedigree was no doubt enrolled, when Wuin Puin was dealt with, but this was not forthcoming. It must, however, have been the basis of the pedigree, which was embodied in the *wajib ul-arz*, drawn up when Wuin Puin was dealt with in the next Revenue Settlement in 1891, and the official, who produced the pedigree out of the proper custody, deposed that it consisted "of two parts, *viz.*, (1) the genealogical table prepared in 1865, and (2) the addition made to it after 1865. The genealogical table was prepared for the first time in 1865." This pedigree, of 1891 was put in by the plaintiffs. No objection was taken to the admissibility of either pedigree.

With the assistance of Counsel, their Lordships have carefully examined these two pedigrees. They do not agree with one another. Not merely does one contain matter which the other omits. This may be accounted for by the fact that one branch of the family was at the date of the pedigree interested in one Mouzah and another in the other. Not merely are names, which from their position in the tree might be supposed to represent the same person, nevertheless very differently spelt: this may be due to want of uniformity in the system of transliteration adopted, or of want of skill in applying it. There are further inconsistencies so serious that, without explanations from other sources, which are not forthcoming, they shake the credit of the whole family tree.

Though, as it happens, the defendants are members of this family themselves, they do not stand or fall by any pedigree, nor does the evidence of it bind them any further than it would bind a stranger. Their case is possession. They put in the pedigree of 1865, not for the purpose of proving that it was accurate, but for the purpose of contesting the plaintiffs' case, by showing that pedigrees of this family, drawn up in similar circumstances and from similar sources and possessing equal authority, are so discrepant that no trustworthy inference can be drawn from either for the purposes of the present case. On the other hand, the plaintiffs may resort to the 1865 pedigree if it supports them, and are not bound to that of

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1891 alone, if a legitimate conclusion can be got out of a combination of the two. What the plaintiffs cannot do is to eke out the defects of either by mere conjecture as to both, and this, in the opinion of the High Court, was all that in substance they were able to do.

It is not suggested that there were any records of any kind which were or could have been made use of in the preparation of these pedigrees. They appear to have been simply handed down by tradition and to have been preserved by memory and by oral communication *inter vivos*. As is well known, in social conditions where a people has not yet learnt to place exclusive reliance on written and printed records, and where family pride or family rights encourage the maintenance of a body of oral family history, memory, unaided by permanent materials, is often a very sufficient medium of record, and oral communication often preserves the record with singular uniformity. Nor does a pedigree necessarily lose its value in proportion to its remoteness from the present time, at least as far as names and kinship are concerned. The oldest names in a pedigree are naturally the first to be learnt and the first to be recited, and the names of the earliest generations may well survive in their proper order long after all trustworthy memory of their lives has passed away. Their Lordships approach these pedigrees with every disposition to give them such evidentiary value as can be justly claimed for them. It is, however, right to observe that the best preparation for such a critical task is familiarity with the customs and thoughts of the communities among whom these materials have been handed down—an advantage which not all of their Lordships have enjoyed, and one, furthermore, which they recognise as more fully possessed by the High Court, whose judgment is under appeal. Accordingly though they have subjected this evidence to an entirely independent scrutiny, they are loth, and as they think rightly loth, to review the conclusion so arrived at, unless some error can be plainly established.

The family in question is governed by the Law of the Mitakshara. Those who claim to be the reversionary heirs must bring themselves within the necessary number of

pedigrees, viz, fourteen. They must show that they are both next heirs and near enough. The common ancestor is one Khokar or Kharku; of him nothing is known, not even his date, but, according to the pedigree of 1891, his fourteenth descendant in a direct line was then traceable, so he must have lived long ago. According to the plaintiffs, he begot three sons: Tehraj the first, and a second Tehraj, and Mahraj. From Mahraj, they say, descended Nihal Singh, whose death in 1864 extinguished the whole of the Mahraj stock, and thus entitled some of the plaintiffs, most of whom descend from Tehraj the first, though about five descend from Tehraj the second. The first observation, which arises on the face of this pedigree, is that the house of Mahraj appears not to be exhausted. It shows one Sarup Singh, who is not described as childless and is not even stated to be dead. It is true that, if he left male issue, whose line continued, Nihal Singh ought not to have been proprietor in 1864, as he was, since Sarup Singh was the elder brother of Nihal Singh's great-great-grandfather; but the circumstance illustrates the imperfect way in which these pedigrees are made out.

Let it, however, be taken, as the Judges in the High Court took it, that with Nihal Singh his house came to an end. Tehraj the second is said by the plaintiffs to have had a grandson, Ghazi, the direct ancestor of the smaller group of the claimants. Who was Ghazi? According to them he was first cousin once removed of Lal, son of Mahraj, and he had a second cousin, named Saidu, grandson of Tehraj the first through whom, as their direct ancestor, the larger group of the plaintiffs come in to claim. Now, according to the pedigree of 1865, Ghazi was the grandson of Hathraj, one of Khokar's sons. Under this pedigree Khokar had only two sons: Hathraj and Bhiraj. If Hathraj is Mahraj the whole descent is at once in confusion; if Hathraj is Tehraj, which Tehraj is he? If Ghazi, Lal, and Saidu were brothers, as they are in the older pedigree, the house of Saidu must stand aside, and only some member of the house of Ghazi can claim. If Hathraj be Tehraj, or rather be both the Tehrajs, then either there was no Mahraj, or Mahraj is Bhiraj. But Bhiraj had no

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issue. Hence he is not Mahraj, or at any rate is not the plaintiffs' Mahraj, and the plaintiffs are no relations at all of Nihal Singh, who, came of other stock. It was argued that the two Lals are one and the same person, that the one Lal was really Ghazi's younger brother, and that so far the defendants' pedigree is an improvement on the plaintiffs'. One effect of this contention is that there is no necessity to go back to Khokar as the common ancestor, or to reach him through Mahraj and to trace down from him through Tehraj, whether Tehraj be one person or two. Wega or Bela then becomes the common ancestor, for he was the father both of Ghazi and Lal, which upsets the plaintiffs' whole claim. As a conjectural emendation this may be right, but it is guess-work. It may do for those who pronounce the verdict of history, but an action of ejectment is a serious matter.

Tracing down through Ghazi we come in the direct line at the eighth remove to one Mahtaba, who is described in the pedigree of 1865 as being then alive. He had a first cousin, the son of his father's younger brother, also described as then being alive. These persons or their children (for they are not entered as childless) would be nearer to Nihal Singh than the Ghazi plaintiffs. On the plaintiffs' pedigree, however, they do not appear at all. Moreover, after Bhara or Behara, Ghazi's grandson according to the earlier and his great-grandson according to the later pedigree, the two pedigrees become hopelessly irreconcilable.

On the other hand, if the consanguinity has to be traced through a common ancestor further back than Wega, *alias* Bela, namely, through Khokar, which is the plaintiffs, case, then the Saidu branch is the elder, and according to the pedigree of 1891, which alone records this branch, and by no means clearly, one person at least—Partab Singh—not then marked as childless and not accounted for, would be senior to all others of that branch in the same degree of consanguinity. Now Partab Singh is not a party to these proceedings.

It may be that these puzzles and others, which need not be detailed, were capable of solution. Unfortunately the explanations were not forthcoming. The plaintiffs them-

selves were sensible of their difficulties, for they incorporated in their pleadings a pedigree of their own, which does not agree with either of those proved. It was argued that the pedigree of 1891 should be preferred to that of 1865, since the former refers to Wuin Puin, while the latter refers to Raja Sansi, with which the branches now claiming were not closely connected, if at all. This explanation seems insufficient. If the family tradition was correctly preserved, then since both pedigrees and all the branches went back to Khokar and his immediate descendants, they should have given the same account of the part, which was common to both, and was for both the beginning of all things. In fact they differ. Either may be right or both may be wrong, but there is nothing to show what the link really is, which is needed to make good the plaintiffs' claim, and it is the weakness of this link which is the weakness of that claim.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed with costs.

Appeal dismissed.

Solicitors for the Appellants: Messrs. Barrow, Rogers & Nevill.

Solicitors for Respondents Nos. 1 and 2 Mr. Douglas Grant.

OUDDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEALS NOS. 82, 83 OF 1916.
September 12, 1918.

Present:—Mr. Stuart, A. J. C., and
Pandit Kanhaiya Lal, A. J. C.

Pandit SURAJ NARAIN AND ANOTHER—
PLAINTIFFS—APPELLANTS

versus

Pandit IQBAL NARAIN AND OTHERS—
DEFENDANTS—RESPONDENTS.

Hindu Law—Joint family—Title, division of, whether

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distinguishable from division of property—Separation—Joint management by manager for all members—Partition by metes and bounds—Enquiry, nature of—Manager, liability of.

In cases of joint Hindu families, a division of title is distinguishable from a division of property, the former being a matter of individual decision, the desire on the part of one member to sever himself from the joint family and to enjoy his hitherto undefined or unspecified share separately from the others, without being subject to obligations which arise from the joint status of the latter, being the natural resultant from his decision, namely, the division and separation of his share by metes and bounds. But a separation of one branch of the family from another does not necessarily put an end to the joint management of the estate by the manager on behalf of all, for a partition by metes and bounds may not take place till several years later. In an ordinary suit for a partition of the joint family property, where there has been no previous separation, the enquiry is, in the absence of fraud or other improper conduct, directed to ascertain the divisible assets, the manager not being liable to account for his past dealings with the family income. He cannot, however, escape liability to account for the income once a separation has taken place. [p. 545, col. 2.]

Appeals from the decree of the Subordinate Judge, Hardoi, dated the 10th April 1916.

The Hon'ble Pandit Gokaran Nath Misra, Babus Ishwari Prasad and Lachhman Prasad, for the Appellants.

Mr. A. P. Sen, for the Respondents.

JUDGMENT.—These are cross-appeals arising out of a final decree for partition. On the 20th June 1905 Suraj Narain and his son Kailash Narain filed a suit for partition of their half share in the joint family property and for their share of the mesne profits from October 1901, alleging that they had separated from the remaining members of the family at that time. The Court of first instance decreed the claim, but on appeal this Court held that there was no evidence of any separation prior to the institution of the suit and that the plaintiffs were not consequently entitled to claim accounts or mesne profits for the period during which they were joint. The decree granted by this Court was in the following terms:—

"The Court (below) should endeavour to divide the said property in two equal lots and to assign one lot to each party by mutual consent or otherwise. Compensation in cash can of course be ordered to be paid in the event of a precisely equal division of property being found impossible. In

this connection, and as part of the enquiry into the divisible assets of the joint family under the head of moveable property, the Court should take an account of the income, enjoyed by the defendants (and by Pandit Bakht Narain before his death), from the date of the institution of the plaintiffs' suit on June 20th, 1905, to the date on which possession was given to the plaintiffs under the decree now appealed against, from the immoveable property of the joint family, in respect of which the plaintiffs have been found to be entitled to a half share. The defendants will be entitled to set off against such income, not only the expenses of management, but all expenditure which the Court may find to have been properly incurred on objects to which the income of the joint family may properly be applied by the manager of the same. The balance, if any, will be treated as part of the divisible assets of the joint family, under the head of moveable property, in the hands of the defendants, and the plaintiffs will be awarded one-half of the same." This decree was subsequently confirmed on appeal by their Lordships of the Privy Council [*Suraj Narain v. Iqbal Narain* (1).]

It is admitted that the plaintiffs got possession on the 9th March 1909. The Court below has taken an account of the income derived from the immoveable property belonging to the family from the 20th June 1905 to the 9th March 1909 and of the expenditure incurred during the said period; and allowed the plaintiffs a sum of Rs. 12,409-1-4½ exclusive of a share in the grain recovered by the defendants and in the debts due to the joint family.

Both the parties have taken exception to different items entered in the accounts. The main objection of the plaintiffs is directed against the method adopted by the Court below in debiting the plaintiffs with liability for a share of the expenses incurred solely for the benefit of the defendants after the institution of the suit.

It is unquestionable that if the plaintiffs be deemed to have continued joint till the

(1) 18 Ind. Cas. 30; 40 I. A. 40; 35 A. 80; 24 M. L. J. 345; 13 M. L. T. 194; 17 C. W. N. 333; 11 A. L. J. 172; (1913) M. W. N. 183; 17 C. L. J. 288; 15 Bom. L. R. 456; 18 O. C. 129 (P. C.).

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9th March 1909, when they got possession in pursuance of their decree for partition, they would be liable for the expenditure incurred for family purposes or in discharge of a common obligation; but if the branch of the family, represented by the plaintiffs, be deemed to have separated from the date of the institution of the suit for partition, the plaintiffs' share of the income from the joint property will be liable for all legitimate expenses or obligations connected with their branch of the family and the defendants' share of the income will be liable for all legitimate expenses and obligations connected with their branch.

The judgment of this Court is far from clear on the point but reading it in the light of the judgment of their Lordships of the Privy Council, by which it was affirmed, there can be little room for doubt that the propriety of the expenditure was to be judged with due regard to the position each party occupied after the institution of the suit, that is, from a standpoint different from that which they occupied prior to the suit, for no accounting was allowed for the period preceding it. In other words, the manager was not required to justify what he had spent prior to the suit, but to justify what he had spent after its institution. That justification can only be shown by establishing that what he had spent was spent for the benefit of the entire family, and not of any particular branch or in discharge of a common burden; for if that were not so, it would be within his power to reduce the divisible assets, existing on the date of the suit, materially by spending recklessly for his personal ends or for the benefit of his own issue to prejudice the other side.

In their judgment in the suit, out of which these proceedings have arisen, their Lordships say that the question for determination before them was whether the plaintiffs had separated, as they alleged, in October 1901 or whether they continued joint in property, if not in food and worship, up to the institution of the suit in 1905. Their Lordships, agreeing with this Court, held that the plaintiffs had failed to establish their separation in October 1901 or their exclusion from that date, and on that ground they upheld the decree passed by

this Court, dismissing the claim for mesne profits prior to the date of the institution of the suit and allowing it after that date. The separation of the plaintiffs from the date of the institution of the suit was thus in effect affirmed. In fact in their later decision in *Girja Bai v. Sadashiv Dhundiraj* (2), their Lordships, referring to their decision in *Suraj Narain v. Iqbal Narain* (1), pointed out that a division of title was distinguishable from a division of property, the former being a matter of individual decision; the desire on the part of one member to sever himself from the joint family and to enjoy his hitherto undefined or unspecified share separately from the others without being subject to obligations which arise from the joint status of the latter, being the natural resultant from his decision, namely, the division and separation of his share by metes and bounds. A similar view of the said decision was taken in *Soundararajam v. Arunachalam Ohetty* (3).

It is obvious that a separation of one branch of the family from another does not necessarily put an end to the joint management of the estate by the manager on behalf of all, for a partition by metes and bounds may not take place till several years later. In an ordinary suit for a partition of the joint family property, where there has been no previous separation, the enquiry, as explained in *Balakrishna Aiyar v. Muthusawny Aiyar* (4) and *Porneshwar Dubey v. Gobind Dubey* (5), is, in the absence of fraud or other improper conduct, directed to ascertain the divisible assets, the manager not being liable to account for his past dealings with the family income. He cannot, however, escape liability to account for the income once a separation has taken place.

The result of the procedure, adopted by the Court below, is that while the defendants have been allowed all the expenses incurred by them on objects personal to them or

(2) 37 Ind. Cas. 321; 43 L. A. 151 at p. 156; 20 C. W. N. 1085; 14 A. L. J. 822; 20 M. L. T. 78; 12 N. L. R. 113; (1916) 2 M. W. N. 65; 18 Bom. L. R. 621; 4 L. W. 114; 24 C. L. J. 207; 31 M. L. J. 455; 43 C. 1031 (P. C.).

(3) 33 Ind. Cas. 853; 39 M. 136 & 159; 29 M. L. J. 793 & 816; 2 L. W. 1247 & 1266; 18 M. L. T. 552 & 568; (1915) 1 M. W. N. 31.

(4) 3 Ind. Cas. 878; 32 M. 271; 19 M. L. J. 70; 5 M. L. T. 145.

(5) 33 Ind. Cas. 190; 43 C. 459; 20 C. W. N. 25.

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in which the plaintiffs had no concern, no such allowance has been made in favour of the plaintiffs. The defendants have kept their personal or separate income to themselves and have charged the family funds in their possession with all expenses personal to them or their branch of the family during the progress of the suit. We cannot, however, ignore the altered position created by the suit for partition, and have, therefore, to examine in the case of each disputed item, whether the expenditure was incurred by the defendants for the benefit of their branch or for the common benefit of the entire family.

The first item in dispute is that shown under head 15, being a sum of Rs. 2,750 said to have been paid to Pandit Bihari Lal Raina on account of a deposit made by him prior to the institution of the suit for partition. The contention of the learned Counsel for the plaintiffs is that the total amount deposited by Bihari Lal Raina was Rs. 13,737-0-6, while the amount advanced on his account or repaid to him from time to time was Rs. 11,787-0-6, the balance due to him being only Rs. 1,950. The defendants, on the other hand, have filed an extract from their account books, stating that Rs. 13,737-0-6 were deposited by Bihari Lal Raina and Rs. 5,450 were advanced on his account or repaid to him. In his deposition of the 2nd November 1907, Bihari Lal Raina stated that out of the money deposited by him Ram Narain advanced some loans and sent him the deeds obtained in lieu thereof. In the absence of the original account books, which are not on the record, it is difficult to say how much was actually left uninvested and how much remained due to Bihari Lal Raina. The only objection taken by the plaintiffs in the Court below under this head was that the alleged deposit or *amanat* by Bihari Lal Raina was fictitious. They admitted that if the deposit was shown, they would have no objection to the amount paid to Bihari Lal Raina being debited in the account. The amount of deposit being no longer in dispute, it was for the plaintiffs to show that Bihari Lal Raina has been overpaid. They have given no evidence on that point. The receipts filed prove that Rs. 2,750 have been paid to Bihari Lal Raina between the 27th June 1905 and the 3rd May 1908 and the Court below has rightly

included the said payment in the debit side of the account.

The second item in dispute is that entered in head 17, being payments made on account of *hundis* drawn by Pandit Bakht Narain after the institution of the suit. Some of these *hundis* were drawn before the date of the suit and the money borrowed by means of them was credited in the joint family funds. The validity of the transactions represented by those *hundis* cannot be questioned in the case. Out of the five *hundis* drawn by Pandit Bakht Narain after the institution of the suit, one for Rs. 2,000 in favour of Mahadeo Prasad is shown to have been drawn for the payment of revenue, another for Rs. 2,500 in favour of Govind Prasad for the payment of the decree for profits obtained by the co-sharers of Jaliamau. The remaining three *hundis*, that is, one for Rs. 2,500 and another for Rs. 1,000 both in favour of Govind Prasad, dated the 23rd July 1905, and another for Rs. 5,000 in favour of Mahadeo Prasad, dated the 29th July 1905, are not shown to have been drawn for joint family purposes. These *hundis* were drawn within nine days of the institution of the suit for partition. The purposes for which these loans were taken not having been established, they cannot be charged against the plaintiffs. The plaintiffs are, therefore, entitled to have the said *hundis* excluded from the account, that is, from the debit and credit sides, or, in other words, to have Rs. 903-2-6 on account of interest paid on them deducted from the expenditure shown under this heading.

The third item in dispute relates to head 19, being the amount paid to Pandit Suraj Narain on account of costs awarded to him by the decree for partition. The decree directed that the costs of the suit were to be paid out of the estate and this payment has, therefore, been rightly included in the accounts. The contention of the plaintiffs is that their expenses in that suit, other than those which were awarded to them, should also have been paid out of the joint family funds. But no such claim was put forward before the Court below or in the memorandum of appeal and it cannot, therefore, be considered.

The fourth item in dispute relates to head 20, which deals with the expenses of

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the suits filed by the manager in connection with the estate. It appears that in 1907 a suit for defamation was brought by Mr. Manuel against Pandit Iqbal Narain in connection with a statement made by the latter in a civil suit in which Mr. Manuel appeared for the present plaintiffs. The amount spent by Pandit Iqbal Narain in his defence was Rs. 118-1-0. But this amount cannot be charged against the joint family property, because the alleged act of defamation was one for which the joint family could in no way be held responsible.

A sum of Rs. 500 was paid to Pandit Bakht Narain on the 31st October 1905 to obtain redemption of the village Tatera which was part of the joint family property. The plaintiffs have been allowed a share in that village and are liable with the other members of the family for the amount spent in redeeming it from the mortgagees.

The plaintiffs have also taken objection to the amount spent by Pandit Bakht Narain in the suit filed by him against Ratan Lal for the recovery of the property belonging to the joint family which was in his possession. Pandit Bakht Narain originally claimed the entire property; but when Pandit Suraj Narain subsequently filed a suit for the recovery of his half share, Pandit Bakht Narain had to confine his claim to the half share which belonged to him. The trial of the two cases practically proceeded together, and the plaintiffs were indirectly benefited by the proceedings taken by Pandit Bakht Narain to establish the title of the joint family to that property. The expenses in that suit have, therefore, been rightly charged against the joint family fund.

An objection is also taken to the expenses incurred in a suit for money filed by Bihari Lal against Gajraj Singh. That money was lent out of the deposit made by Bihari Lal with the joint family. The joint family had undertaken to invest the money for the benefit of Bihari Lal and whatever expenses were incurred in that suit should be debited in Bihari Lal's account.

There is also an objection to the money spent in connection with certain suits filed against Ram Singh, the Zemindar of Bharsara, who was an agent of the joint family. These suits were defended for the protection of the interest of the joint family in the

village Bharsara, in which Ratan Lal wanted to make realizations after the death of Pandit Ram Narain to the prejudice of the joint family. The defendants sought the assistance of Ram Singh, who was a co sharer in the village, and recovered rents through him. Ratan Lal then sued the tenants for rents and, on the tenants pleading payment to Ram Singh, expenses had to be incurred to support the right of Ram Singh to realise the same. It is immaterial whether Ram Singh was eventually successful or not in justifying what he had done, because what he had done was done at the instance of the joint family, whose agent he had become, and the joint family was in justice bound to bear the expenses connected with his defence.

The next objection relates to head 22 and is connected with the suit brought against Ratan Lal, in which Rs. 6,361-9-3 were awarded as costs to him. The amount has been rightly paid out of the joint family funds, as the suit was filed for the protection of the joint family interest. In connection with that suit various other expenses were incurred which are entered in the account books and they have rightly been included in the account.

An objection is also taken to an item of Rs. 200-2-6 entered under head 24 as having been incurred in connection with the suit for defamation filed by Mr. Manuel against Pandit Iqbal Narain. For the reasons given under head 20 this item must be excluded from the account.

The next objection relates to head 30, which represents the salaries paid to the servants of the estate. The plaintiffs contend that some of these servants were the personal servants of Pandit Bakht Narain and his sons. There is nothing, however, to show that any of these servants were personal and that their services were not available to the plaintiffs. Their salaries have, therefore, been properly charged against the joint family funds.

An objection is also taken to certain expenses under head 32 incurred in journeys by rail or *ekka* to Fyzabad, Lucknow, Jaunpur and other places. It is suggested that these expenses were incurred by Pandit Iqbal Narain and his brothers in connection with the prosecution

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of their defence in the suit for partition. It is difficult at this distance of time to say for which purpose each journey was undertaken, but assuming that it was undertaken in connection with the litigation then pending, the joint family would still be liable for the same, as the decree passed in the suit for partition directed that the costs of the partition suit were to be paid out of the estate. The same principle might well be applied to expenses incurred out of Court.

The next objection relates to head 44, comprising, among other things, the expenses in connection with the death anniversary of Bari Babuji, that is, the widow of Pandit Raj Narain, and the purchase of books and other articles. It is difficult to say that the expenses were incurred for the personal benefit of any of the defendants and they have been rightly included in the accounts. The law books purchased on the 6th July 1905 may have been as much for the benefit of one member of the family as of the other, and the objection of the plaintiffs in regard to this item is not entitled to any weight.

There remain certain objections taken by the plaintiffs with reference to the items entered under heads 49 to 53. Head 49 relates to the expenses in connection with the marriage of the daughter of Pandit Iqbal Narain in 1905 and the marriage of Dharam Narain in 1906. Head 50 relates to the expenses incurred in connection with the illness and death of Pandit Bakht Narain in 1906. Head 51 deals with the expenses incurred in connection with the illness of the wife of Pandit Iqbal Narain. Head 52 deals with the expenses incurred in connection with the maintenance of the defendants after the death of Pandit Bakht Narain. Head 53 deals with the advances made to Pandit Bakht Narain between the 20th June 1905 and the 6th April 1906; the total amount being Rs. 6,830-4-6. So far as the expenses entered under heads 49 to 53 are concerned, they are purely personal to the branch of the family represented by Pandit Bakht Narain and his sons, and they will be charged accordingly against their share of the income. It is not fair to the plaintiffs that the expenses of the maintenance of

Pandit Bakht Narain and his sons and grandsons should be paid out of the family funds while the pay and income enjoyed by Pandit Bakht Narain and his sons should be kept by them intact, and similar expenditure incurred by the plaintiffs for their support excluded. The plaintiffs cannot properly be made liable for the same. In regard to the sum of Rs. 1,509-7-6 entered under head 53, the Fyzabad account books show that all that money was spent for estate purposes. The objection of the plaintiffs in regard to the same cannot, therefore, be sustained.

With reference to the amount shown under head 56 as having been invested in loans and mortgages, it has been pointed out that the bond executed by Ohhutki Singh for Rs. 944-8-0 on the 30th October 1903 and the bond executed by Mannu Singh of Makanpur for Rs. 20 on the 16th November 1905 have not been filed or treated as forming part of the joint family property. The money advanced by means of those bonds has been included in the expenditure shown in the accounts. The defendants do not contest the right of the plaintiffs to claim a half share in the said bonds but they have not filed them in Court along with the rest.

The cross-objections filed by the defendants relate to head 21, dealing with the expenses incurred by them in the suit filed by Pandit Suraj Narain, head 23, dealing with the expenses incurred by them in connection with the mutation proceedings instituted on the death of Pandit Bakht Narain, and head 65, sub-heads 1 and 12, touching the deductions made on account of the profits of Jaliamau from 1315 Fasli and the costs of the civil appeal filed by the defendants in this Court from the decree passed in the suit for partition. As regards the expenses incurred in the suit for partition, the details of which are entered in the account books and the correctness of which is not questioned, the defendants are entitled to charge them against the joint family funds, because the decree passed in the suit for partition so directs it. The expenses incurred in the appeal are similarly to be paid out of

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the joint family funds, because the appeal is only a proceeding in the suit. The expenses incurred in the mutation proceedings consequent on the death of Pandit Bakht Narain cannot, however, be so charged, because the plaintiffs have no concern therewith. In regard to the share of the profits due to Bisheshwar Nath, a co sharer of Jaliama, which were paid by the defendants after the 9th March 1909, it is sufficient to say that the liability which the defendants have satisfied was one chargeable against the entire joint family, and the plaintiffs cannot be prejudiced if the amount due to Bisheshwar Nath is treated as a debt due by the joint family which the family has since discharged.

There is also an objection as regards an item of Rs. 1,732-14-3 under head 64, relating to the money advanced to Ram Singh. It is admitted that a mortgage-bond was taken from Ram Singh on the 6th September 1909 in lieu of that money. The plaintiffs cannot claim both a share in that money and a share in that mortgage bond. The Court below says that the defendants are willing to give the plaintiffs a half share in that mortgage bond but as the bond was taken after the 9th March 1909, up to which the accounts have to be adjusted, the bond subsequently taken by the defendants cannot be taken into account. The defendants will be deemed to be the sole owners of that bond.

The other objections taken by either party in their grounds of appeal are not pressed. The amount due to the plaintiffs according to the above account is Rs. 20,573.

Both the appeals are, therefore, allowed in part, the result being that instead of Rs. 12,409-1-4½ the plaintiffs will get a decree for the above amount with proportionate costs here and below against the defendants, who will get their costs in proportion from the plaintiffs in this appeal.

The bond of Chhutku Singh and Mannu Singh above referred to will be added to the list of the joint property in which the plaintiffs have a half share. The rest of the decree of the Court below will be confirmed.

Appeals partly allowed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 188 OF 1918.

November 20, 1918.

Present:—Mr. Batten, A. J. C.

SOGAI—DEFENDANT—APPLICANT

versus

WARLOO—PLAINTIFF—NON-APPLICANT.

Contract—Person not privy to contract, whether can take advantage of it.

A person who is not a party to a contract and with whom there is no privity, cannot gain any advantage by it whether as a plaintiff or as a defendant unless he is in the position of a *cestui que trust*. [p. 549, col. 2; p. 550, col. 1.]

Revision of the judgment and decree of the Junior Small Cause Court, Bhandara, dated the 5th of April 1918, in Civil Suit No. 963 of 1917.

Mr. G. R. Deo, for the Applicant.

Mr. Atmaran Bhagwant, for the Non-Applicant.

JUDGMENT.—I agree with the view taken by the lower Court in this case, that the terms of the agreement between plaintiff and his partner, defendant No. 1, do not necessarily bear the meaning attached to them by the applicant. The clause, in my opinion, means that if a debtor of the firm pleaded that he had paid defendant No. 1, the plaintiff would, after the dissolution of the partnership which left him the sole owner of the business, settle the matter with the debtor and whatever the result, would not hold the defendant No. 1 liable. It is impossible to believe that the plaintiff intended to agree to absolve any debtor who claimed to have paid defendant No. 1 whether that debtor had really paid him or not. The words *jama kharch karna* may no doubt mean "to book as received and struck off as applied," but this is not the literal or necessary meaning. Even if the words bore this meaning, which in my opinion they do not, the defendant-applicant, who was not a party to the contract and with whom there was no privity of contract, cannot gain any advantage by the contract as he certainly was not put in the position of a *cestui que trust*, vide *Laxman Bhat v. Govinda* (1) and *Seth Ramlal v. Seth Narsinglass* (2). It does not appear to make any difference that the

(1) 11 C. P. L. R. 109.

(2) 14 C. P. L. R. 22.

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applicant is not the plaintiff; he is seeking in the litigation to gain an advantage by a contract to which he was not privy.

As to the fact of re-payment, it is a question of evidence, as to which I will not interfere in revision.

The application is dismissed with costs.

Revision dismissed.

ODDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 374 OF 1917.

August 30, 1918.

Present:—Mr. Lindsay, J. C.

PARTAB SINGH—DEFENDANT—APPELLANT

versus

BALWANT SINGH—PLAINTIFF

—RESPONDENT.

Mortgage—Money left with mortgagee to redeem prior mortgage—Redemption, time for, not specified—Mortgagee, failure of, to redeem within reasonable time—Damages, suit for, by mortgagor, maintainability of—Contract Act (IX of 1872), ss. 46, 55—Mortgage with possession—Consideration overstated by mistake—Mortgagee, whether can recover interest on amount overstated.

Where a portion of the mortgage consideration is left with the mortgagee to redeem certain prior mortgages existing on the property and no particular time is specified in the deed for such redemption, it is the duty of the mortgagee, in accordance with the principles laid down in sections 46 and 55 of the Contract Act, to redeem the prior mortgages within a reasonable time, *i.e.*, by the first date upon which redemption is obtainable. If the mortgagee fails so to redeem the prior mortgages, the mortgagor is entitled to recover from the mortgagee damages sustained by him in consequence of the failure of the mortgagee to redeem. [p. 551, col. 1.]

Where a deed of mortgage, under which possession of the mortgaged property was handed over to the mortgagee, provided that there was to be no accounting between the parties at the time of redemption, and it appeared that a portion of the mortgage consideration was set down in the deed as being due to the mortgagee from the mortgagor, merely by way of guess without any account having been really taken at the time:

Held, (1) that it was open to the mortgagor to show that there was a mistake in the statement of the mortgage consideration; [p. 552, col. 1.]

(2) that the mortgagor was entitled to claim from the mortgagee in possession interest on the amount by which the said portion of the mortgage consideration exceeded the real amount due to the mortgagee from the mortgagor. [p. 552, cols. 1 & 2.]

Appeal from the decree of the District Judge, Hardoi, dated the 13th July 1917, confirming the order of the Munsif, Hardoi, dated the 19th March 1917.

Mr. A. P. Sen and Babu Ishwari Prashad, for the Appellant.

The Hon'ble Pandit Gokaran Nath Misra and Pandit Harkaran Nath Misra, for the Respondent.

JUDGMENT.—The defendant appellant in this case is a mortgagee of the plaintiff-respondent. A suit was brought by the latter for the purpose of recovering a sum of Rs. 800, which he claimed to be due to him by way of damages for breach of the mortgage contract.

The Court of first instance awarded the plaintiff a sum of Rs. 615-3-0. This decree has been affirmed in substance by the Judge of the lower Appellate Court, who modified it only to a small extent. The defendant now appeals, and his case practically is that the suit as framed was not maintainable and that the plaintiff had no right to recover.

In order to understand the matters in issue between the parties, it is necessary to state that on the 21st of June 1902 Balwant Singh and his brother Gur Bakhsh mortgaged a $2\frac{1}{2}$ *biswas* share in Mauza Kakumau to Partab Singh for a sum of Rs. 4,100. The mortgage is professed to be a mortgage with possession and the mortgaged property included the *sir* rights of the mortgagors. It seems that actual physical possession was not delivered to the mortgagee under this mortgage but that for a number of years he received his share of profits from the mortgagors. On the 12th of July 1910, Balwant Singh alone executed another mortgage of the same $2\frac{1}{2}$ *biswas* in consideration of a loan of Rs. 9,000. The intention of the parties by this second transaction was to discharge the earlier mortgage of the 21st of June 1902.

When the mortgage of 1902 was made, it is admitted that a sum of Rs. 1,400 was left with the mortgagee Partab Singh to pay off certain prior mortgages with possession which had been executed in favour of Hazari Lal and Sheo Lal. These mortgagees were in possession of a number of specified plots the aggregate area of which came to 132 *bighas* odd and when the sum of

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Rs. 1,400 was left with Partab Singh to redeem these earlier charges, the intention was that he after redemption was to get possession of one-half of this area of 132 *bighas*, the other half being made over to the mortgagors.

The mortgagee failed to pay off the prior mortgages and at the time the mortgage with which we are now concerned (namely, the mortgage of the 12th July 1910) was executed, Rs. 1,400 was still with the mortgagee. Again an agreement was made between the parties that Partab Singh should apply this sum of Rs. 1,400 in discharge of the earlier mortgages. It is an admitted fact that up to the date of this suit he had failed to do so. The plaintiff Balwant Singh now comes to Court and claims that by reason of Partab Singh's failure to redeem these mortgages he has suffered loss, inasmuch as if redemption had been made in accordance with the contract he would have been in possession of a one-half share of this area of 132 *bighas* odd and would have received the profits thereof. Consequently the plaintiff claimed a sum of Rs. 492, being the profits of this half share of the area described for a period of 6 years before the suit.

The Court of first instance held that the plaintiff could not succeed in getting profits for the full period claimed but awarded profits for a period of five years. It is to be observed that the plaintiff was not claiming this sum of Rs. 1,400 from his mortgages. Both the Courts below have stated quite correctly that a claim of this sort could not succeed for that would mean enforcing a contract to lend money. They were both of opinion, however, that the plaintiff had been damnified by the refusal of the mortgagee to discharge the prior mortgages for which purpose he had the money in hand and that he was entitled accordingly to the damages he claimed.

On this part of the case the argument here is that there was no breach of contract on the part of the mortgagee and that consequently the plaintiff was not entitled to recover. The main contention on this point is that neither the deed of 1902 nor the deed of 1910 contains any stipulation regarding the time at which redemption is to be made by the mortgagee Partab Singh.

I am unable to accede to this argument. It is quite true that no express covenant was recorded in the deed of mortgage requiring Partab Singh to redeem the prior charges at any particular time, but in accordance with the principles laid down in sections 46 and 55 of the Indian Contract Act it must be taken that, in the absence of any specification of the time for performance, it was the duty of Partab Singh to redeem the prior charges within a reasonable time. It is to be noted here that the mortgages in favour of Hazari Lal and Sheo Lal were only redeemable in the fallow season of Jeth. The mortgage with which we are now concerned was executed on the 12th of July 1910 and it may reasonably, therefore, be said that Partab Singh should have redeemed the earlier charges by the 1st of July 1911, that being the first date upon which the redemption was obtainable. I may mention here that in the Courts below the defendant-appellant did not seek to excuse his non-performance of the contract on the ground that no particular time for performance had been specified. On the contrary he tried to justify his action by saying that the mortgagor Balwant Singh had not performed his portion of the contract. This argument relates to that stipulation in the mortgage-deed by which the mortgagor contracted to relinquish his *sir* rights in some of the lands mortgaged. Both the Courts below have very properly held that the defendant could not be excused or justified on this ground, inasmuch as the contract for the relinquishment of *sir* rights is an illegal contract which cannot be enforced. I have no doubt, therefore, that the plaintiff was entitled to recover damages under this head.

With regard to the plea of limitation contained in the third paragraph of the memorandum of appeal that must be rejected. The claim of the plaintiff was not limited, in my opinion, to a claim for 3 years for it is based upon the breach of a contract in writing and registered.

The other point to be dealt with relates to an item of Rs. 1,018-8-0, which is referred to in the mortgage-deed of the 12th of July 1910. It seems that at the time when this mortgage was executed the mortgagor Balwant Singh had failed for 2 years to render to the mortgagee his pro-

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fits in respect of the $2\frac{1}{2}$ *biswas* share which had been mortgaged to him.

The years in question were the years 1312 and 1313 Fasli. When the mortgage of the 12th of July 1910 came to be written, a sum of Rs. 1,018 was allowed to the mortgagee in respect of the profits of a $2\frac{1}{2}$ *biswas* share for these two years. According to the case of the plaintiff now this statement of the account in the mortgage-deed is a mistake and that as a matter of fact a much smaller sum than Rs. 1,018 represented the aggregate amount of profits which was due to Partab Singh for the two years in question. Both the Courts below have examined the account in this respect and they have both held on the evidence of the Patwari, which they accepted as correct, that the statement in the mortgage-deed that a sum of Rs. 1,018-8-0 was due in respect of these two years to Partab Singh is a clear mistake. There was evidence before the Court to show that at the time this mortgage of 1910 was drawn up no accurate calculation of the profits was made and it is said that this sum of Rs. 1,018 was set down merely at random. On the findings come to by both the Courts it is not possible to doubt that there was a serious mistake in the statement of the profits. It has been argued before me that the plaintiff is bound by the statement in the mortgage-deed and that he is not now at liberty to plead that the amount of the profits was erroneously stated to be Rs. 1,018-8-0. The argument is that as an account was made up at the time which was accepted by the plaintiff mortgagor, he cannot be allowed to resile from his agreement. But I have just stated that the evidence shows that no account was really taken and that this amount was set down merely by way of guess. There is no merit, therefore, in the argument and, I think, it was open to the plaintiff to show that there was a mistake in the statement of the profits. Here again it is to be observed that the plaintiff is not asking the defendant to hand over to him the amount by which the sum of Rs. 1,018 odd exceeded the real amount which was due. He is only claiming interest on the excess amount and in my opinion he is entitled to that relief, the fact being

that the mortgagee is in possession and receiving the profits of the property in lieu of interest on a sum which is found not to have been owing to him. It is to be noticed here that according to the terms of the deed of mortgage there is to be no accounting between the parties at the time of redemption. I can see no reason why in the present suit the plaintiff should not claim interest on the excess amount just referred to.

Another point which is argued is that the Court below was wrong in allowing interest at the rate of 12 per cent. I see no force in this contention. The rate seems to me to be a reasonable rate.

Lastly exception is taken to the finding of the lower Appellate Court as to the amount by which the sum of Rs. 1,018 odd exceeds the sum which was really due. After examining the calculation of the Court below I think the learned Judge was right and that the calculation which was made in the Court of first instance was erroneous.

The appeal fails on all points and is dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 317
OF 1916.

March 11, 1918.

Present:—Mr. Justice Fletcher and Justice
Sir Syed Shamsul Huda, Kt.

SAILAJA NATH ROY CHAUDHURY AND
OTHERS—PLAINTIFFS—APPELLANTS
versus

CHANDI CHARAN LAHA AND OTHERS—
DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII B. C. of 1885), s. 106, suit under—Court-fee payable—Court Fees Act (VII of 1870, Sch. II, Art 17, cl. 3—Declaratory suit—Plaint inartificially drawn up, effect of.

A suit instituted under the provisions of section 106 of the Bengal Tenancy Act is in fact a suit for a declaration that the Record of Rights is wrong. Therefore, such a suit, being one for a declaratory decree within the meaning of Article 17, clause 3 of Schedule II of the Court Fees Act, is not chargeable with an *ad valorem* Court-fee even where it is

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transferred to the Civil Court for the purpose of trial.

The mere fact that a plaint has been inartistically drawn up does not alter the nature of the suit.

Appeal against the decision of the Additional Subordinate Judge, Khulna, dated the 16th September 1915, affirming that of the Munsif, 2nd Court, Khulna, dated the 18th and the 28th January 1915.

Babu Anilendra Nath Roy Chaudhury, for the Appellants.

Babu Narendra Chandra Bose, for the Respondents.

JUDGMENT.

FLETCHER, J.—This is an appeal by the plaintiffs against the decision of the learned Subordinate Judge of Khulna, dated the 16th September 1915, confirming the decision of the Munsif of the same place. The suit was brought under section 106 of the Bengal Tenancy Act. Though the case was transferred to the Civil Court for the purpose of trial, still the suit was a suit instituted under the provisions of section 106 of the Bengal Tenancy Act. Now, what is the proper Court-fee in a suit instituted under section 106 of the Bengal Tenancy Act? There is a clear decision of this Court in the case of *Satis Chandra Giri v. Gopal Chandra Rai* (1) that a suit under section 106 of the Bengal Tenancy Act is a suit for a declaratory decree within the meaning of Article 17, clause (3) of Schedule II of the Court Fees Act and that, therefore, the plaint in such a suit does not require an *ad valorem* stamp. On the other hand, the learned Judges of the Courts below have relied on the decision of this Court in the case of *Ohandi Charan Laha v. Manoranjan Chattopadhyaya* (2), where it was held that a suit brought under section 106 of the Bengal Tenancy Act; which was transferred to the Civil Court and in which there were claimed other reliefs, might be valued on an *ad valorem* basis. The judgment in that case made certain remarks and amongst them we find this: "No general rule governing all the cases," that is, all the cases under section 106 of the Bengal Tenancy Act, "can be laid down; but the question must be decided on the facts of each special

case." If there is no general rule—and in the view of the learned Judges who decided the case of *Satis Chandra Giri v. Gopal Chandra Rai* (1) there is no general rule, and in the view of the learned Judges in the case of *Ohandi Charan Laha v. Manoranjan Chattopadhyaya* (2) there is a general rule—I may say so without disrespect that the learned Judges who decided the case of *Satis Chandra Giri v. Gopal Chandra Rai* (1) were bound by the decision in the case of *Ohandi Charan Laha v. Manoranjan Chattopadhyaya* (2) and, as they said that there was no general rule but that each case must be decided on the facts of that particular case, I think we should follow the earlier authority and go back to the rule that has been clearly and definitely laid down, namely, that a suit instituted under the provisions of section 106 of the Bengal Tenancy Act—notwithstanding these badly drawn up plaints that come from the Mofussil—is in fact a suit for a declaration that the Record of Rights is wrong and that the mere fact that a plaint has been inartistically drawn up does not alter the nature of the suit and that such a suit, as laid down in the case of *Satis Chandra Giri v. Gopal Chandra Rai* (1), is in fact a suit for a declaration and not chargeable with an *ad valorem* fee. In that view, I think the present appeal must be allowed and the case must be remitted to the primary Court for trial on the merits. Costs will abide the result.

SHAMSUL HUDA, J.—I agree.

Appeal allowed;
Case sent back.

PRIVY COUNCIL.

APPEAL FROM THE ALLAHABAD HIGH COURT.

June 3, 1918.

Present:—Lord Sumner, Sir John Edge, Mr. Ameer Ali and Sir Walter Phillimore, Bart.

Chaudhri RISAL SINGH AND ANOTHER—

PLAINTIFFS—APPELLANTS

versus

BALWANT SINGH AND OTHERS—

DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11—Reg.

(1) 7 Ind. Cas. 627; 12 C. L. J. 638; 15 C. W. N. 110.

(2) 18 Ind. Cas. 275; 17 C. L. J. 416.

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judicata—Hindu Law—Widow, decree against, whether bars suit of reversioner.

Where the estate of a deceased Hindu has vested in a female heir, a decree fairly and properly obtained against her in regard to the estate is, in the absence of fraud or collusion, binding on the reversionary heir; and where merits are tried and the trial is fair and honest, a Hindu lady otherwise qualified to represent the estate in litigation does not cease to be so qualified merely owing to a personal disability or a disadvantage as a litigant. [p. 559, col. 2; p. 560, col. 1.]

A Hindu widow sued for a declaration that she had not validly adopted the defendant as a son to her deceased husband. Both Courts in India dismissed the suit, holding that by her own acts she was personally estopped from denying the validity of the adoption. The Privy Council affirmed that decision and also held that she had authority from her deceased husband to make the adoption in question and that the defendant had been validly adopted. On the death of the widow the next reversioner sued to eject the adopted son, on the ground that inasmuch as the widow had no authority from her deceased husband to make an adoption the defendant had not been validly adopted:

Held, that though the rule of *res judicata*, as enacted in section 11 of the Code of Civil Procedure, was not strictly applicable to the case, the principle of *res judicata* applied, and that the decision in the widow's suit on the question whether the defendant had or had not been validly adopted, barred the suit of the reversioner. [p. 557, col. 2.]

Appeal against a decree of the High Court, Allahabad, Sir Henry Richards, C. J., and Justice Sir P. C. Banerji, dated the 29th, April 1915, reported as 30 Ind. Cas. 657, affirming that of the Court of the Additional Subordinate Judge, Saharanpur, dated the 16th February 1914, where the plaintiffs-appellants' suit was dismissed with costs.

FACTS.—The plaintiffs-appellants brought the present suit against the defendants-respondents to eject them from an estate called the Landhaura Raj, alleging that the first respondent Balwant Singh was not the validly adopted son of Raja Raghubir Singh, a former proprietor of the estate, inasmuch as the widow of the latter, Rani Dharam Kunwar, adopted the first respondent without the authority therefor from her deceased husband. The question whether the Rani had authority to adopt the first respondent had already been the subject of litigation between the adoptive mother and the adopted son. That litigation had come up on appeal to His Majesty in Council, and their Lordships of the Judicial Committee had held that the Rani had authority from her husband to adopt the first respondent and

that his adoption was valid: see *Dharam Kunwar v. Balwant Singh* (1).

In the present suit the Additional Subordinate Judge held that the Privy Council decision was binding on the plaintiffs-appellants and that their suit was accordingly barred by the rule of *res judicata*. He, therefore, made a decree dismissing their suit with costs. On appeal the High Court by a majority affirmed that decree. The only question for determination in this appeal was whether the present suit was barred by the rule of *res judicata*.

Messrs. Dunne, K. C., and W. L. Richards for the [Appellants.—The question is whether the first plaintiff, the next reversioner, is estopped by the rule of *res judicata* from denying that the defendant Balwant Singh was validly adopted by Rani Dharam Kunwar. The plaintiff says that the Rani had no authority from her deceased husband to make any adoption. This question of authority was issue No. 3 in the Rani's suit. That issue was neither heard nor decided by the Courts in India: see *Dharam Kunwar v. Balwant Singh* (2). The Court of first instance had excluded evidence on that issue. It appears from *Dharam Kunwar v. Balwant Singh* (1) that this Board also held that the Rani was estopped owing to her own acts from raising the question as to the validity of the adoption. The Rani could not, therefore, be said to have been then representing the estate. She was acting not in the interest of the estate but in her own interest.

As some evidence on the question of authority was admittedly excluded, it is submitted that the issue had not been heard and finally decided within the meaning of section 11 of the Code of Civil Procedure, 1908. The case is not governed by that section but by the rule laid down in *Katama Natchiar v. Rajah of Shivagunga* (3). But as already pointed out, the Rani was not representing the estate and

(1) 15 Ind. Cas. 673; 16 C. W. N. 675; 9 A. L. J. 730; 14 Bom. L. R. 485; (1912) M. W. N. 641; 12 M. L. T. 95; 16 C. L. J. 60; 34 A. 398; 23 M. L. J. 200; 39 I. A. 142 (P. C.).

(2) 30 A. 549; 5 A. L. J. 568; A. W. N. (1908) 231; 4 M. L. T. 385.

(3) 9 M. I. A. 539; 2 W. R. (P. C.) 31; 1 Suth. P. Q. J. 520; 2 Ser. P. Q. J. 25; 19 E. R. 843.

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there was no fair trial of the issue as evidence relating to it was excluded. The finding of the Board was based on the Rani's statement in Baldeo's suit, but that statement was not evidence against the plaintiff, and the finding based on such evidence could not bind the plaintiff.

The issue as to authority was not a necessary issue in the Rani's case, and consequently a decision thereon does not operate as a bar in the present suit: *Concha v. Concha* (4).

The deed of adoption shows that the Rani took an estate for life under the Will of her late husband and Balwant Singh took the remainder thereunder. The Rani could not, therefore, dispute Balwant Singh's title. She was then a devisee and could not represent the estate: *Board v. Board* (5) and *Dalton v. Fitzgerald* (6). Reference was also made to *Robinson v. Duleep Singh* (7). What the Board then did was to merely express an opinion in order to deter the reversioner from further litigation.

Messrs. *De Gruyther, K. C.*, and *J. M. Parikh*, for the Respondents.—As to the contention based on the Will of the late Raja, the Rani could only take an estate for life under the Will; if the Will is good, it gives the Rani authority to adopt and would, therefore, put an end to the case. The English authorities on the question of *res judicata* are of no value in an Indian case, which must be decided on the construction of section 11 of the Code of Civil Procedure, 1908.

In a suit against a widow in respect of the estate the decision is binding on the reversionary heir: *Katama Natchier v. Rajah of Shivagunga* (3), *Jugul Kishore v. Jotendro Mohun Tagore* (8), *Pertabnarrain Singh v. Trilokinath Singh* (9) and *Hari Nath*

Chatterjee v. Mothurmohun Goswami (10). It has been held that section 11 of the Code of Civil Procedure, 1908, is not exhaustive and a decision against one reversioner binds another, though the second does not claim through the first: *Chiruvolu Punnamma v. Chiruvolu Perrazu* (11). In *Venkatanarayana Pillay v. Subbammal* (12) the Board held that a remote reversioner was entitled to revive a suit brought by a near reversioner.

Section 11 of the Code of Civil Procedure deals with issues as well as suits: *Kameswar Pershad v. Rajkumari Ruttan Koer* (13) and *Thakur Tirbhuvan Bahadur Singh v. Raja Rameshar Bakhsh Singh* (14). To determine what was in issue one must look not to the decree but to the judgment and the pleadings: *Jagatjit Singh v. Sarabjit Singh* (15). The only decision that operates as *res judicata* is the decision of the final Court of Appeal. There was a final decision by the Board that the Rani had authority to adopt and that Balwant Singh was validly adopted. That decision is binding on the plaintiffs. Reference was also made to *Abdullah Ashgar Ali Khan v. Ganesh Dass* (16).

Mr. Dunne, K. C., replied.

JUDGMENT.

SIR JOHN EDGE.—This is an appeal from a decree, dated the 29th April 1915, of the High Court at Allahabad, which affirmed a decree of the Additional Subordinate Judge of Saharanpur by which the suit of the plaintiffs had been dismissed. The suit was dismissed on the ground that a decision of

(10) 20 I. A. 183, 21 C. 8; 17 Ind. Jur. 481; 6 Sar. P. C. J. 334; 10 Ind. Dec. (N. S.) 638.

(11) 29 M. 390; 1 M. L. T. 183; 16 M. L. J. 307 (F. B.).

(12) 29 Ind. Cas. 298; 42 I. A. 125; 28 M. L. J. 535; 17 M. L. T. 435; 21 C. L. J. 515; 17 Bom. L. R. 468; 19 C. W. N. 641; 2 L. W. 596; 38 M. 406; (1915) M. W. N. 555 (P. C.).

(13) 19 I. A. 234; 20 C. 79; 6 Sar. P. C. J. 241; 10 Ind. Dec. (N. S.) 53.

(14) 33 I. A. 156 at p. 164; 10 C. W. N. 1065; 8 Bom. L. R. 722; 16 M. L. J. 440; 3 A. L. J. 695; 4 C. L. J. 405; 1 M. L. T. 265; 9 O. C. 377; 28 A. 727 (P. C.).

(15) 18 I. A. 165; 19 C. 159; 15 Ind. Jur. 749; 6 Sar. P. C. J. 80; Rafique & Jackson's P. C. No. 125; 9 Ind. Dec. (N. S.) 562 (P. C.).

(16) 42 Ind. Cas. 959; 44 I. A. 213; 128 P. W. R. 1917; 22 M. L. T. 451; 22 C. W. N. 121; 3 P. L. W. 381; 26 C. L. J. 568; 15 A. L. J. 889; 19 Bom. L. R. 972; 34 M. L. J. 12; 7 L. W. 62; 132 P. L. R. 1917; (1918) M. W. N. 7; 45 C. 442 (P. C.).

(4) (1886) 11 A. C. 541 at pp. 549, 550—552; 56 L. J. Ch. 257; 55 L. T. 522; 35 W. R. 477.

(5) (1874) 9 Q. B. 48; 43 L. J. Q. B. 4; 29 L. T. 459; 22 W. R. 208.

(6) (1897) 2 Ch. 86 at p. 90; 66 L. J. Ch. 604; 76 L. T. 700; 45 W. R. 685.

(7) (1879) 11 Ch. D. 798 at p. 813; 48 L. J. Ch. 758; 39 L. T. 313; 27 W. R. 21.

(8) 10 C. 935; 11 I. A. 66 at p. 73; 8 Ind. Jur. 455; 4 Sar. P. C. J. 553; 5 Ind. Dec. (N. S.) 657.

(9) 11 C. 183; 11 I. A. 197 at p. 207; 8 Ind. Jur. 697; 4 Sar. P. C. J. 567; Rafique & Jackson's P. C. No. 86; 5 Ind. Dec. (N. S.) 883.

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the Board on the 23rd April '912, in an appeal to His Majesty in Council in a previous suit, in which Balwant Singh, the principal defendant in this suit, was the defendant, and the late Rani Dharam Kunwar was the plaintiff, operated as a bar to the maintenance of this suit, which is brought by plaintiffs who were not parties to the previous suit, and do not represent either party to the previous suit. That decision is reported as *Dharam Kunwar v. Balwant Singh* (1).

In this suit the plaintiffs are Chaudhri Risal Singh and Lala Fateh Chand. The plaintiff Chaudhri Risal Singh claims in this suit possession of part of the Landhaura Raj, which is a large estate of great value; his claim is based on an allegation that he is the heir of Raja Jagat Prakash Singh, whom he alleges to have been the last male owner of the estate. The other plaintiff, Lala Fateh Chand, alleges that before suit Chaudhri Risal Singh conveyed to him the other part of the estate, and he claims possession of that other part of the estate as the grantee of Chaudhri Risal Singh. The plaintiffs also claim mesne profits.

The principal defendant to this suit is Balwant Singh, through whom the other defendants claim title. Balwant Singh's case is that the estate vested in him as the adopted son of the late Raja Raghubir Singh, to whom he alleges that he was validly adopted by the late Dharam Kunwar, the widow of Raja Raghubir Singh, who admittedly died possessed of the estate. The factum of the adoption was denied by the plaintiffs, but it is no longer disputed, and cannot now be disputed; the plaintiffs, however, allege that Rani Dharam Kunwar had no authority to adopt a son to her husband, and further that if she ever had authority to adopt a son to her husband that authority was a limited authority, and was exhausted by previous adoptions made by her before she went through the form of adopting Balwant Singh. The decision of the Board, which has been held by the Courts below to operate as a bar to the maintenance of this suit, related to the adoption of Balwant Singh as a son to her late husband by Rani Dharam Kunwar.

The plaintiffs allege and the defendants deny that on the death of Rani Dharam

Kunwar on the 12th November 1912 the plaintiff Chaudhri Risal Singh was the next nearest reversioner, and was as such entitled to the estate of Landhaura. That issue as to the status of Chaudhri Risal Singh has not been tried, and is irrelevant if the suit is barred by the decision of the Board of the 23rd April 1912.

There has been much litigation relating to the title to the estate of which Raja Raghubir Singh died possessed, and in order to understand the case which was before the Board in 1912 it is necessary briefly to refer to that previous litigation and to the position of the several parties to it. Raja Raghubir Singh died on the 23rd April 1868 and at the time of his death he left no son living; his widow, Rani Dharam Kunwar, was then *enceinte*, and after his death she, on the 16th December 1861, gave birth to Raja Jagat Prakash Singh, who was his posthumous child. Raja Jagat Prakash Singh died in childhood on the 31st August 1870 and on his death Rani Dharam Kunwar succeeded to the possession of the family property in right of her interest for life in it as his mother and heiress. The fact that she alleged that she obtained title to the property under an oral Will of her husband, Raghubir Singh, is immaterial. On the 4th March 1877 Rani Dharam Kunwar adopted Tofa Singh as a son to Raja Raghubir Singh. Tofa Singh, then known as Raja Narendra Singh, died in childhood about two and a half years after his adoption. On the 20th January 1883, Rani Dharm Kunwar adopted another boy, named Ram Sarup, as a son to Raja Raghubir Singh. Ram Sarup, then known as Ram Padab Singh, died in June 1885. On the 13th January 1899, Rani Dharam Kunwar adopted Balwant Singh, the principal defendant in this suit, as a son to Raja Raghubir Singh. On the 13th January 1899, Chaudhri Ram Niwaz, who was the father of Balwant Singh, executed a deed, by which he acknowledged that he had given his son, Balwant Singh, then 16 years old, to Rani Dharam Kunwar, widow of Raja Raghubir Singh, deceased, Rais of Landhaura, as an adopted son for her and her husband, and stated that—"the usual religious ceremonies and those

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connected with the *biradri* have been performed with all publicity to-day. From to-day the said son has no connection left with his natural family. From to-day the said son will have those rights in the whole of the property left by Raja Raghubir Singh, deceased, and possessed by the said Rani, which an adopted son legally acquires. But it has been agreed between me, the executant, and the said Rani, according to the provisions of the Will and permission of Raja Raghubir Singh, deceased, that she shall, till the end of her life, continue to be the owner and possessor of the whole estate and property of every description belonging to the said Raja which exists at present or may be acquired in future; and as long as she lives all sorts of management and supervision of the estate shall rest with her as its owner."

On the 1st May 1900, one Baldeo Singh, claiming to be the reversionary heir of Raja Raghubir Singh, brought a suit in the Court of the Subordinate Judge of Saharanpur against Rani Dharam Kunwar and Balwant Singh to have the adoption of Balwant Singh set aside. In that suit evidence as to the alleged adoption was taken. The main contention of Baldeo Singh, so far as the adoption of Balwant Singh was concerned, was that Raja Raghubir Singh had not given to Rani Dharam Kunwar authority to adopt a son to him, and that any authority which Raja Raghubir Singh may have given to his wife to make an adoption was not an authority which enabled her to make successive adoptions. No oral evidence to prove that an authority to adopt had not been given to Rani Dharam Kunwar by Raja Raghubir Singh was apparently procurable; Rani Dharam Kunwar did not give evidence in that suit, but in her written statement in that suit she alleged that she had "under valid authority and after due proclamation adopted Balwant Singh, defendant No. 2, and the aforesaid adoption is in every way proper." Her Pleading in that suit stated to the Court that the authority to adopt was oral, and as to the nature and scope of her authority to adopt, said that Raja Raghubir Singh's object in giving his wife authority to adopt was that "in the event of Rani Dharam

Kunwar, who was then pregnant, giving birth to a daughter, or of a son being born and dying, she should adopt, and in the event of the death of that adopted son, she should again adopt, and in the event of the last-named also dying, she had authority to adopt again, and so on." There was documentary evidence put before the Subordinate Judge, and four witnesses were called to prove the oral authority to adopt, but the Subordinate Judge did not believe these witnesses, and he found that Rani Dharam Kunwar had no authority to adopt Balwant Singh, as the authority was not one authorising her to make successive adoptions. Having found, however, that Baldeo Singh had failed to prove that he was a reversioner, the Subordinate Judge dismissed the suit, but in his decree he inserted his finding against the validity of the adoption. The decree came on appeal before the High Court at Allahabad, and the appeal was dismissed; but the High Court, on the application of Balwant Singh, struck out of the decree of the Subordinate Judge his finding as to the invalidity of the adoption, on the ground that, Baldeo Singh having failed to prove that he was a reversioner, the issue as to authority to adopt did not arise and was irrelevant. That application was resisted by Rani Dharam Kunwar, and her Advocate frankly informed the High Court that her object in wishing to have the finding as to the invalidity of the adoption retained in the decree of the Subordinate Judge was that it might be used as *res judicata* in future litigation between her and Balwant Singh.

Before Baldeo Singh's suit was dismissed Rani Dharam Kunwar and Balwant Singh had quarrelled. Balwant Singh was claiming his full rights as an adopted son and was refusing to be bound by the terms as to Rani Dharam Kunwar's position with regard to the ownership, management, and control of the property that had come from Raja Raghubir Singh, which had been agreed to by Chaudhri Ram Niwaz in the deed of the 13th January 1899, and she determined to repudiate the adoption.

On the 7th January 1905, Rani Dharam Kunwar brought a suit against Balwant Singh in the Court of the Subordinate Judge of Saharanpur and in her plaint alleged that Raja Raghubir Singh had never

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given her authority to adopt a son, and prayed that it might be declared that she had no power to adopt Balwant Singh, and had in fact never adopted him according to any ceremony under the Hindu Law, and that a document of the 13th January 1899, in her name as the executant which purported to be a deed of adoption in favour of Balwant Singh, was void and ineffectual as against her.

The deed of adoption of the 13th January 1899 which Rani Dharam Kunwar sought to have declared void was a registered deed in her name and under her seal, in which she alleged that Raja Raghubir Singh when he became hopeless of recovery in his last illness made the following Will in her favour, she being then pregnant:—

"If (God forbid !) you give birth to a daughter, or if a son be born but dies after his birth, I strictly order you to adopt some boy to me, so that he might perform my *sraddh* ceremony and yours, and perpetuate my name, and after your death become the absolute owner and possessor of the whole of my estate. If (God forbid !) the son who might be adopted under this authority should die in your lifetime you will have power to adopt another boy."

In that deed Rani Dharam Kunwar, amongst several other things, also alleged that she on the day on which the deed bears date, after performing the necessary ceremonies, adopted Balwant Singh, son of Chaudhri Ram Niwaz, to herself and her husband in the presence of the gentry, the district authorities, and other European gentlemen and the members of her *biradri*; and that Chaudhri Ram Niwaz gave Balwant Singh to her as an adopted son. That deed was on the 19th January 1899 duly registered by the Sub-Registrar of Rurki, Rani Dharam Kunwar having first personally admitted in the presence of the Sub-Registrar its execution by her. In her plaint in her suit against Balwant Singh she endeavoured to explain away that deed by alleging that she had no knowledge of that deed before July 1904; that she had not got it registered; that it was written in her name without her knowledge on the 13th January 1899 by one Tahauwar Ali, who was her Diwan in charge of her entire business, and was her adviser, and that he had got it registered. She also alleged in her

plaint that having learnt during the pendency of Baldeo Singh's suit that Tahauwar Ali was secretly in collusion with Balwant Singh she dismissed him, and she also endeavoured to explain away her written statement in the suit of Baldeo Singh, admitting the adoption of Balwant Singh, and her Pleader's statement in that suit as to her authority to make an adoption, by denying that her written statement and her Pleader's statement had been authorised by her.

In the suit of Rani Dharam Kunwar against Balwant Singh he in his written statement, amongst other things, alleged that Rani Dharam Kunwar had authority to adopt him to Raja Raghubir Singh and that he had been validly adopted. The Subordinate Judge held that Rani Dharam Kunwar was by her acts estopped from denying that Balwant Singh had been validly adopted to Raja Raghubir Singh, and did not try any other issue. The High Court at Allahabad, agreeing with the Subordinate Judge, dismissed the appeal of Rani Dharam Kunwar, and thereupon she appealed to His Majesty in Council and again failed. The facts, which this Board has stated as to the history of the litigation and as to the positions of the parties and their acts, have been derived from the record of the appeal to His Majesty in Council in which the Board gave its decision of the 23rd April 1912. The evidence upon which that decision was arrived at was before the Board in the record of that appeal. It is said that evidence to show that Rani Dharam Kunwar had no authority to adopt Balwant Singh had been excluded in her suit, and that consequently the Board in 1912 ought not to have found that Balwant Singh had been validly adopted. It is true that Rani Dharam Kunwar applied to the Subordinate Judge that evidence should be taken, but it does not appear that she ever applied to have witnesses summoned or tendered any evidence which was rejected. It is difficult to conceive what oral evidence Rani Dharam Kunwar could have produced, except her own personal evidence to prove that she had received from Raja Raghubir Singh no authority to adopt, and if she had given evidence that she had no authority to make the adoption such evidence, having

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regard to her own acts and documentary evidence on the record, could not have been accepted as true.

Their Lordships in this appeal pressed the learned Counsel who appeared for the appellants to state what oral evidence there was available to prove or to suggest that Raja Raghubir Singh had not in his final illness given to Rani Dharam Kunwar his authority to adopt, but the learned Counsel was not in a position to suggest what oral evidence could have been produced to prove that Raja Raghubir Singh had not given that authority to his wife. The Board in 1912 was satisfied, and rightly satisfied, that no further evidence as to the authority or absence of authority to adopt could be expected to be produced by anybody beyond the evidence then already taken. As appears from the report of the case of *Dharam Kunwar v. Balwant Singh* (1), the learned Counsel for Rani Dharam Kunwar contended in argument before the Board in 1912 that if it were held that Rani Dharam Kunwar was not estopped from denying that Balwant Singh had been validly adopted, the question arose whether she had any authority to adopt him; and further contended that such authority as she alleged would not extend to the adoption in question. There was ample material in the Appeal Record before the Board in 1912 upon which the Board might find that Raja Raghubir Singh had given authority to Rani Dharam Kunwar to adopt a son to him, and that such authority was a general authority and was not limited to making one or more successive adoptions.

It is clear that the Board in 1912 did intend to decide the question of authority to adopt as a question of fact. In the judgment of the Board it is said:—

"The third question, *viz.*, as to whether the Rani had authority from her husband to adopt the defendant, gives rise to the point which has been argued before their Lordships."

And then their Lordships dealt with the contentions on that subject, and found that Raja Raghubir Singh had given to Rani Dharam Kunwar a general power to adopt which justified her adoption of Balwant Singh, and said:—

"Their Lordships, in reviewing the facts of the case, are of opinion that the question may well be decided as one of fact on the Rani's own statements without recourse to the doctrine of estoppel. In their view she was speaking the truth in Baldeo Singh's action when pleading as to her authority."

It is clear that the reasons of the Board in 1912 for deciding thus as to the facts and for not confining the decision to the question of the estoppel were to quiet any religious scruples, which might have arisen if Raja Raghubir Singh could be said to have a son only by estoppel to perform religious duties, and also to put a stop to further litigation as to the validity of the adoption of Balwant Singh.

There can be no doubt, in their Lordships' opinion, that Rani Dharam Kunwar in her suit against Balwant Singh did, notwithstanding the personal estoppel under which she laboured, represent the estate on the question of fact as to whether Balwant Singh had or had not been validly adopted, and that she represented the estate within the meaning of the rule in *Katama Natchiar v. Raja of Shivagunga* (3). The principle of law to be applied in such cases was, their Lordships consider, correctly summarised by Mr. Justice Banerji in his judgment in this case thus: "Where the estate of a deceased Hindu has vested in a female heir a decree fairly and properly obtained against her in regard to the estate is, in the absence of fraud or collusion, binding on the reversionary heir." It cannot be said that there had not been a fair trial by the Board in 1912 of the right in the suit of Rani Dharam Kunwar against Balwant Singh. The right in that suit was his right to the estate as a son validly adopted to Raja Raghubir Singh. It is true, as was pointed out in a judgment of the High Court in this suit, that the rule of *res judicata*, as enacted in section 11 of the Code of Civil Procedure, 1908, is not strictly applicable in this case, as the plaintiffs were not parties to the suit of Rani Dharam Kunwar against Balwant Singh, and do not claim under a party to that suit, but the principle of *res judicata* has been applied rightly by the Courts in India so as to bind reversioners by decisions in litigation, fairly and honestly conducted,

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given for or against Hindu females who represented the estates, as Rani Dharam Kunwar did in her suit against Balwant Singh.

It has been urged by the learned Counsel for the appellants here that Rani Dharam Kunwar cannot be regarded as having represented the estate in her suit against Balwant Singh, as by her acts she was personally estopped from denying that she had validly adopted him to Raja Raghubir Singh. In the absence of all authority, their Lordships cannot decide that a Hindu lady, otherwise qualified to represent an estate in litigation, ceases to be so qualified merely owing to personal disability or disadvantage as a litigant, although the merits are tried and the trial is fair and honest. The principle is that reversioners must risk that, so that there may be an end to litigation.

Their Lordships will humbly advise His Majesty that this appeal fails, and should be dismissed with costs.

Appeal dismissed.

Solicitors for the Appellants: Messrs. T. L. Wilson and Co.

Solicitor for the Respondent: Mr. E. Dalgado.

PATNA HIGH COURT.

APPEAL FROM APPELLATE ORDER NO. 279 OF 1917.

July 3, 1918.

Present:—Mr. Justice Mullick and Mr. Justice Thornhill.

Sheikh MAULA BUX—PLAINTIFF—

APPELLANT

versus

RAGHUBAR GANJHU—DEFENDANT—

RESPONDENT.

Civil Procedure Code (Act V of 1908), ss. 2, 47, O. XXI, r. 90—Execution—Sale set aside on ground of fraud—Order setting aside sale, whether "decree"—Appeal, second, whether lies.

It is not open to a party to impeach an execution sale under section 47 of the Civil Procedure Code, and if a Court does, professing to act under section 47, set aside a sale on the objection of the judgment-debtor in a proceeding between the judgment-debtor and the decree-holder, the order setting aside the sale will not be a decree. [p. 561, col. 1.]

The language of Order XXI, rule 90 of the Civil Procedure Code, which gives a Court power to set

aside sales on the ground of fraud in publishing and conducting the sale, is wide enough to include cases where fraud is committed after the publication of the sale proclamation. [p. 561, col. 2.]

Where a decree-holder agreed not to proceed with an execution sale on a promise by the judgment-debtor to pay up the whole of the decretal money within two months, but nevertheless proceeded to sell the property in contravention of his agreement:

Held, (1) that the conduct of the decree-holder amounted to fraud in the matter of conducting the sale and that the proper provision under which the judgment-debtor could come and impeach the sale was Order XXI, rule 90 of the Civil Procedure Code; [p. 561, col. 2.]

(2) that no second appeal lay against the order setting aside the sale. [p. 561, col. 2.]

Appeal from an order of the Judicial Commissioner, Oota Nagpur, dated the 22nd May 1917, affirming that of the Subordinate Judge, Ranchi, dated the 1st January 1916.

Mr. Rai Gurusaran Prasad, for the Appellant.

Mr. Uma Oharan Laha, for the Respondent.

JUDGMENT.

MULLICK, J.—The plaintiff got a decree against the defendant for money and the execution with which we are concerned was one which was lodged on the 8th February 1915. In pursuance of that execution petition the plaintiff attached some immovable property belonging to the judgment-debtor, the sale being fixed for the 15th May 1915. The judgment-debtor paid Rs. 40 and got the time for the sale extended till the 15th June, promising not to take any further objection to the regularity of the sale proclamation. On the 15th June the judgment-debtor did not appear and the property was duly sold and purchased by the decree-holder for Rs. 412, which represented the balance due on the decree. The sale was confirmed and delivery of possession was made on the 29th July 1915. In August 1915 the judgment-debtor filed an application before the execution Court alleging that after the 15th May the decree-holder agreed not to proceed with the sale on a promise by the judgment-debtor to pay up the whole of the decretal money within two months. The judgment-debtor alleged that by this fraud on the part of the decree-holder he was kept out of all knowledge of the sale till the 29th July. The execution Court as well as the District Judge on appeal have held that the story told

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by the judgment-debtor is true and that there was fraud on the part of the decree-holder; and the sale has, therefore, been set aside. The present second appeal is filed by the decree-holder against the order setting aside the sale.

Now it is clear that a second appeal will not lie if there is no point of law involved. Upon the appellate judgment of the learned District Judge it is not clear that there is any point of law which requires our interference. The learned Judge has disposed of the case upon the merits and has found as a fact that there was fraud on the part of the decree-holder. The learned Vakil who appears for the appellant before us, however, urges that as the execution case was finally concluded with the delivery of possession, it cannot be said that there was any execution proceeding in the course of which the judgment-debtor was competent to make an objection under section 47 of the Civil Procedure Code. He says that the order made by the execution Court was an order under section 47 and that it was a decree and that, therefore, a second appeal lies. It is quite clear that the order of the execution Court was not a decree, having regard to the definition of decree in the Civil Procedure Code (section 2). As the law now stands, it would appear that it is not open to a party to impeach a sale under section 47 of the Civil Procedure Code and that, in any event, if a Court does, professing to act under section 47, set aside a sale on the objection of the judgment-debtor in a proceeding between the judgment-debtor and the decree-holder, that order will not be a decree. Order XLIII of the Code now gives a right of appeal against all orders setting aside sales on the ground of irregularity or fraud in the matter of publishing or conducting a sale and, therefore, an order purporting to have been passed under section 47, setting aside a sale, would not be a decree within the meaning of section 2, because under Order XLIII it has been made specially appealable otherwise than as a decree. Therefore the order, if made under section 47, not being a decree, no second appeal will lie.

The learned Vakil then falls back upon another contention, namely, that Order

XXI, rule 90, which gives a Court power to set aside sales on the ground of fraud in publishing and conducting the sale, does not include cases where fraud has been committed after the publication of the sale proclamation. He contends that to obtain relief for such a fraud the judgment-debtor must bring a separate suit. In my opinion the language of Order XXI, rule 90, is sufficiently wide to cover fraud such as has been found in the present case. Here the decree-holder promised not to hold the sale if payment was made within a certain time, but he then fraudulently proceeded to sell the property in contravention of the arrangement made with the judgment-debtor. This would, in my opinion, be fraud in the matter of conducting the sale. Therefore the proper provision of the Civil Procedure Code under which the judgment-debtor could come and impeach the sale was Order XXI, rule 90, and against an order under that section there is only one appeal allowed by Order XLIII. A second appeal does not, therefore, lie. The result is that the appeal is dismissed with costs.

THORNHILL, J.—I agree.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL CIVIL No. 55 OF 1915.

June 14, 1916.

Present:—Sir Lancelot Sanderson, Kt.,
Chief Justice, Justice Sir John Woodroffe, Kt.,
and Justice Sir Asutosh Mookerjee, Kt.
MARIAM BIBEE—PLAINTIFF—APPELLANT

versus

Shaiikh MUHAMMAD IBRAHIM AND

OTHERS—DEFENDANTS—RESPONDENTS.

Muhammadian Law—Gift—Musha, doctrine of, applicability of—Possession, delivery of, whether necessary Appeal—Documentary evidence, conflicting—Appellate Court, duty of—Burden of proof—Benami transaction—Test for determining nature of transaction—Custom, proof of—Crookes' Work on Castes and Tribes of N.-W. P. and Oudh, admissibility of—Pardanashin lady, deed executed by, validity of—Civil Procedure Code (Act V of 1908), O. XXI, r. 16—Commissioner, examination of witnesses by—Demeanour of witnesses, note of.

Per Sanderson, C. J.—Where a case has been decided on documentary as well as oral evidence, if the

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documentary evidence is conflicting, great weight should be given by the Appellate Court to the opinion of the trial Judge who has seen and heard the witnesses. [p. 580, col. 2.]

The Court of Appeal should not allow an appeal unless they are satisfied that the Judge who tried the case was wrong. If they are in doubt at the end of the argument whether the Judge was right or wrong, since the burden of proof is on the appellant and he has not satisfied them that the Judge was wrong, the appeal should be dismissed. The Judge in the Court below may have heard witnesses and if so, the Court of Appeal should be more unwilling to set aside his judgment especially if there was a conflict of evidence, than in a case tried on written evidence, where the witnesses were not before the Judge, because of the opportunity afforded of judging how far the witnesses were worthy of credit. [p. 580, col. 2; p. 581, col. 1.]

The doctrine relating to the invalidity of gifts of *musha* is wholly unadapted to a progressive state of society and ought to be confined within the strictest limits. [p. 581, col. 2.]

When a person makes a gift to two donees, one of whom is an adult and the other a minor but the latter is not in the guardianship of the donor at the time of the gift, and the adult accepts the gift on behalf of himself and the minor, the gift is not invalid. But when the gift is made to an adult and an infant who is in the donor's care or guardianship, the gift may be void because the donor is assumed to take seisin at once of the minor's share, whereas the gift in favour of the adult requires acceptance and thus confusion is occasioned. [p. 581, col. 2; p. 582, col. 1.]

If a Muhammadan owner makes a gift of a house to two of his sons, one of whom is adult and the other is a minor and the adult son takes possession of the property, the gift is absolutely void. [p. 581, col. 2.]

According to Muhammadan Law seisin or actual possession by the donee is not necessary to complete the gift, but the donor must evince his intention of making a complete transfer of the ownership in the property from himself to the donee by placing the latter in a position to enjoy it beneficially or to make use of it consistently with its purpose, and in considering this question the relationship of the parties must be kept in view. In other words, to be in a position to take possession is tantamount to taking possession; and to place the donee in a position to take possession, is equivalent to delivery of possession; similarly investing with authority for that purpose is equally sufficient. [p. 582, col. 1.]

Per *Curiam*.—Long established usages existing in particular districts and families in India should be given effect to; but it is of the essence of special usages modifying the ordinary law of succession that they should be affixed and invariable; and it is further essential that they should be established to be so by clear and unambiguous evidence. [p. 583, col. 1; p. 597, col. 2.]

A custom must be ancient, certain and reasonable and being in derogation of the general rules of law, must be construed strictly. [p. 583, col. 1.]

Circumstances under which deeds executed by *pardanashin* ladies can be avoided discussed. [p. 584, col. 1; p. 585, cols. 1 & 2; p. 604, cols. 1 & 2.]

Per *Woodroffe, J.*—A Commissioner for the examination of witnesses is entitled by law to note his observations as to the demeanour of the witnesses examined by him. [p. 592, col. 1.]

Per *Mookerjee, J.*—Reference may legitimately be made to the Work on Castes and Tribes of the North-Western Provinces and Oudh by Mr. Crookes as an authoritative statement of customs prevalent among the Braki sect of Muhammadans. [p. 597, col. 1.]

The fact that a custom was not pleaded in litigations between members of the community where it might have been pleaded, is relevant evidence for the purpose of showing the non-existence of the custom. [p. 597, col. 2.]

Where the question arises, whether the ostensible purchaser is also the real purchaser, the familiar test to apply is what is the source of the purchase-money. In a case of gift, however, when it is alleged that the transaction was fictitious, this test fails, and the Court must rely upon other aspects of the matter, namely, the surrounding circumstance contemporaneous with the gift and the subsequent conduct of the parties concerned. [p. 598, col. 1.]

The burden lies on the appellant to satisfy the Court that the finding of the trial Court which he assails is not supported by the evidence on the record. [p. 600, col. 1.]

Under the Muhammadan Law as administered by British Indian Courts, where the subject of gift is incorporeal property not susceptible of physical possession the gift thereof may be completed by such transfer of control as may be appropriate and possible in the circumstances. [p. 600, col. 1.]

The doctrine relating to the invalidity of gifts of *musha*, though not favoured, cannot be altogether ignored or repudiated. [p. 603, cols. 1 & 2.]

A settlement of a disputed or doubtful claim is a valid and binding arrangement which the parties thereto are not permitted to deny, ignore or repudiate. [p. 605, col. 1.]

Appeal against the decision of Mr. Justice Greaves, dated the 3rd May 1915.

FACTS appear from the following judgment of

GREAVES, J.—The plaintiff in this case is the daughter of one Haji Kader Bux, deceased, a Muhammadan of the Braki sect or community who died on the 28th August 1907, leaving him surviving three sons, the defendants Shaik Muhammad Ibrahim, Shaik Muhammad Solaiman and Abdus Samad, five daughters, namely, the plaintiff and the defendants Hakima Bibi, Khadija Bibi, Ayesha Bibi and Khairunnessa Bibi, and two widows, Waziran Bibi and Mohatabo Bibi, the last named being the mother of the three sons and five daughters. The plaintiff claims to be entitled to 7/88 of her father's

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estate and amongst other reliefs asks for an enquiry of what the estate consists and for partition thereof. The defendants other than those above mentioned are two sons of a brother of Haji Kader Bux, named Hazir Bux with whom he used to carry on business in Calcutta and elsewhere and who succeeded to their father's share in the business, and one Muhammad Siddick who was and is entitled to a share in the profits of the Calcutta business.

The plaintiff's claim is resisted upon three grounds which appear in the written statement of Shaik Muhammad Ibrahim and which are as follows:—

(1) That Haji Kader Bux left no property, having during his lifetime disposed of it by two Hebas, the first of which was made on the 22nd April 1897 in favour of the defendant Shaik Muhammad Ibrahim of the share of Haji Kader Bux in the Calcutta business and the second of which was made on the 19th July 1907 in favour of his three sons of the rest of his property.

(2) That the Eraki community, although governed in all other respects by the Sunni School of Muhammadan Law, is governed in matters of succession and inheritance by Hindu Law and that by the law and custom governing the parties the plaintiff is not entitled to any share in the estate of Haji Kader Bux if he in fact left any estate.

(3) That by a deed of release, dated the 10th January 1908, the plaintiff for valuable consideration released any right and interests she had in her father's estate.

The suit was filed on the 3rd January 1911, and on the 24th April 1911 the defendant Ibrahim applied to record terms of settlement contained in a letter of the 17th March 1911 addressed by the plaintiff to him. The plaintiff filed an affidavit setting out other terms and her Counsel desired to go into these matters and cross-examine with regard to them to show, I gather, Ibrahim's bad faith or the pressure he had tried to exercise, but I declined to allow cross-examination on this and I have not taken these matters into account or consideration for the purposes of this judgment, as I conceived them to be attempts to arrive at a settlement of the matters

in dispute and designed to avoid the family embitterment which a suit like this naturally engenders and the heavy expense necessarily involved in a litigation of this nature.

The issues I have to determine were agreed upon between the parties and are as follows:—

(1) Has the Court any jurisdiction to try the case?

(2) Was the deed of the 10th January 1908 explained to the plaintiff and did she receive the consideration of Rs. 45,000? Was the deed executed by her under misrepresentation and fraud?

(3) Is there a custom among the Eraki community excluding females from inheritance?

(4) Were the Hebas made by Kader Bux, and are they valid and operative under Muhammadan Law?

(5) Whether the suit is bad for misjoinder of parties and causes of action?

The determination of issue No. 1 depends on the validity of the first Heba, and accordingly I propose to postpone the determination of this issue until after the determination of the issue with regard to the Hebas which is issue No. 4, and as part of the consideration for the deed of release was the alleged existence of the custom excluding women from succession and the existence of the Hebas, it will be convenient to dispose of issues Nos. 3 and 4, which deal with these matters, before deciding the issue with regard to the release which is issue No. 2.

I propose then to deal first with issue No. 3. The plaintiff denies the existence of any such custom as alleged and of course the burden of proof lies on the defendant Muhammad Ibrahim who sets up the custom. The custom as pleaded is, as above stated, that the members of the Eraki community are governed in matters of succession and inheritance by Hindu Law. On behalf of the plaintiff the following evidence was given on this point. The plaintiff stated that she belonged to the Shaik Rakhi community according to the custom of which daughters and wives inherit. She stated in cross-examination that she did not know what Rakhi sect meant or the difference between them and other Muhammadans, the only difference she knew of being that they did not marry

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outside their sect. She purported to give instances of the succession, of female members of the community to whom she was related, to property but as there was no proof of such instances forthcoming except her bare statement I must, I think, disregard her evidence on this point. Muhammad Solaiman also gave evidence as a member of the Eraki community negating the existence of any such custom and stating that although his father and grandfather left no property, that his uncle one Muhammad Hossain did and his daughter succeeded to their father's estate. He also stated that the plaintiffs, in Suit No. 54 of 1913 to which I shall have to refer later, were Erakis.

Hadi Hossain, a member of the community, also gave evidence as to the non-existence of such custom, stating that in matters of inheritance the Eraki community were governed by Khoranic Law. He also stated that to his knowledge the plaintiff in the suit Exhibit C was a member of the Eraki community.

This witness stated that the Eraki community exists in Balia, Azamgurb, Ghazipur, Jaunpur and Gorakhpur and that there was nothing to distinguish Erakis from other Mahomedans and stated, although this was not corroborated, that his father left property and that he gave his sister a share.

Shaik Sovan, also a member of the same community, gave similar evidence negating the existence of any such custom as alleged and stating, although this was not corroborated, that his father left property and that his sister got a share of it. He purported to give other instances within his knowledge of females succeeding, but this evidence was uncorroborated and I can attach very little value to it.

The next witness Abdul Hamid, the husband of the plaintiff, gave similar evidence as to the non-existence of the custom to that given by the other witnesses and similar evidence was given on the plaintiff's behalf by one Shaik Abdur Rahaman.

This concludes the plaintiff's oral evidence on this issue, but she also relied on certain judgments, Exhibits A, B and C, in which no such custom was set up to rebut claims to property by women members of the Eraki community. I admitted this evidence under section 13 of the Evidence

Act, but I declined to admit pleadings in pending suits which were tendered in evidence on this point. These judgments do not seem to me to be of much value as they are at the most only negative evidence and, of course, there may have been good reasons in such suits for not pleading the custom, if such custom there be. And, moreover, it does not seem to be a satisfactory way of making them evidence to call witnesses who knew or were related to the parties or so stated and thus endeavour to establish that the suits were between parties some of whom at least were members of the Eraki community.

A great mass of evidence was given on behalf of the defendant Mahomed Ibrahim to establish the existence of this custom, which it is necessary to refer to in some detail and the references to this evidence are to the brief handed to me by Counsel for the defendant Mahomed Ibrahim.

Mohatabo Bibi, the mother of the plaintiff, at page 70 states as follows: "My father had three brothers their names are Jani Mian, Hakima Mian and Delkhalas Mian; they were sons of Niamut Mian. Niamut Mian had three daughters also,—namely, Karama, Naubka and Rashera. All these three were married. They all three died long after their father's death. Niamut Mian was a well-to-do man and carried on a sugar factory. Karama, Naubka and Rashera were married also to well-to-do men but inferior to Niamut. None of the daughters Karama, Naubka and Rashera got any share in the property of Niamut Mian after his death as there was no custom for the females to inherit, neither myself nor my sister Jasma and Hakima got any share by right of inheritance left by our father and Hakima and Jasma were married to people who are very poor. Delkhalas Mian had one son and two daughters; one son and one daughter named Sakina who has been married in Tikadauri in a poor family is alive, but the property left by Delkhalas Mian was inherited by my father, Bhojally and his brother Hossain Ally. Bhojally had two daughters, namely, Karima and Nabowat, but Karima died when she was 4 or 5 years old. Nabowat also died only 6 years ago but she got no share in the property left by Bhojally. This Bhojally was the father of Abdul Hamid, the

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husband of *Musammat* Mariam. Bhojally and Hossain Alli had two sisters, namely, Fahima and Mahima; both of them were married and died of ripe age. Sakina died two years ago and Karima died 3 or 4 years. Both of them were poor but Sakina was slightly better off than her sister Karima. Neither Karima nor Sakina got any share in the property left by their father Jain Meah. Hossain Ally is dead and left one daughter and one son, namely, Salehan and *Musammat* Mahrma. *Musammat* Mahrma is alive and has been married in village Nagra. Salehan got all the property left by Hossain Ally according to the custom. Mahrma got nothing. *Musammat* Janut (*sic*) Bibi, Mariam Bibi, Fatima Bibi and Janut Bibi were the daughters of Haji Niamut who was my uncle-in-law; these four girls, named above, never got any share in their father's estate. My grandfather-in-law was Haji Faziullah. He had two daughters Badama and Manita; none of these two daughters got any share in their father's property. I never knew or heard of any female, whether sister's daughter or widow, getting any share in the property left by a male ancestor. The custom in our Brotheri excluding the female inheriting exists from ever. I never heard of any female getting any inheritance in our Brotheri. Haji Hajir Bux had no daughter nor he had any sister."

The next witness who speaks to the custom is Khadija Bibee, the sister of the plaintiff, and at pages 78 and 79 she states as follows: "There is a custom in our Brotheri that only sons succeed and that daughters and widows get no share in the property. I knew it from the time I acquired my age of discretion and heard of the existence of it (custom) from others of old age too. In all the properties of Kotwari, Calcutta, Sitamarhi, Muznafferpore which are in possession of my brother I have no right or interest because under the aforesaid custom we have got no right or interest."

"I cannot give the exact time when I first of all heard of the existence of the custom, but I remember, I heard of it from my grandfather."

Hakima, the sister of the plaintiff, at page 82 states as follows: "If this Haba had not been made by my father none of us, sisters or mothers, would have got any

share in the property because our custom does not allow that. I know as to the existence as to this custom since I attained my Hosh (age of discretion); from the time as far back as my recollection goes not a single daughter or a widow had got any share in the property left by their father and husband."

The next witness is Mohamed Amin, who is the first cousin of the deceased Kader Bux, and he at pages 13 and 14 and at page 16 states as follows: "None of my sisters got any share in the property left by my father. My maternal grandfather's house was in village Rashra. My mother is alive and she too got no share in her father's property. The defendant's father was Haji Hookoom of Tekadauri. He is dead now but the three sons of Haji Hookoom—Haji Ahmad, Mohamed Ismail and Mohamed Shafi are alive. Haji Hookoom was a man worth lacs of rupees. His sons hold his landed property and his money. *Musammat* Mohataba Bibi got nothing in her father's property. The above named female did not get any share in the father's property, because there is no custom among our brothers to the effect that the females may succeed to their father's property. The widows also do not inherit the property left by their husbands. Our Brotheri is called Raqi. The following are the instances in my Brotheri where widows and daughters did not get inheritance in the property left by their husband and father."

The witness then went on to give three instances in which women did not succeed:—
"My community is called Raqi. As far as I know, it is not known as Eraki. I cannot say whether Mohamed Ibrahim knows the name of our community correctly. We differ very much from Muhammadans of other communities. We very much differ from Sunni Muhammadans of other communities. But I am a Sunni. We differ very much in our customs from the Sunni Muhammadans of other communities. But I do not understand what the Counsel means by Law Muhammadans. Law called Shera is the same but customs are different. The custom with regard to succession in our Raqi community is that wives and daughters

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do not get inheritance. Among us shares are never given to wives and daughters."

He was then asked whether he traced his origin from Iraq in Arabia. He replied: "I do not know what Iraq is and so I cannot answer this well. The customs stated by me above as to the exclusion of wives and daughters from inheritance is known to whole of my community everywhere."

The next witness was Abdul Haq and at pages 24 and 25 he states as follows: "In our community if a man died leaving a widow and brother and no sons or daughters, then the brother alone will succeed him. In our community if a man died leaving a widow and a distant cousin but no sons or brothers, then the distant cousin alone will succeed." And at page 25 he states as follows:—

"The distant cousin who inherited the property would maintain her but he would do so by way of charity, and if he refuses to maintain her she is helpless in the matter and could do nothing."

Shukrulla at page 27 states as follows:—
"My mother got no share in the property of my maternal grandfather's property according to the custom prevalent in our community."

Soleman at page 31 states as follows:—
"My maternal grandfather was a wealthy man and left much property at his death. But my mother *Musammât Badamô* did not inherit anything from her father's estate, because there existed a custom in my community that widows and daughters do not inherit any property."

Other witnesses speak as to custom in similar terms. There is no need to consider their evidence in detail:—

Wabullah (page 33), Shaik Abdulla (page 35), Abdul Majid (page 36), Mohamed Shafi (page 37), Abdus Salam (page 38), Sher Ali (page 39), Wali Ullah (page 40), Abdul Rahim (page 41), Majer Ali (page 42), Abdul Latiff (page 45), Ali Mia (page 47), Karamut Ali (page 50), who is the headman of the village Kotwari where defendant Mohamed Ibrahim resides, which consists of about 100 families, half of whom are Erakis.

Similar evidence was given by Mohamed Sivan, pages 52 and 53, who stated in cross-examination that the Eraki community were originally Hindus and were converted to Muhammadanism.

Similar evidence as to custom was given by Mohamed Zakaria, pages 55 and 56, Abdul Meah, page 58, Dulli Meah, page 59, Abdus Sattar, page 94.

The defendant Mohamed Ibrahim also gave evidence as to the existence of the custom in similar terms as did Mohamed Sidik. It is matter of comment that Abul Barkat, a leader of the Muhammadan community and evidently a witness of knowledge and position who was examined for another purpose, was not examined as to the existence of the alleged custom, although he knew the Muhammadans of Kotwari are Erakis by caste and although the defendant Ibrahim and the deceased were disciples of his. Now there is undoubtedly a large body of evidence called on behalf of the defendant Mohamed Ibrahim to testify to the existence of the custom alleged, but although one does not wish to indulge in meticulous criticism of the evidence it does not in my opinion establish the custom pleaded, that is to say, that this community is governed in matters of succession by Hindu Law, but rather seeks to establish a custom by which under no circumstances females inherit, which is of course not in accordance with the principles governing succession by Hindu Law. The result is that in my opinion the defendant Mohamed Ibrahim has failed to establish the custom pleaded, and with regard to the third issue there is in my opinion no custom among the Eraki community excluding females from inheritance.

I should add that the existence of such a community is abundantly established, but there is no satisfactory evidence as to their origin and that they were originally Hindus, and I desire to make it clear that I have taken no account of any evidence given as to dress, customs and so on (of course other than the custom which I have to determine) which sought to establish the Hindu origin of the community. Some such evidence was given on commission and was sought to be given before me, but much of it I have disallowed and, as before

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stated, such evidence as was given, I have disregarded as being outside the question I have to determine. I think it may well be that there has been a practice among certain families of this community to exclude women from succession, but in my opinion this is not sufficient to establish the custom sought to be relied on. I come now to deal with the fourth issue—that with regard to the two alleged Hebas.

The first Heba is an oral Heba and purports to have been made by Kader Bux in favour of the defendant Mohamed Ibrahim on the 22nd April 1897 of Kader Bux's share in the Calcutta business. The two infant defendants Mohamed Solaiman and Abdus Samad were born respectively on the 30th December 1897 and the 11th August 1901 and consequently were not in existence at the date of the alleged Heba.

The principal evidence in support of this Heba is as follows and the references here again are to the brief:—Mohatabo Bibee at page 71 states: "My husband Quader Bux, when he returned from Calcutta, told me as to his Calcutta Heba when myself, Waziran, Mariam, Hakima and Khadija were present. I enquired from him why did he make that Heba, and he replied that Ibrahim was his son and I made him owner just like myself and made him seated on my Guddi (*aise hum waise wuh*)."

The next witness on this point is Mohamed Amin who was a partner in the firm of Kader Bux Hazir Bux. He at page 12 states as follows:—"This Mohamed Ibrahim got his share by virtue of a verbal gift made by Haji Kader Bux in favour of Mohamed Ibrahim. This verbal gift was made in Bysack, Sambat 1954, in a way that the capital of the firm was debited against Kader Bux and credited to Mohamed Ibrahim. This was entered in the Calcutta Nakal Bahi. Before this credit and debit entries were made, the Khatta used to be made in the name of Kader Bux and Ibrahim; after that the debit and credit entries in the Khatta were made in the name of Ibrahim alone and it stands so up to this time. Kader Bux was not illiterate and knew how to read and write Mohajani. I saw him read and write

hundreds of times and I could identify his signatures and his handwriting. After this said gift in Sambat 1954 Kader Bux ceased to have had any connection with the hide business at Calcutta."

The next witness is Shukrulla, a relative of Kader Bux and a Gomastha in the firm, and he at page 27 states as follows:—"I once was a Gomastha from Sambat 1950 to 1964 at the hide business firm of Kader Bux and Hazir Bux at Calcutta. In Sambat 1953 to 1954 the following were the partners of Kader Bux:—Hazir Bux, Haji Kader Bux, Mohamed Ibrahim, Haji Abdul Ghanni, Mohamed Sjddik and that is all. In Sambat 1955 the following were the partners in that firm:—Hazir Bux, Mohamed Ibrahim, Haji Abdul Ghanni, Mohamed Siddik. Haji Quader Bux was no longer a partner in Sambat 1955 because he had given his whole share in the firm by gift on Bysack Budi 6th Sambat 1954, by making *Jama Kharach* in favour of Mohamed Ibrahim in Nakal Bahi."

The next witness is Abdul Latiff, uncle of the plaintiff, and he at page 44 states:—"In Sambat 1954, Kader Bux made a verbal gift in favour of Mohamed Ibrahim as to his share in the hide business firm. I was present at the verbal Heba (gift) made by Kader Bux. From the time of the said verbal Heba (gift) Kader Bux ceased to have any concern in the hide business firm and Mohamed Ibrahim became the partner of that firm in place of Kader Bux; that verbal gift was practically given effect to by the making of debit and credit entries in the account books of the firm in the name of Mohamed Ibrahim."

The next witness is Abdus Sattar and at page 93 he states:—"But the owner of the share represented by the name of Haji Kader Bux Mohamed Ibrahim was Haji Kader Bux alone. That share was gifted to Mohamed Ibrahim by Haji Kader Bux in Sambat 1954 by means of Heba. That Heba was made in my presence at Calcutta. That Heba was made by Haji Kader Bux verbally and by transfer entries in the books of the Calcutta business firm. The value of the share in the firm so gifted was between Rs. 50,000 and Rs. 52,000 at the time of gift. After that Heba the share

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of the capital of the aforesaid firm belonged exclusively to Mohamed Ibrahim alone. At the time of the Heba, Mohamed Solaiman and Abdus Samad the other two sons of Kader Bux were not born."

The defendant Ibrahim also gave evidence with regard to the first Heba. He stated that the first Heba was in his favour: "I was 16 or 17 at the time the Heba was made and entries were made in the account books. All the books of 1953 were closed and account made of profit and losses, and my father made a Heba of his share in my favour and entries were made in the books of account at my father's instance. The accounts were kept in my name. Subsequently a Heba was made in the presence of Hazir Bux, Mohammed Siddik and Abdus Sattar Gomashtas and others. From then the account appeared in my name and my father had no connection with the business entries after they were in my name. On one occasion I was not here and my father signed my name by his pen to the accounts. That was the only occasion." This witness produced to verify his statements Exhibits 4A, 5A, 5B, 5C, 6A, 7A, 8A, 9A, 10A, 11A, 11B, 12A 12B, 13A, 13B, 14A, 15A, 16A, which purported to corroborate the statements contained in his evidence. Further evidence was given by Mohamed Siddik and he stated that he was present when the first Heba was made and that he made entries in the books of account and that Kader Bux told the partners that he had made over his share to Ibrahim from that moment and from that time Ibrahim would be the proprietor, and in cross-examination he stated that after the Heba, Kader Bux lived usually at his native village. In 1955 he came to Calcutta occasionally after the Heba; he stayed at Calcutta for much less period than before and after the first Heba he did no work in connection with the Calcutta firm. No notice was issued to the public by Kader Bux.

It is now necessary to refer shortly to a few of the exhibits. Exhibit 4A purports to show a debit in the account of the father of the sum that at the date of this entry stood to his credit in the books of the firm and to credit the account so debited to Kader Bux to his son Mohamed Ibrahim. Exhibit 5A purports to

show a credit of the sum of the same date to the account of Mohamed Ibrahim, and Exhibit 6A purports to show that the share of profit in respect of his share is after his death transferred to the credit of Mohamed Ibrahim and Exhibit 7A is to the same effect though in this his signature is as follows:—"Mohamed Ibrahim by the pen of Kader Bux."

The genuineness of the first Heba is disputed by the plaintiff on three main grounds:—

(1) That after the date of the alleged Heba a house No. 47, Taltolla Lane, was purchased in the names of Hazir Bux and Kader Bux.

(2) That in a Heba (Exhibit H) made by Hazir Bux in November 1907 in favour of his two sons, the defendants Mohamed Jaun and Abdus Sattar, Hazir Bux states that his brother Kader Bux owned a $7\frac{1}{2}$ annas share in the Calcutta business although he made a transfer of this property to Mohamed Ibrahim some 10 or 12 years before his death for some political reason and goes on to refer to the house in 47, Taltolla Lane, as belonging to him and his deceased brother, the inference, I am asked to draw, being that the alleged Heba was only a *benami* transaction.

(3) That when the defendant Mohamed Ibrahim petitioned (Exhibit G) after his father's death to be appointed guardian of his infant brothers, he included in the schedule to the petition as the property of the infants their two-third share in the property left by Haji Kader Bux, that is to say No. 47, Taltolla Lane, and outstandings on account of the Calcutta business.

With regard to the first of these objections it is true that the premises 47, Taltolla Lane are by the conveyance (Exhibit I) conveyed to Hazir Bux and Kader Bux, but this was the name of the firm as appears from the evidence of the defendant Mohamed Ibrahim, page 124, and moreover it is in evidence before me that 47, Taltolla Lane, was purchased with the money of the firm (see Exhibit 12B), that repairs and taxes were charged to the firm (see Exhibit 13B), and that the rent was divided amongst the partners (see Exhibit 15A). Having regard, therefore, to the fact that it was purchased

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with the firm's money if it was in fact conveyed to Hazir Bux and Kader Bux as individuals they held the premises in trust for the partnership.

With regard to objection (2), in my opinion the Heba (Exhibit H) is not evidence against the defendant Mohamed Ibrahim but even if it is, it is not in my opinion in any way conclusive against the Heba and with regard to the statement therein contained as to Taltolla Lane, I prefer the evidence of Exhibits 12B, 13B and 15A to the statement in Exhibit H.

With regard to objection (3), I accept the statement of the defendant Mohamed Ibrahim, who appeared to me a reliable witness, as to how the application for guardianship came to be made and the details inserted.

He states: "I applied at Ghazipore for the guardianship of the infants. I cannot read or write Urdu. My Attorney wrote to me from Kotwari to say a certificate was necessary for carrying on the business. I wrote to him (Budraj Sing) to say if he sent an application for me to sign, I would do so. A place was marked for me to sign. The marks appear on the document. I signed in three places."

The result is that in my opinion Kader Bux made a valid Heba of his share in the Calcutta business to the defendant Mohamed Ibrahim.

In my opinion the deed of dissolution of partnership on the retirement of Abdul Ghanni, Exhibit 3, is not evidence and I have not taken it into consideration in the conclusion at which I have arrived.

With regard to the 2nd Heba the evidence is as follows, and here again the references are to the brief:—

The first witness on this point is Mohatabo Bibi and she at page 71 states as follows: "Haji Qader Bux made his second Heba two months or one and a half months before his death. The second Heba he made in the Dalan, myself, Musammatt Wazirun, the 3 daughters, Maryum, Khadija, Hakima being seated at the door."

Khadija Bibi at page 78 states as follows:—"The second Heba was made by my father in the Dalan of the Zenana house, and we five executants were standing there at the door of the Dalan; my father said that he was going to make a

Heba of his property to his three sons and so you had better be present and listen to it. When Qader Bux died, he had no property whatsoever; he was my father."

Hakima Bibi at page 82 states as follows:—"The 2nd Heba was made before me at the time my father announced to us his first Heba, and at that time when he made his second Heba, I, Maryum and Khadija and my brothers and other female members and children of my family were present. The first Heba consisted of the Calcutta business of the firm. The Calcutta property gifted away was worth Rs. 50,000. The second Heba made at Kotwari comprised the Muzaffarpore, Sitamarhi, Kotwari business and Zemindari and groves. The properties comprised in the second Heba were worth Rs. 50,000. I knew of the value of both the properties gifted away at the time when the first Heba was announced and the second Heba was made. I came to know of the value of the properties in this way, that when my father announced the first Heba, he told us of the value of the Calcutta property he had gifted to Ibrahim. And when my father had told them, meaning all of us five, that the gifted property was worth Rs. 50,000. I, Mariam, Khadija and my two mothers were present when he told us of it."

Mohammed Amin at page 13 states as follows: "This verbal gift in favour of three sons was made in the male quarter situated at Kotwari in the presence of myself, Hazir Bux, his brother Aboul Latiff, my own brother Mohamed Sattar son of Hazir Bux, Soleman resident of Amhat a cousin of Qader Bux, and some 2 or 4 persons whose names I do not recollect. Besides these males above mentioned Qader Bux sent for his two wives and all the daughters to be present in the room close to the room where Qader Bux was, in order that they might be present and hear the verbal gift Qader Bux was going to make when all persons, males and females, were present; then Hazi Qader Bux said that he had already made a gift of his Calcutta business to Mohammed Ibrahim and now he was gifting the rest of his property to his three sons Mohammad Ibrahim, Abdus Samad and Soleman. When he said this he was holding some papers and

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documents in his hands and gave the documents and papers to Mohammad Ibrahim and told Mohammad Ibrahim to accept that gift for himself and his younger brothers. Then after that we all went away. When these documents and papers were given to Mohammad Ibrahim he accepted the gift for himself and his younger brothers."

Suleman at page 31 states as follows:—"This second Heba was made in Kotwari in presence of Hazir Bux, Mohammad Ibrahim, Mohammad Sattar, Mohammad Amin, Abdul Latif and some five or seven more men. Qader Bux said that whatever estate has been left with him he makes a Heba of it to Mohammed Ibrahim, Suleman and Abdus Samad his sons. After that he took a bundle of papers and documents and gave them in the hands of Mohammad Ibrahim. He then said that whatever estate and properties he had got, he makes a Heba of all that property to his sons and asked Mohammed Ibrahim to accept it for himself as well as for his younger brothers Suleman and Abdus Samad. Mohammed Ibrahim accepted the Heba on his own behalf and on behalf of his younger brothers."

Then Abdul Latif at page 44 states as follows:—"Some time before his death Qader Bux made a second verbal gift in Kotwari of all his properties that he was possessed of at that time. That second verbal gift was made before me at Kotwari. This second verbal gift was in favour of Mohammed Ibrahim and his brothers. At the second verbal Heba, Mohammed Ibrahim accepted that Heba on his behalf as well as for his younger brothers; at the time of this second Heba the following persons were present: Myself, Mohammed Amin, my own brother, Mohammed Sattar, Mohammed Ibrahim, Mohammed Suleman, Abdus Samad, Ali Mian, Soleman of Amhat, Karamat Mian and few others of Kotwari."

Ali Mian at page 47 states as follows:—"When Hazi Quader Bux died he left no property at all at the time of his death. He had made a gift verbally of all his properties at Kotwari and other places and of all his dues and other properties to his three sons before he (Qader Bux) died. He made the second Heba (gift) verbally before me. At the time of the making of the second verbal gift and also before that Qader Bux

told me and the people present at the second Heba that he had already made a Heba verbally of all his properties at Calcutta to Mohammed Ibrahim alone; he made a mention of his first Heba at the time of his second Heba."

Abdus Sattar at page 94 states as follows:—"The second Heba (gift) was made at Kotwari in my presence. After the second Heba the properties comprised therein were taken possession of by Mohammed Ibrahim and his brothers;" and Ibrahim the defendant states that the second Heba was made in the presence of himself, his three sisters and of his uncle Hazir Bux, his two mothers and his father. "My mother and sisters remained in the room, we were in the Dalan. They were sent for by my father. Abdul Latif, Abdus Sattar, Mohammed Amin, Suleman, Karamat and others were present. My two little brothers were there. My father said he had already disposed of his share in the Calcutta business in my favour and was disposing of the rest of his property at Sitamarhi, Muzaffarpore in favour of myself and 2 younger brothers. My father asked me to accept same on behalf of myself and younger brothers. He made over all the documents in respect of these properties and of the Zemindari to me; he asked me to take charge of them on behalf of myself and my brothers."

As against this the plaintiff relies on the guardianship application and the Heba made by Hazir Bux, to which I have already referred. The plaintiff further relies on the evidence of the defendant Ibrahim as to his father's desire before his death to execute a document in respect of the two alleged Hebas as showing they were incomplete and non-existent, but I think he may well have desired to reduce to writing what had already been completely carried out by the oral transactions already referred to so as to prevent any disputes after his death; but I do not think that this shows that no such Hebas were in fact made. The result is that in my opinion the existence of and validity of the second Heba is established and with regard to the fourth issue, I hold that the Hebas were made by Qadir Bux and are valid and operative under Muhammadan Law.

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This really disposes of the case but it is, I think, desirable that in case I have formed a wrong opinion with regard to the Hebas or either of them I should express my opinion with regard to the validity of the release.

I now accordingly come to the second issue which concerns the release of the 9th and 10th January 1908.

The material parts of the document are as follows:—"We, *Musammats* Waziran Bibi and Mohatabo Bibi, widows of Haji Kadir Bux deceased, and *Musammats* Mariam Bibi, Hakima Bibi and Khadija Bibi, daughters of Haji Kadir Bux deceased, are residents of Mouzah Kotwari, Pargana Lakhnesar, District Balia. We declare that the late Haji Kadir Bux, the predecessor of the declarants, was a proprietor of the moveable and immoveable properties detailed below, and his intention was to give away the whole of his properties to his three sons, Mohamed Ibrahim, Mohamed Solaiman and Abdus Samad, and with this object he made his eldest son Mohamed Ibrahim the proprietor of the shop in Calcutta and prior to his demise the late Haji Saheb in the presence of us, the declarants, and of Mohamed Ibrahim, Mohamed Solaiman and Abdus Samad and other relatives and kinsmen of his, made a gift of and gave away all his moveable and immoveable properties situate in Districts Balia, Calcutta, and Mozaffarpur to his sons aforesaid, made (them) proprietors, and put (them) in possession of the same, and in accordance with the oral gift and grant aforesaid all the three sons of the Haji Saheb aforesaid are holding or possessing all the properties as proprietors and it is their names which have been registered in the Sarkari papers, and it is also the custom amongst our community that the sons only get possession of the paternal property and females of the family do not get shares in the paternal property. However, as a precautionary measure and to prevent future disputes, lest disputes should arise in the family through instigation, etc., on the part of anybody, we the declarants after considering our advantages and disadvantages and with our sense and understanding unimpaired declare as below:—

"First. We the declarants Waziran ibi, Matabo Bibi, widows of the Haji aheb deceased, do by execution of this document declare that we do not wish to take any share in our husband's property. If we have any kind of right then we relinquish the same in favour of our sons.

"Clause the second We, the declarants *Musammats* Mariam Bibi, Hakima Bibi and Khadija Bibi, daughters of the Haji Saheb deceased, declare that our brothers aforesaid have paid the sum of four thousand and five hundred rupees in cash to each of us the declarants, consequently we the declarants have no claim or right of any kind to the properties aforesaid. If we have any kind of right we relinquish all those in favour of our brothers Mohamed Ibrahim, Mohamed Solaiman and Abdus Samad. Now we have no demand or claim of any kind to the property left by the father. Our brothers aforesaid are in every way proprietors of all (the same).

"Clause the third.—We the declarants do in every way confirm and admit the oral gift and grant which has been made by our husband and (our) father."

The document is signed on behalf of Mariam Bibi, the plaintiff, by the pen of her husband Abdul Hamid and one Haji Ahmed signed the document on behalf of the other ladies. It purports to be written on 19th January 1908 by the pen of Hadi Hossain, who was called as a witness on commission. It was duly registered by the Registrar the facts with regard to this being stated in the document as follows:—that the executants having heard and understood the contents and terms of this document admitted in a loud voice the preparation and execution of the document from behind the leaves of the door facing the west of the room leading to the Dalan, facing north of the female apartments and in my presence, that is, in the presence of the Registrar, *Musammats* Mariam Bibi received after counting a sum of Rs. 4,500, and it further goes on to say that the executants were duly identified.

The plaintiff alleges that she thought she was executing not a release but a power-of-attorney, that it was never

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explained to her and that no money was paid her. The evidence on behalf of the plaintiff with regard to this document is as follows:—

The plaintiff herself, who is a Parda-nashin lady, gave evidence before me to the following effect:—

"I remember executing a document. I cannot read or write. I executed a power-of-attorney; after my father's death Ibrahim said he had to collect moneys from various people and that he would give me my share after they were got in. I put my thumb mark to the power-of attorney. The document was not explained to me. My husband was present there. I did not obtain his permission or ask him anything. It was not explained by him to me or by any one else. I have got confidence in Ibrahim. I did not ask anybody anything about the document; later after my father's death I wanted my share. Ibrahim said he had to collect the money due to the estate and when everything was got in he would give me my share, but for that purpose a power-of-attorney was necessary and that I must execute one. No money was paid when I put my thumb mark. Ibrahim asked me to execute the document. I and my own mother and Ibrahim were there at the time" and in cross-examination she stated: "I did not ask my husband to sign my name; no one read anything out. I had great confidence in Ibrahim. Not one word was read out of the document; a document was shown and we were told it was the Muktearnamah."

Her husband Abdul Hamid gave evidence to the following effect: He stated that some four or five days before the document was executed Ibrahim came to see him. He said "you want money now. I shall help you with money if you ask me to do what I want you to do." I said if I can help you I shall be very glad to. Ibrahim said to me, my sister, your wife, and other sisters are pressing for their shares. He said to me if I gave to all sisters their shares, how can I carry on business. I shall be without money. You had better help me that I may go on with the business. Ibrahim said to me, I shall give them their shares. He said to me it was his intention to get a release executed by them and asked me not to interfere in the matter, I said to him, "this thing must

be explained to your sisters. If they come to know of the execution of the release they will not do it;" Ibrahim said it would not be given out to them that a release was being executed. Then he said it would be given out to them they were executing a power of attorney. He said it would be given out to them the document was a Muktearnama to be executed by them for the purpose of collecting the outstanding dues to enable him to pay up the sisters' shares. He asked me to remain silent and not interfere in the matter. In reply I said, "what is your consideration for my helping you in the matter?" He said to me, "you are pressed by creditors. I will give you money to pay your creditors. I will go myself to the creditors and speak to them personally not to press you for money. I also would get a commission business for you." In reply to that I said, "how would you help me in starting a commission business? Are you going to lend me the money or to give me the money once and for all?" Ibrahim said to me, "I won't pay the money by way of loan or by way of gift, but I would give you the money in respect of the shares of my sisters."

I relied on his words and agreed to that. On the day the document was executed I went to Ibrahim's place, a mile from mine, at 10-30 or 10 and found Mohamed Amin and two or four persons of his family. They were sitting in his parlour. I also took my seat there and at or about 11 or 11 30 the Registrar and Munshi came to the place. I do not know the Munshi's name. When the Registrar came Ibrahim made over the release to him. The Registrar on going through the document asked Ibrahim if the parties to it were agreed. The Registrar took the document and read it and asked Ibrahim if the parties were all agreed. He read it out aloud. He enquired of Ibrahim whether everything was explained to his sisters. Ibrahim said "yes." Ibrahim said the parties were agreeable, and then the Registrar and other persons went to the inner apartments. We all accompanied the Registrar to that place. The document was made over to the Registrar. When he came, Ibrahim went in to take the thumb impressions of the five persons and the Registrar enquired whose thumb impressions they were and each thumb im-

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pression of each person was pointed out to the Registrar and he noted them. He further stated that it was not true that it was read and explained three times. "It was not read and explained in my presence. No money was paid to the ladies. Ibrahim gave me money, on the first day Rs. 200, after that Rs. 500, after that another Rs. 500 on the day the document was executed and registered and after that he paid me Rs. 500. I did not tell my wife what the document was. A year or a year and a half after the document was executed my wife came to know what the document was. I told her this."

On behalf of the defendants the evidence with regard to the release was as follows:— (References are to the copy brief before mentioned).

Mohatabo Bibi's evidence is as follows:— She says "after a day or two a man a Mian (Muhammadan) came from Rashra with ten or twelve men to my Dalan with a document and read over and explained the document. I, *Musammam* Mariam, Khadija, Hakima and Waziran all five were present there. After he explained and read the contents of the document to us he (man of Rashra) told us that he would have no right left (meaning after the completion of the document). Then he said that we know already. Then he asked us to sign over it. We all said that we cannot write and are illiterate. I and Waziran said our brother Haji Ahmed would sign for us. Khadija and Hakima said our uncle should sign for us. *Musammam* Mariam said that *Musammam* Nisia's Chaacha (meaning Abdul Hamid who is Nisia's father) should sign for her and accordingly Abdul Hamid and Haji Ahmed did sign the document. That man of Rashra who explained and read over the document to us said to us then that it should be attested. We then told him to have it attested by the persons who were present there. Then the document was attested. Then the Sub-Registrar was brought there with 10 or 12 men there. The Sub-Registrar sat in the Dalan, we were in the Khamia. In the Khamia, I, Mariam, Khadija, Hakima, Waziran were seated. The document which was given by the Rashra man who had read the document to Waziran was demanded by the Sub-Registrar. Waziran Bibi, therefore, presented the document to the Sub-Registrar and

Amin came and asked us five to be seated at the door and we did. Then the Sub-Registrar called out to each of us five executants name by name and each of us responded; then the document was read over and explained to us by the Sub-Registrar. The Sub-Registrar enquired if the daughters received the money; the daughters said that they had not as yet; then Ibrahim went to his male apartment and brought the money there through his servants; that money was taken by Mariam, Hakima and Khadija. The money was made over by Haji Ahmed to Abdul Hamid who delivered it to each of his daughters. Each daughter was paid Rs. 4,500. Each of those daughters took away that money to their respective houses."

Khadija Bibi's evidence was to the same effect and in cross examination she stated "Besides the Sub-Registrar the following were present at the time when the money Rs. 4,500 was given to me:—Haji Ahmad who is my Mamoo, Abdul Hamid, Amin, Latif, Sattar and many others whose names I do not know. The sum of Rs. 4,500 was paid to me in silver coin and not in G.C. notes, and that sum was in three bags. In each bag was a sum of Rs. 1,500. The money was not in one bag and each bag contained Rs. 1,500. I know that each bag contains Rs. 1,500 because when money was paid to me I counted the money so I found each contained Rs. 1,500. I know how to count."

Hakima gave evidence as follows: She said: "That deed of release was registered at Kotwari in the house of Ibrahim, defendant. The Registrar was at the Dalan and we all executants were at the adjoining Khamia. I know the contents of the document which was registered and which we signed. As stated above I knew of the contents of that deed, as I and we all had heard of its contents before and also on the day when that deed was registered, we all at first heard the draft of that deed once. When the draft was brought from Allahabad and also when it was brought from Ghazipur, Amin had read the draft and explained it to us all on the day of the registration of that deed. The Mian of Rashra came and brought the document. He called all five of us. That Rashra man came with Haji Ahmed and Abdul

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Hamid and Muhammad Amin and that Rashra man read over and explained the contents of the documents to us. The Sub-Registrar came the same day on which the Rashra man had come to Kotwari. The Sub-Registrar read and explained the contents of the document to us all five and asked us whether the payment of money had been made to all of us or not. Then I, Mariam and Khadija told the Sub-Registrar that we had not received the money as yet. Then the money was brought by Ibrahim. Haji Ahmad handed over the money to Abdul Hamid who having counted it made it over to each of us there, that is the sisters. We all three sisters took the money and when Mariam went to her husband's house, her husband came with men and took the money to his house. The money was with all of us while we remained there. We all five executants executed the document at the request of Ibrahim. It was a *dust-bardary* (deed of release). We heard the contents four times. When the draft came from Allahabad first of all in that the two Hebas made by Kadar Bux were mentioned also the custom existing, so as to exclude females from inheritance, was mentioned in it. It was also mentioned in it that some money to the daughters would be given after the registration."

Hadi Hassain the scribe's evidence was as follows: "On the next day I faired out the document. One Ali Mian came from Muhammad Ibrahim to fetch me and I accompanied Ali Mian with the original deed and its draft to Kotwari to Muhammad Ibrahim's place. Having reached Kotwari on the same day I proceeded to the Zenana (female) quarter of Muhammad Ibrahim from his male or Mardana quarter with Muhammad Ibrahim, Haji Ahmad, Muhammad Amin, Muhammad Sattar, Abdul Hamid and some other persons whose names I do not recollect. I knew all these men. I gave the names before; some of whom were known to me from a period of two or three years, and some from a period of four or five years. I went to the women's quarter and then I ascertained as to the females sitting behind the door. I ascertained as to them from Haji Ahmad, Abdul Hamid and Muhammad Ibrahim. There were five females behind the door.

Two of them were Waziran Bibi and Mahtabo Bibi, mother of Muhammad Ibrahim. The three of them were Ibrahim's sisters, named *Musammats* Mariam, Hakima and Khadija. I then read out the original deed which I had faired out on the stamp paper to them, and explained it to them. I explained its contents in the dialect in their parts which is commonly spoken by villagers and vulgar people here. Those females understood my explanation and told me that it was what they wished and was executed according to their wishes."

This evidence is corroborated by Muhammad Amin (first cousin of Kader Bux) at pages 14-15; by Abdul Huq at page 24 who attested the deed; by Shukrulla, page 27; by Abdul Latif, page 44, an attesting witness and the plaintiff's uncle; by Ali Mian, page 47, an attesting witness, and also by Haji Ahmad, page 60.

Abdus Sattar testifies to the same effect as the other witnesses as to deed of release and stated. "That money was paid out of the fund of the Kotwari firm and was debited to Ibrahim in the Roznamcha book, also called Roka Bahi (day book); that entry was made after registration. After sunset when we sat on our Gudi I caused the entries to be made in that book. In that firm we keep Roznamcha, Khasra and Khata books. That aforesaid entry of the aforesaid money is entered in all those books of that firm. The price of the stamp paper and the cost of the registration of that deed was also paid out of the funds of the said Kotwari firm."

These books [*viz.*, Roznamcha book, also called Roka Bahi (day-book) Khasra and Khata books] were produced before me and are Exhibits 16A and 17A in this case. Exhibit 16A purports to debit the account of Mohammed Ibrahim with Rs. 160 for the stamp, with Rs. 13,560 which represents the three sums of Rs. 4,500 and with the Registrar's fee of Rs. 60. Exhibit 17A is to the same effect.

Defendants Mohammad Ibrahim and Mohammed Siddik gave evidence similar to that of the other witnesses already referred to with regard to the deed of release, but it is not necessary to refer to their evidence in detail.

The circumstances under which the deed

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of release was prepared are as follows:—The defendant Mohammad Ibrahim stated that his father before his death wanted to execute a document in respect of the two Hebas he had already made and wanted to state therein how and when the two Hebas were made and that the deed of release originated with him (Ibrahim), and that he suggested the two mothers and three sisters should execute a document in which his father's intentions should be stated and that if they wanted anything paid, he was prepared to pay it and that he consulted some lawyers at Rashra who suggested the form the document should take.

Mohatabo Bibi and Ibrahim apparently discussed the matter in the presence of the plaintiff, Khadija, Hakima and Waziran and after this Haji Ahmad and Abdul Hamid were invited to attend to discussion and advise the ladies, which they did. These persons then agreed to execute a document in the terms of the release and Shukrulla was deputed to go to a lawyer at Allahabad and get a draft prepared embodying the terms agreed on which he did, the draft being prepared by Nawab Abdul Majid, Barrister-at-Law of Allahabad. The draft was subsequently settled by a Ghazipur Pleader, the witness Muhammad Abdulla, who was recommended by the witness Abul Barkat.

It is common ground that the plaintiff had no separate legal advice with regard to the execution of the release and that the several lawyers who settled and prepared the deed, only put into legal form what had been previously agreed, if I accept the evidence of the defendants with regard to the preparation and execution of the release; but so long as I am satisfied that the plaintiff knew and understood what she was doing and the full effect thereof, this even, having regard to the fact that she was a Pardanashin lady, will not prevent the document standing. See *Mahomed Buksh Khan v. Hosseini Bibi* (1), *Kali Baksh Singh v. Ram Gopal Singh* (2).

(1) 15 I. A. 81 at p. 91; 15 C. 684; 12 Ind. Jur. 291; 5 Sar. P. O. J. 175; 7 Ind. Dec. (N. S.) 1040.

(2) 21 Ind. Cas. 985; 36 A. 81 at p. 91; 26 M. L. J. 121; 15 C. W. N. 282; 19 C. L. J. 172; 16 Bom. L. R. 147; 15 M. L. T. 130; (1914) M. W. N. 112; 12 A. L. J. 115; 16 O. C. 378; 41 I. A. 23 (P. C.); 1 O. L. J. 67.

If I am to decide this issue in favour of the plaintiff, I must do so upon the evidence of the plaintiff herself and that of her husband Abdul Hamid, whose evidence is that he concealed from his wife the true nature of the document and allowed her to execute it under the belief that she was merely executing a power-of-attorney and was thus a party to a fraudulent conspiracy to deceive her. And I must say that the plaintiff's own mother, her two sisters, and the various other witnesses who testified to the facts above stated with regard to the execution have all entered into a fraudulent conspiracy to rob the plaintiff of what is her due. The evidence of most of these witnesses was given on commission, and I have had no opportunity of seeing them in the witness-box; but if I have to choose between the evidence of Abdul Hamid on the one hand and that of Ibrahim and of Muhammad Siddick on the other hand, I unhesitatingly prefer the evidence of these two witnesses who appeared to me truthful and reliable witnesses.

I am satisfied on the evidence before me that the deed of 10th January 1908 was explained to the plaintiff and that she did receive the consideration of Rs. 4,500 and that the deed was not executed by her through misrepresentation and fraud and I decide the 2nd issue in favour of the defendants.

The plaintiff's Counsel invited me to express an opinion as to whether in addition, the transaction was fair and equitable and, I think, insisted that I was bound to do so. I do not think I am so bound in view of the way the case for the plaintiff was pleaded; but I do not think it was unfair and inequitable under the circumstances, and in so stating I do not forget that both Abdul Hamid and his wife were in indigent circumstances at the date of the deed.

In my opinion the family believed in the existence of some such custom as is alleged, and I think that in their family the practice of excluding women from inheritance had been acted on for some time and they may well have thought that what was their practice was a binding legal custom, for it is difficult to say when practice ends and custom begins. Again there were the two Hebas which, in my opinion, they

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thought valid and effectual, although *ex abundanti cautela* and to prevent disputes they preferred to have a document signed by the plaintiff acknowledging their validity. Under these circumstances I do not think the release by the plaintiff of any rights she may have had in consideration of Rs. 4,500 was an unfair and inequitable transaction. It would certainly have been the wisest course to have insisted on the plaintiff having separate legal advice in a transaction of this nature. I should here state that the value of the property, the subject of the first Heba, was Rs. 50,000 at the date of the gift and at Kader Bux's death was two or three lacs. The value of the property, the subject of the 2nd Heba, was Rs. 50,000 or 60,000 at the date thereof.

With regard to the first issue, as a result of my judgment, this Court had no jurisdiction to try the case, but of course to arrive at the conclusion I had to hear the evidence.

With regard to the 5th issue, I decide this in the negative, as, if my judgment had been otherwise, I think it was necessary to have all the parties who were before me before the Court.

Mr. Rasul asks for costs including costs of executing and filing commission.

THE COURT.—Yes. The plaintiff to pay Ibrahim $\frac{2}{3}$ of taxed costs. The Rs. 2,100 deposited in Government Promissory Notes to be returned to Ibrahim's Counsel or Attorney. Suit dismissed against other defendants with costs on scale No. II.

Messrs. A. P. Sen, A. Sukrawardy and P. K. Ohakravarti, for the Appellant.

Messrs. Jackson, Rasul and N. Ghatak, for the Defendants-Respondents.

Mr. Majumdar, for the Infant Respondent.

Mr. J. N. Sinha, for Mahommed Siddik Respondent.

JUDGMENT.

SANDERSON, C. J.—This is an appeal by the plaintiff from the judgment of Greaves, J., dismissing her suit. The nature of the claim and the defence are fully set out at the beginning of the learned Judge's judgment as follows:—"The plaintiff in this case is the daughter of one Haji Kader Bux, deceased, a Muhammadan of the Eraki

sect or community who died on the 28th August 1907, leaving him surviving three sons, the defendants Shaik Mahomed Ibrahim, Shaik Mahomed Solaiman and Abdus Samad, five daughters, namely, the plaintiff and the defendants Hakima Bibi, Khadija Bibi, Ayesha Bibi and Khairunnessa Bibi, and two widows, Waziran Bibi and Mohatabo Bibi, the last named being the mother of the three sons and five daughters. The plaintiff claims to be entitled to $\frac{7}{88}$ of her father's estate and amongst other reliefs asks for an enquiry of what the estate consists, and for partition thereof. The defendants other than those above mentioned are two sons of a brother of Haji Kader Bux named Hazir Bux, with whom he used to carry on business in Calcutta and elsewhere, and who succeeded to their father's share in business, and one Mahomed Siddik who was and is entitled to a share in the profits of the Calcutta business.

The plaintiff's claim is resisted upon three grounds which appear in the written statement of Shaik Mahomed Ibrahim and which are as follows:

(1) That Haji Kader Bux left no property, having during his lifetime disposed of it by two Hebas, the first of which was made on the 22nd April 1897 in favour of the defendant Shaik Mahomed Ibrahim and of the share of Haji Kader Bux in the Calcutta business, and the second of which was made on the 19th July 1907 in favour of his three sons and of the rest of his property.

(2) That the Eraki community, although governed in all other respects by the Sunni School of Muhammadan Law, is governed in matters of succession and inheritance by Hindu Law, and that by the law and custom governing the parties the plaintiff is not entitled to any share in the estate of Haji Kader Bux if he in fact left any estate.

(3) That by a deed of release, dated the 10th January 1908 the plaintiff for valuable consideration released any right and interest she had in her father's estate."

It will be convenient to set out the material dates: 22nd April 1897 was the date on which the 1st Heba relating to the

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Calcutta business is alleged to have been made by Kader Bux.

13th October 1904—The purchase of the house 47, Taltolla Lane.

7th February 1907—The dissolution of partnership so far as Abdul Gunny was concerned.

19th July 1907—The alleged 2nd Heba by Kader Bux.

28th August 1907—The death of Kader Bux.

31st October 1907—The Hebanama of Hadjee Bux.

5th November 1907—Hadjee Bux died.

9th January 1908—The deed of release.

9th June 1908—Petition of Mahomed Ibrahim for guardianship.

The learned Judge found that the two Hebas were in fact made and that they were valid and operative under Muhammadan Law. This decision really disposed of the case, and it is this question which was first argued by the learned Counsel for the appellant.

The verbal evidence as to the first Heba has been summarised by the learned Judge in his judgment, and I need not refer in detail to that with which he has already dealt: the principal evidence relating thereto is to be found at pages 24, 46, 47, 63, 64, 128, 135, 136, 139, 369 to 377, 403 to 414, 424, 425, 432 of the paper-book.

As regards the constitution of the Calcutta firm at the date of the first Heba, viz., April 1897, it appears that the partners entitled to share in the profits were Kader Bux, Hazir Bux, Abdul Gunny and Mahomed Siddik (see page 345 of paper-book), that Kader Bux's account was entered in the books of the Calcutta firm under the name of Haji Kader Bux Mahomed Ibrahim (see page 127 and the accounts), Kader Bux resided generally at Kotwari, but sometimes at Calcutta: Mahomed Siddik and Hazir Bux were the managers of the Calcutta firm.

The defendant Ibrahim had at the time of the alleged Heba been about 2 years in the firm and had been working chiefly as cashier, but going about with his uncle Hazir Bux and looking after the business of the firm generally (see page 135). There were other businesses at various places in

which Kader Bux and Hazir Bux were interested, and it was under these circumstances that Kader Bux is alleged to have made over his share in the Calcutta business to Ibrahim, who at that time was his only son; or, in the words supposed to have been used by his father, "to have made him owner just like myself and made him seated on my *guddi*".

With regard to the first Heba, I am satisfied on the evidence that there is no ground for interfering with the learned Judge's finding that a transaction purporting to transfer Kader Bux's share in the Calcutta business to Ibrahim was in fact made.

But it is said that the transaction was a *benami* one. The verbal evidence of those connected with the business is against this allegation, and, in addition to the other matters relied on, the evidence goes to show that Kader Bux took no part in the working of the Calcutta firm after the first Heba.

Before the date of the first Heba there were three accounts—1st, an account in the name of Kader Bux Mahomed Ibrahim, which was called during the hearing the partnership account—2nd, an account in the name of Kader Bux which was drawn upon by Kader Bux for his expenses—3rd, an account in the name of Mahomed Ibrahim which was an interest account.

After the alleged Heba, the first account was put into the name of Mahomed Ibrahim, and the other two accounts remained in the same names. The 2nd account remained in the name of Kader Bux, but Ibrahim drew upon it for his expenses. It seems curious if Kader Bux had ceased to have any connection with the firm, that this account should have remained in the name of Kader Bux, but it was pointed out that this was not exceptional in the case of this firm, for there was a similar account in the name of Hazir Bux, and after his death the account was kept in his name, his sons drawing upon it for expenses. At the time of the alleged Heba the balance standing to the credit of Kader Bux was debited to him and credited to Mahomed Ibrahim, and the accounts were thereafter dealt with as if Ibrahim was a partner. Further more in the deed of dissolution of February 1907 Ibrahim is treated as a partner, he and Hazir Bux taking over the share of

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the outgoing partner, and no reference is made to Kader Bux. But certain matters were relied upon by the appellant as showing that the verbal evidence, confirmed as it is by the deed of dissolution and the accounts, could not be relied upon—and that the transaction was really a *benami* one.

First, it is said that the application for guardianship made on the 9th June 1908 admitted the title of the minor brothers to a share in the house No. 47, Taltolla Lane, which, according to the defendant's case, had become the property of the firm after Kader Bux ceased to be a member, and also to a share in the Calcutta business. The learned Judge having seen and heard the witness has accepted the evidence of the defendant Mahomed Ibrahim, who appeared to him a reliable witness, as to how the application came to be made and the details inserted, and I am not prepared to interfere with his finding of fact thereon. Ibrahim said he could not write or read Urdu: it is to be noted that if he did know what was in the details contained in the application for guardianship, he was deliberately creating evidence contrary to the case which he set up in the Court below. It is urged, however, that it was after he made this application that he changed his mind, and decided to defraud his two brothers; this seems to me improbable and is inconsistent with the learned Judge's finding that in his opinion Ibrahim was a witness of truth.

Secondly,—that the house No. 47, Taltolla Lane was conveyed to Kader Bux and Hazir Bux on 13th October 1904, seven years after the first alleged Heba. It is true that the conveyance is to Kader Bux and Hazir Bux. But the consideration for the sale was money advanced by the Calcutta business and the Exhibits 12B, 13B, 14A and 15A confirm the verbal evidence that this house belonged in reality to the firm; repairs were charged to the firm and the rent was included in the profits which were divided among the partners. To make the matter more clear we had the pages represented by Exhibits 12B and 15A translated by one of the Court Interpreters and Translators, and these show conclusively that the entries were made under the heading of the firm, and in particular

that the sum of Rs. 43½-11-6, which was the balance on the house account, was included in the amount credited to the profit account of the firm.

Reliance, however, was placed on the Hebanama of Hazir Bux of the 31st October 1907 (which document and the deed of dissolution of partnership were admitted by consent of learned Counsel for the plaintiff and Mahomed Ibrahim during the course of the argument) as showing that this house did in fact belong to Kader Bux and Hazir Bux, and not to the firm.

I am not prepared to disturb the learned Judge's finding, having regard to the verbal evidence, corroborated as it is by the firm's books, that this house was the property of the firm and that Kader Bux and Hazir Bux must be taken to have held it in trust for the partnership.

Thirdly, reliance was placed on the statement in Hazir Bux's Hebanama that Kader Bux had "owing to its being considered advisable," or according to another translation for "politic reasons," substituted the name of Mahomed Ibrahim in the place of his own in the books of the shop and had also declared his son to be owner of his share and had got the credit and debit entries made in the name of Mahomed Ibrahim: I agree with the learned Judge that this is not conclusive against the Heba, and indeed the reference to the declaration by Kader Bux that his son was owner of his share may be said to be consistent with the Heba having been made.

Fourthly—it was urged that Mahomed Ibrahim was only 16 or 17 years old at the date of the Heba and that it was improbable that his father would entrust him at so early an age with his share in the business. This is a matter for consideration undoubtedly, but upon such consideration it must be remembered that the evidence was that Mahomed Ibrahim's uncle was the manager together with Siddik and that apparently his father had not taken a very active part in the working of this part of the joint business.

Fifthly—it was urged that the father would not have given the one son so large a portion of his property: In this connection it must be remembered that at the time Mahomed Ibrahim was the only

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son; it is said that Kader Bux's wife was in the family way, but the child was not born until eight months afterwards, and there is no evidence to show that Kader Bux was aware of his wife's condition at the time of the alleged Heba; apparently at that time the Calcutta business was not so valuable and did not bear such a large proportion to the rest of the father's property as it did afterwards.

There is, however, another matter upon which much reliance has been placed by the learned Counsel for the appellant, viz., that in the deed of release of 9th January 1908, Mahomed Ibrahim submitted a statement that the Calcutta business belonged not to him only, but to him and his two brothers.

The beginning of the declaration in this deed is not inconsistent with the case of the defendant Ibrahim, but on the contrary to some extent it confirms it, inasmuch as it recites that it was the intention of Kader Bux "to give away the whole of his properties to his three sons Mohamed Ibrahim, Mahomed Solaiman, and Abdus Samad, and with this object he made his eldest son Mohamed Ibrahim the proprietor of the shop in Calcutta," which may be taken as a reference to the first Heba in 1897; but it then proceeds to say that prior to his death "he made a gift and gave away all his moveable and immoveable properties situate in District Balia, Calcutta, and Muzaffarpore to his sons aforesaid and made them proprietors and put them in possession of the same, etc."

In the schedule the Calcutta shop is specifically mentioned as part of the property which was held and possessed by the three sons as proprietors in accordance with the oral gift and grant aforesaid.

On the face of the deed, therefore, there appears to be an inconsistency; for in the one place it is declared that for the purpose of carrying out his intention of giving away all his property to his three sons he made Ibrahim the proprietor of the Calcutta shop; in another place it is declared that the shop was held and possessed by the three sons as proprietors.

By reference to one of the Court Interpreters it appeared that the words in the original which have been translated "the oral gift and grant," are more accurately translated thus: "the Heba and oral gift."

Such words are, in my judgment, consistent with either case, viz., that there was a Heba and subsequent oral grant, or that there was only the Heba which is further described as an oral grant. It is urged that the above-mentioned statements are not inconsistent if the first Heba of 22nd April 1897 is regarded as a *benami* transaction; it should, however, be noted that so far as the deed itself is concerned, it makes it clear at any rate that the intention of Kader Bux was to give all his property to his three sons, and even if the first Heba was in the nature of a *benami* transaction, the second was not, and if that was a good and valid Heba, transferring all Kader Bux's property to the three sons, the plaintiff's claim would be defeated.

We are asked to conclude that the above-mentioned description of the property in the deed is so inconsistent with the evidence of Mohamed Ibrahim that his evidence should not be accepted. The learned Judge in the course of a very careful and exhaustive judgment does not deal with this particular point, and I am not surprised, for I cannot find that a single question was put in cross-examination of the defendant Ibrahim as to how the Calcutta business came to be described in the schedule to the deed as belonging to the three sons and not to him only. This leads me to think that not much reliance, if any, was placed on this point at the trial.

In the course of its preparation the deed went through several hands, and instructions apparently were given by various people to three individuals at least at different times, and it may be that in consequence confusion may have arisen. What happened was this. Shukrulla got the draft prepared, apparently on verbal instructions, at Allahabad by Nawab Abdul Majid, a Barrister-at-law. This draft was read to him by the Barrister's clerk and he says that he noticed that in the draft no amount of money was mentioned and no list of property was included, while in the deed, which subsequently he heard the Sub-Registrar read and explain to the ladies, these matters were mentioned.

Next, the draft was taken by Abdul Hamid and Haji Ahmed to Moulvi Abdulla a Pleader at Ghazipur, who was called a

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witness and who identified the draft. In this draft there is no list of properties: and by reference to the original the draft finishes at the end of the third clause (or 1st paragraph on page 147 of the paper-book) and by the interpreter's translation, the words "verbal gift" in clause three should be "Heba and verbal gift."

The draft was then shown by Ibrahim to a Pleader at Rashra, Lala Ramkrishna Lall.

The draft and stamp were then taken by Ibrahim, Haji Ahmed and Abdul Ahmed to Hadi Hossain, a scribe, for the purpose of his making a fair copy, and to him was given a "list of the properties"—See page 84 of the paper-book.

As far as I know, there is no evidence as to who made up the list of properties or how the properties came to be described in the manner set out in the deed. I understand the deed is written in Urdu, a language which, as already mentioned, Ibrahim has sworn he cannot read or write. The comment made as to the schedule in the application for guardianship is applicable to the schedule of this deed, *viz.*, that if Ibrahim did not know how the property was described in the schedule, he was deliberately creating evidence which would be contrary to the case he was about to set up.

I am not surprised that a deed passing through so many hands and prepared in such a manner as that above mentioned should present some inconsistencies, and though this deed is an important factor in the case, I do not think, having regard to the above-mentioned matters, so much importance should be attached to it as if the whole of it (including the schedules) had been settled by a competent conveyancer.

This deed unexplained, added to the other matters already referred to, does raise some doubt in my mind, as to whether the first Heba was a *benami* transaction, and it is very unfortunate that this particular matter was not drawn to the attention of the defendant, so that the Court should have been in possession of any explanation he might have been able to give. On the other hand the learned Judge has seen the witness Ibrahim in the witness-box and subjected to a long cross-examination, and he has come to the conclusion that he was a truthful and re-

liable witness, and in my judgment it would not be just or fair to the defendant for this Court, sitting as a Court of Appeal, to come to the conclusion that his evidence must be unreliable because of the contents of the schedule of this deed and the criticisms of learned Counsel upon it, when the point was never put to the defendant in the Court of first instance. He has sworn that this was not a *benami* transaction: this evidence is corroborated by other witnesses and by Mahomed Siddik (who was also described by the learned Judge as a reliable witness), the entries in the books, and the deed of dissolution of partnership; and in a case like this where the documentary evidence is conflicting, in my judgment great weight should be given to the opinion of the learned Judge who has seen and heard the witnesses and this is a case in which very important witnesses were seen and heard by the learned Judge. The principle on which a question such as this should be dealt with by a Court of Appeal is laid down in *Colonial Securities Trust Co. v. Massey* (3), where Lord Esher said: "We must see first of all what is the rule of conduct of the Court of Appeal when hearing an appeal on a question of fact from the judgment of a Judge trying a case without a Jury. It cannot be shaped according to the rule of conduct of the Court of Common Law before the Judicature Acts, but must follow that adopted by the Courts of Appeal in Chancery, because before that Court only could an appeal from a Judge sitting without a Jury have then come. In the Courts of Equity the matter appealed against was the decision of a Judge and for that reason such an appeal was called a re-hearing, since the Court could set aside the decree or judgment of the Judge who had tried the case, and pronounce another decree or judgment. The Court of Appeal in Chancery acted upon this rule, that they would not allow an appeal unless they were satisfied that the Judge was wrong. If they were in doubt, at the end of the argument, whether the Judge was right or wrong, since the burden of proof was on the appellant and he had not satisfied them that the Judge was wrong, they dismissed the appeal. That is the rule of conduct which we ought

(3) (1896) 1 Q. B. 38; 65 L. J. Q. B. 100; 73 L. T. 497; 44 W. R. 212.

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now to apply in this Court. The Judge in the Court below may have heard witnesses; and if so, the Court of Appeal would be more unwilling to set aside his judgment, especially if there was a conflict of evidence, than in a case tried on written evidence where the witnesses were not before the Judge, because of the opportunity afforded of judging how far the witnesses were worthy of credit." The burden of proof is now on the appellant and I am not satisfied that the learned Judge was wrong on this point, and I, therefore, think that his judgment on this point should not be disturbed.

With regard to the second Heba of 19th July 1907, the learned Judge has found that the existence and validity of the second Heba was established. As regards the question whether a gift was in fact then made by Kader Bux to his three sons, in my judgment, there was ample evidence to support the learned Judge's finding. As regards the extent and the effect of the gift, I am satisfied on the evidence that Kader Bux intended, as stated in the deed of release dated 9th January 1908, to give the whole of his property to his three sons to the exclusion of the rest of his family. If the first Heba was not of a *benami* nature, then the defendant's case is proved in its entirety; but even if it was *benami*, the object and intention of the second Heba was to vest all Kader Bux's property in his three sons, which would be sufficient to bar the plaintiff's claim, provided that the gift was a valid Heba. In this connection I may point out that much reliance was placed by the plaintiff on the Hebanama of Hazir Bux as showing that the first gift of Kader Bux was *benami*. This document was executed on 31st October 1907, two months after Kader Bux's death and about two months before the deed of release. If this document is to be accepted as showing the true state of affairs as the plaintiff urged, it is strongly against the plaintiff on this part of the case; after reference to Kader Bux's death the words of the document are:—"Now his sons, S. M. Ibrahim, Mohamed Solaiman and Abdus Samad, are in his place holding and possessing the property left by him as owners," a clear indication that the plaintiff was not entitled to any share in her father's estate.

The validity of the second Heba is disputed

first on the ground that it was a gift by Kader Bux to Mahomed Ibrahim, an adult, and to his other two sons who were minors at the time, and was consequently void, reliance being placed upon the rule of Muhammadan Law as to confusion. Certain texts in support of this proposition were relied upon, and the text of Al Hakim may be taken as an example. Al Hakim states:—"A man makes a gift of a house to two of his sons, one of whom is adult and the other is a minor and the adult son takes possession (of it). The gift is absolutely void, and this is the correct view. For the gift in favour of the minor is complete at the very moment of the declaration of the gift because the seisin or possession of the father is equivalent to his (minor's) seisin or possession." (*Qibz*): Whereas the gift in favour of the adult son stands in need of acceptance. Thus the gift in favour of the minor precedes (that in favour of the adult), and thus confusion (*shuyu*) is occasioned. And the device is that he (father) should deliver possession of the house to the adult son and then make a gift of it to both of them. Thus it is laid down in the Wajiz of Al Kardari."

Fatawa Alamgiri. Vol. IV, p. 549, Ed. Cal., and the case of *Nizam ul din v. Zubaida Bibi* (4) was also referred to.

If the rule above stated applies to this case, it must be given effect to: but it is to be noted that it has been laid down by the Judicial Committee of the Privy Council in *Muhammad Muntaz Ahmad v. Zubaida Jan* (5) that the doctrine relating to the invalidity of gifts of Musha is wholly unadapted to a progressive state of society and ought to be confined within the strictest rules.

The principle of the rule in question seems to be that when a person makes a gift to an adult, and an infant, who is in the donor's care or guardianship, the donor is assumed to take seisin at once of the minor's share, whereas the gift in favour of the adult requires acceptance, and thus confusion is occasioned.

According to the evidence in this case, the gift of the property was made to Ibrahim and his two younger brothers, and Kader

(4) 6 N. W. P. H. C. R. 338.

(5) 16 I. A. 205 at p. 215; 11 A. 430; 5 Sar. P. Q. J. 433; 6 Ind. Dec. (N. S.) 721.

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Bux asked Ibrahim to accept the property on behalf of himself and his two brothers—see for instance pages 128, 137 and 379 of the paper-book; and that he then handed over all the documents to Ibrahim requesting him to take charge of them for himself and his two younger brothers.

If this evidence is accepted as to the manner in which the gift was made, it seems to me that it does not come within the above rule, for Ibrahim must be taken to have accepted the property for himself and his brothers at one and the same time and thereby placed himself in the position of trustee or guardian for his brothers, and consequently the donor would not take seisin of the property for his younger sons and no 'confusion' would arise.

There appears to be no dispute as to the validity of a gift to two donees, one of whom is an adult and the other a minor, but who is not in the guardianship of the donor at the time of the gift.

No case has been produced to show that the doctrine relied on has been applied to such a case as the present, and keeping in view the opinion of the Privy Council that it should be kept within the strictest rules, I am not prepared to extend it and apply it to this case.

Next it was urged that possession had not been given in such a way as to make the gift valid. According to Muhammadan Law, seisin or actual possession does not seem to be necessary to complete the Heba—and the correct view seems to be that the donor must evince his intention of making a complete transfer of the ownership in the property from himself to the donee by placing the latter in a position to enjoy it beneficially, or to make use of it consistently with its purpose, and in considering this question the relationship of the parties must be kept in view. In other words, to be in a position to take possession is tantamount to taking possession; and to place the donee in a position to take possession is equivalent to delivery of possession—similarly investing with authority for that purpose is equally sufficient—see the authorities cited at pages 90 and 122 of Ameer Ali's Muhammadan Law, Vol. I, 4th Edn. In this case as regards the share in the Calcutta business and the Taltollah house, Ibrahim was in fact in pos-

session at the time, and as regards the rest of the property, the second Heba seems to have been made with much publicity, and by handing over all the documents, keys, Rokars, books, etc., which Kader Bux possessed in respect of all his properties to Mahomed Ibrahim, and by asking him to take charge thereof, Kader Bux intimated his intention of giving him possession, and thereby put him in a position to take possession. In addition there is some evidence that from that date the donees did take possession, see for instance pages 128 and 137 of the paper-book.

For these reasons, in my judgment, the Heba of the 19th July 1907 which the learned Judge has found was in fact made, was valid according to Muhammadan Law.

That being so, the whole of Kader Bux's property passed by reason of the two Hebas to his sons, and the plaintiff has no claim thereto. This conclusion is sufficient to justify the dismissal of the appeal.

Other points, however, were argued before us and it is necessary, therefore, to express my opinion thereon.

The defendant Ibrahim attempted to establish by evidence a custom to the effect that in the Eraki community, to which the plaintiff and Ibrahim belonged, females do not under any circumstances inherit any property.

With regard to this, in the first place, it is to be noticed that this was not the custom pleaded.

The pleadings alleged that the members of the Eraki community were governed in the matter of succession and inheritance by the Hindu Law. Under that law, as is well known, under certain circumstances females do inherit. In the second place, it was admitted that such a custom as the defendant attempted to establish had never yet been recognised in any Court of Law in India. Thirdly, there was evidence brought forward by the plaintiff showing some instances where the alleged custom had not been followed, and there was general evidence produced by the plaintiff against the existence of such a custom. Fourthly, the defendant's witnesses were not agreed as to the incidents of the custom, as for instance, Ibrahim himself at page 393 said, "I am not fully aware of the provisions of Hindu Law, but if under certain circum-

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stances females inherit under that form of law, the same thing applies to us under certain circumstances as well." Such a statement is inconsistent with the custom attempted to be established, viz., that under no circumstances do females inherit, and it was contrary to the evidence of his witnesses taken on commission.

Again some of the witnesses asserted that it was part of the custom to maintain mother and sister (e.g., Abdul Mian's evidence at page 78), whereas others declared that the sister and mother have no right to maintenance (see Abdul Latif, page 65, Abdur Salam, page 57, Wahbullah, page 52, and Musammal Khadija, at page 106, who declared that her position was no better than that of a charity girl or a slave girl).

Now a custom must be ancient, certain and reasonable, and being in derogation of the general rules of law must be construed strictly: *Hurpershad v. Sheo Dyal* (6), and Sir Montague Smith in giving the judgment of the Privy Council in *Ramalakshmi Ammal v. Sivanantha Perumal* (7) said: "Their Lordships are fully sensible of the importance and justice of giving effect to long established usages existing in particular districts and families in India, but it is of the essence of special usages modifying the ordinary law of succession that they should be ancient and invariable and it is further essential that they should be established to be so by clear and unambiguous evidence. It is only by means of such evidence that Courts can be assured of their existence and that they possess the conditions of antiquity and certainty on which alone their legal title to recognition depends."

In my judgment the evidence in this case does not comply with the above-mentioned essentials. I do not think the evidence is clear or unambiguous: it does not show with certainty what the custom was: and the custom sought to be proved varies from that relied upon in the pleadings: and for these reasons I agree with the learned Judge

that the evidence failed to establish the custom relied on.

The last question which I need to consider is that relating to the release of the 9th January 1908.

The learned Judge has found on the evidence as a fact that the deed was explained to the plaintiff and that she did receive the consideration of Rs. 4,500 and that the deed was not executed by her through misrepresentation and fraud. In my judgment there was ample evidence on which the learned Judge was entitled to arrive at this conclusion, and I am not prepared to interfere with his finding of fact in this matter. The fraudulent representation relied upon was that the defendant Ibrahim had represented to her that the document was merely a power-of-attorney necessary for the preservation of the estate. The deed was executed on her behalf by her husband, but when the plaintiff came to Court making the claim in this case, his evidence was that he himself was a party to a fraudulent conspiracy to deceive her.

This witness was examined before the learned Judge who disbelieved him, and it is to be noted that during the course of the argument in this Court the learned Counsel for the appellant stated that he could not support the contention as to the fraudulent representation, and that he must also throw over the evidence of the plaintiff's husband. This is material, for it amounts to an admission that the plaintiff, in order to avoid being bound by the release, set up a case at the trial which the learned Judge has found to be a false one, and which, it is now admitted, cannot be supported.

It is not necessary for me to go through the evidence as to the explanation of the deed to the plaintiff or the receipt of the money by her: I think, however, it is desirable to draw attention to the endorsement on the deed by the Sub-Registrar. This gentleman could not be called as a witness as he is dead, but the memorandum endorsed by him in the course of his duty as Sub-Registrar contains material corroboration of the evidence on the questions of explanation and receipt of the money.

Further, it is to be noted that the deed was executed in an open manner, the maternal uncle and husband of the plaintiff, amongst others, being present and signing the deed.

(6) 3 I. A. 259 at p. 285; 26 W. R. 55; 3 Sar. P. C. J. 611; Bald. 25; 3 Suth. P. C. J. 304; Rafique & Jackson's P. C. No. 41 (P. C.).

(7) 14 M. I. A. 570 at p. 585; 17 W. R. 552; 12 B. L. R. 396; 2 Suth. P. C. J. 603; 3 Sar. P. C. J. 108; I. A. Sup. Vol. p. 1; 20 E. R. 898.

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I think it must be taken from the evidence that the plaintiff and her husband knew perfectly well what she was doing by executing the release, and that the plaintiff received the money. This is in accordance with the learned Judge's finding of fact: it may, however, well be that her husband, who was in need of money, disposed of it.

It cannot be said that she had not independent advice: for she was living with her husband, and his story, no doubt made up for the purpose of this claim, that he was a party to a deception upon her having been discarded, it must be taken that he, knowing well the facts of the case and what was in the deed, was in a position to advise her.

But it is urged that this was a case in which the plaintiff, being a Pardanshin lady, should have had independent legal advice, and that she was labouring under a mistake as to her rights both as regards custom and the Hebas or gifts referred to in the release.

—The law with regard to this question has been laid down by the Judicial Committee of the Privy Council in *Mahomed Buksh Khan v. Hosseini Bibi* (1) and *Kali Bakhsh Singh v. Ram Gopal Singh* (2). In the latter case it is stated at page 91* that there is no absolute rule of law that a Pardanshin lady must have independent advice. "The possession of independent advice or the absence of it is a fact to be taken into consideration and well weighed on a review of the whole circumstances relevant to the issue of whether the grantor thoroughly comprehended and deliberately and of her own free will carried out the transaction. If she did, the issue is solved and the transaction is upheld, but if upon a review of the facts which include the nature of the thing done and the training and habit of mind of the grantor as well as the proximate circumstances affecting the execution:—if the conclusion is reached that the obtaining of independent advice would not really have made any difference in the result then the deed ought to stand." As regards the custom, the learned Judge finds that it may well be that there has been a practice among certain families of this community to exclude women from succession, though there was not a

custom in the true legal sense of the word: and I doubt very much, if the plaintiff had obtained independent legal advice on this point, it would have made any difference or prevented her from executing the release. But even if she had been advised that there was no such custom binding on her as that alleged in the release, there was the fact of the two Hebas, the second of which was made in her presence and of the first of which, according to the evidence, she must have been fully aware: As by one or both of these Kader Bux, in my judgment, made a valid and effective disposal of all his property to his sons, it cannot be said that when she executed the deed she was labouring under any mistake as to her rights in this respect or that the parties in this respect were labouring under a mutual mistake or misapprehension as to their respective rights. For these reasons, in my judgment, the deed of the 9th January 1908 was a good and valid deed whereby the plaintiff for good consideration relinquished all claim and right to her father's properties.

With reference to this deed of release, the learned Counsel for the plaintiff relied upon it as showing that there was only one Heba, that by such Heba all the property passed to the three sons, and consequently the defendant's case as to the first Heba could not be sustained. With this I have already dealt in the course of my judgment: and I only refer to it again to point out that even if this contention be accepted in its entirety, there still remains the second Heba in the plaintiff's way, and I am satisfied on the evidence that, whether by reason of the two Hebas or, (if, contrary to the view expressed by the learned Judge, the first was merely a *benami* transaction) then by reason of the second Heba, Kader Bux intended to dispose and did dispose of all his properties to his three sons to the exclusion of the other members of the family, and whatever the rights of the sons might be "*inter se*," this would dispose of the plaintiff's claim, for as far as she is concerned it would be immaterial whether the property passed by one or both of the Hebas.

Speaking generally of this case, the learned Judge tried the case at great length

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and examined the evidence with much care. I do not find any errors of apprehension such as could justify this Court in reversing his decision, nor do I find any misconception of law. That being so, as was pointed out by their Lordships in a recent case in the Privy Council, *Rivers Steam Navigation Co. v. Hathor Steamship Co.* (8), it would be wrong for this Court to interfere with the Judge's decision. For the above reasons, in my judgment, this appeal should be dismissed with costs.

WOODROFFE, J.—The plaintiff is the daughter of Haji Kader Bux deceased and she claims according to the Muhammadan Law 7/88th part of his estate. To this she would be, it is not disputed, entitled if the defence is not made out. That defence is three-fold: (1) that the parties belong to a community called Erakis whose custom as to inheritance excludes the plaintiff, (2) that if this be not so, at any rate there was nothing for the plaintiff to inherit as her father had during his lifetime made over all his estate by two Hebas to his sons, (3) lastly, that if there was no custom and no gift, the plaintiff for a sum of Rs. 4,500 surrendered all and any rights she might have possessed in her father's estate.

I will deal with these defences in this order. A large body of evidence was adduced upon the question of custom and I was first somewhat impressed by it, supported in part as it is by the Government publication on the Castes and Tribes of the North-Western Provinces and Oudh, but a closer analysis of the evidence and the pleadings and the fact elicited by my brother Mookerjee that the bulk of the evidence on custom was given with reference to the custom set up in the pleadings and not that in the issue, and that the defendant Ibrahim even now takes his stand on the pleadings, have satisfied me that the custom has not been made out in such a way as to justify a reversal of Mr. Justice Greaves' judgment that it has not been proved. I think there is no doubt that there is a community called Eraki, and I should say that it is possible on the evidence that they were Hindus converted to Mahomedanism. The point, however, is not of importance and I do not decide it, but I decide that

if this community has a custom which is in derogation of Muhammadan Law, this has not been made out. It is very important in this connection to see what the pleadings say. The written statement was as follows:—

"That this defendant denies the allegations contained in paragraph 3 of the plaint and states that even if the said Haji Kader Bux had left an estate which he did not, the plaintiff being a daughter would not have been entitled to 7/88th or any share in the said estate, inasmuch as the community, which is known as the Eraki community and to which the plaintiff and the defendants belong, though governed in all other respects by the Sunni school of Muhammadan Law, is like the Khojas and Memons governed in matters of succession and inheritance by the Hindu Law, and the plaintiff is not entitled by the law and custom governing the parties to any share in the estate, if any, of the said Haji Kader Bux."

The learned Judge was quite right in deciding that the evidence does not establish the custom pleaded, that is to say, that the community is governed in matters of succession by Hindu Law, for the evidence rather seeks to establish that in no circumstances do females take by inheritance in this community. No doubt the issue as framed was "Is there a custom among the Eraki community excluding females from inheritance", but the evidence on commission was taken upon the case as stated in the pleadings and before the framing of this issue and even at the trial Mahomed Ibrahim adhered to the case as set out in his written statement. Without looking at the matter technically, it must be admitted that the form in which the written statement puts the case goes against the existence of the custom. For if females are excluded under all circumstances, how came it that the written statement alleged that the succession was governed by Hindu Law according to which females do in some circumstances succeed? Mahomed Ibrahim qualifies this in his evidence by saying that he is not fully aware of the provisions of Hindu Law, but if in certain circumstances females inherit under that form of law, "then the same thing applies to us under certain circumstances as well." This is contrary

(8) 35 Ind. Cas. 193; 20 Q. W. N. 1022; (1916) 1 M. W. N. 446; 31 M. L. J. 169; 4 L. W. 176 (P. C.).

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to other evidence given on his behalf. This evidence in itself is not altogether the same in the mouths of the various witnesses. The Government publication edited by Mr. Crookes, to which I think we may refer, whilst it supports the exclusion of daughters, unless provision be made during their father's lifetime, shows that there are cases in which women do succeed, thus contradicting those witnesses who allege that the custom excludes females altogether. It is admitted that the alleged custom has not been recognised by any Court and the documents before us go against it. For the judgments to which the learned Judge refers show at least this, when read with the evidence, that the parties to these litigations were Erakis, and yet though the custom might have been pleaded in defence, it was not. This is not necessarily conclusive, but it is some evidence against the existence of the custom. I think also the pleadings in pending suits excluded by the learned Judge were also evidence on the same ground. Thus Mahomed Amin, though alleging that Mahomed Jan and Mahomed Husain knew of the alleged custom, yet says they must have forgotten to plead it in the written statement in their suit. It is also to be remembered that most of the witnesses who speak to the alleged custom were personally interested to establish it. Nor must we overlook the alleged fact of the Hebas and the release. As regards the first alleged Heba, if it was, as the plaintiff alleges, *benami*, there would be some reason for its execution at the date alleged, whatever might be the custom. Next, if the Heba was a real transaction, it is possible, though I think on the facts not made out, that Kader Bux wished to immediately advance his eldest son to property which, under the alleged custom, he could only inherit at his father's death. But as regards the second Heba, no such explanation is possible. This was, it is said, executed only a month before his death. The reason assigned for it by Mahomed Ibrahim, namely, that his father intended to go on pilgrimage, is not supported by the other evidence, and I doubt its truth. If further he was ill, the possibility of his death may have been present to his mind. But why should the Heba be executed in favour of sons who according to the alleged custom inherited

the property covered thereby a month or so later? Doubtless a person may make a disposition in conformity with the laws of inheritance, but the fact that it is alleged that a Heba was executed, has some bearing on the question of the existence of a custom which rendered any Heba unnecessary. It is not irrelevant also to consider that it was further thought necessary to get a release from the plaintiff acknowledging a custom which, according to the evidence, is well known to every one. I conclude, therefore, that the alleged custom has not been proved.

I pass then to the question of the Hebas. The first is dated the 22nd April 1897 and is said to have been in favour of Kader Bux's eldest son Mahomed Ibrahim. The property said to have been covered by it is the Caloutta business. The plaintiff alleges that if there was any such transaction, it was *benami* and not real. There is no document. The alleged Heba was oral. Its existence depends on two bases: (1) some oral evidence of which two witnesses were alone heard by the learned Judge, and the rest on commission and (2) some entries in the books made at the time. Some exception has been taken to the mention of *benami*, and it has been said that the matter was not argued before the learned Judge or mentioned in the evidence. This is not so, for the learned Judge mentions the matter of *benami*, and it was put specifically in cross examination during the commission to Abdus Sattar. The plaintiff says that there were no Hebas in fact or law and that if there was a transaction in 1897 it was *benami* and not real and that there was in fact no Heba. It is true it is argued that the evidence is that some entries were made at the time but if so, these were a mere paper affair, not affecting the real ownership or possession.

Now it is to be observed that at the time of the first Heba Mahomed Ibrahim was then a minor of 15, 16 or 17 years of age. The father was then in good health and no reason is assigned why the father ten years before his death should assign to his son what was perhaps his chief property and business, even if there were any other properties at the time, which is not clear. The evidence is that the value

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of the property of the alleged second gift in 1907 was of somewhat equal value. There is nothing however which clearly shows what, if any thing, was left to Kader Bux after the alleged gift. Moreover the son was a minor. There was no stated urgency for making a minor son a partner. The only reason assigned for the alleged gift is that given by Mahatabo Bibee, who says that she enquired of her husband why he made that Heba—she said “I enquired from him why did he make that Heba and he replied that Ibrahim was his son and I made him owner just like myself and made him seated on my *gaddi* (*Juisa ham waisa woh*).” This is no explanation at all. Others can give no explanation. If Kader Bux wanted him to take up his place in the business, there was no need to retire. He could have kept him with him. The defendant is so anxious to disassociate Kader Bux from the business after the date of the Heba, that it is denied that he was ever afterwards even consulted on any occasion: a manifestly improbable statement. There was no apparent reason for his retiring from this business and making it over to a minor. Why, it is asked, was there any anxiety to put him in his place and at any rate a boy of 16 years old or less. Further such a gift would exclude any possible issue, and it is noteworthy that the second son was born on the 30th December 1897 and was, at the time of the alleged Heba, *en ventre sa mere*. This was said to be the less necessary that according to the alleged custom the sons would have taken without any Heba.

According to Mahomed Amin the defendant Ibrahim was a partner in the firm before the date of the first Heba. This contradicts other evidence that he was not a partner, but employed in the firm. At this time there were, it is said, three sets of accounts, account No. 1 which was the partnership account in the name of Kader Bux Mahomed Ibrahim, account No. 2 in the name of the first in which personal drawings are said to be debited, account No. 3 in the name of the latter, being, it is said, deposits made by Ibrahim of money given him by his father. It is suggested that the account that stood in the name of Ibrahim before the

alleged first Heba was really the account of the father. These sums are supposed to represent gifts of large amounts extending from Rs. 2,000 to 5,000 by the father to the son. We find from Exhibit 5d that the account standing to the credit of this young boy in 1897 was Rs. 14,386-1-0. This to me is a very improbable story. What is more likely is that the father opened an interest account of monies of his own in the son's name. The source of the money being the father, the presumption is that the account was his. This so-called private account of Ibrahim is said to have been started when he was 14 or 15. I do not believe that the father gave this young boy these large sums amounting to Rs. 2,000 at a time. It will be observed that Mahomed Ibrahim's name was used before he was a partner. After the 22nd April 1897 it is said that the first account was changed into the name of Mahomed Ibrahim alone and the other accounts continued as before. — But Ibrahim says that the name of the second account indicated nothing for that though the account stood in the name of Kader Bux, he, Ibrahim, was the *malik* of that account. So that according to the defendant's case both before and after the Heba names were used in the accounts which did not indicate ownership.

That there was some change in the account in the year 1897 there is, I think, no doubt. The defendant's evidence is on this point supported by a document on which the plaintiff relies (Exhibit H, the Heba of Hazir Bux the brother of Kader Bux), in which it is stated that credit and debit entries in respect of capital, profit and loss were made in the name of Mahomed Ibrahim. It may be admitted that this change of entry was done with some purpose. But whether that purpose was a *benami* or a real gift, cannot be inferred from the transfer entries alone. For it is admitted that whether the transaction was of the one nature or the other, there would have been the change in the entries which were made. That a transfer might take place in the name of Ibrahim when there was admittedly no gift is shown by the Motihari account, where the whole amount is transferred to the name of

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Mahomed Ibrahim though there had been no gift of the Motihari business. That there was a gift really depends on the credit given to the oral evidence, for there is not, in my opinion, any document tendered by the defendant which is inconsistent with the *benami*. I am not unmindful of Exhibit 3, which is a deed of dissolution of partnership dated 7th February 1907 between Abdul Gunny and others and Mahomed Siddik. This document was tendered by the defendants but was excluded by the learned Judge. It is, in my opinion, evidence and that document states that the share of Mahomed Ibrahim was seven annas and three pies and the name of Kader Bux does not occur. This, however, is not inconsistent with the case that there was no real Heba: for, of course, whenever a *benami* transaction is effected, everything is done which is necessary to give it the appearance of reality. If Mahomed Ibrahim's name stood for his father in 1897, it would stand for him in the deed of dissolution in 1907. There is no document, in my opinion, which supports the defendant's case. It is admitted that so far as the public were concerned, the old name of the firm was retained notwithstanding the change of name in the books. No notice was given to the public that Kader Bux had ceased to be a partner, though little stress can be laid on this circumstance in the case of a firm of this kind. The gift is said to be oral. There is no mention in the transfer entry of the transfer being made on account of a gift. There is no contemporary document which supports the defendant's case. It does not appear that there were any drawings on the partnership account, but as this occurred also as regards Hazir Bux's account all that can be said is that as this account was not drawn on, it does not help the defendant. No reason is assigned why the Heba was not made in writing, as for instance the Heba of Hazir Bux was. According, however, to Ibrahim his father Kader Bux was anxious about the matter before his death and wished to state in writing that this and the other Heba had been made. He is unable to explain if everything was in order why his father should wish to do this. There are, however, three documents besides the alleged release

which directly put in doubt both this and the second Heba. On the 13th October 1904, two persons named Abdul Bari and Abdul Majid made a conveyance of the premises No. 47, Taltolla Lane (Exhibit I). This document purports to be between these persons of the first part and Hazir Bux and Kader Bux the purchasers of the other part. It recites that the vendors were indebted to the purchasers in respect of Rs. 7,000 and by this conveyance conveyed the property to them for that sum. It is quite clear that the conveyance is to the two individual persons named and not to the firm as alleged by the defendant. The suggestion is that the name of the firm was inserted by mistake. This was after the date of the alleged Heba. Now the defendant's case is that this purchase was made with moneys of the firm of which Ibrahim was, and Kader Bux was not, a partner. Whether the debt was to the whole firm or to the two partners mentioned in the conveyance is disputed. If the money was that of the firm, then the conveyance would not have been to Kader Bux who, according to the defendant's case, had long ceased to be a member of the firm. I do not agree with the learned Judge that the conveyance was to the firm and the alternative suggestion that if it was in fact conveyed to these two individuals they held it in trust for the partnership, is not founded on the evidence which suggests that the conveyance, notwithstanding its terms was to the firm. Further the Heba (Exhibit H) made by Hazir Bux in November 1907 refers to the house in 47, Taltolla Lane, as belonging to him and his deceased brother Kader Bux, a statement which the former's son, a supporter of Ibrahim, attributes also to mistake.

Further in the schedule of the alleged release dated 9th January 1903, a document drawn up in consultation with several Pleaders on behalf of the defendant Ibrahim and on which he relies to defeat the plaintiff's claim, it is re-affirmed that the house at 47, Taltolla Lane, belonged as to half (not to the firm) but to Haji Kader Bux, the ancestor deceased. It further contains the statement that this property is "held and possessed as proprietors by Mahomed Ibrahim, Mahomed Sulaiman and Abdus Samad, sons of the Haji Sahab aforesaid."

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But how is this in the defendant's case? If it was bought with the money of a firm of which Kader Bux had ceased to be a partner, the latter could not have a half or other share in it. Nextly if the property as alleged belonged to the firm and Muhammad Ibrahim had alone a share therein to the exclusion of his brothers, how is it that in the schedule Ibrahim's sharers are declared to be co-sharers in it? I am not overlooking the fact that the release itself speaks of Ibrahim having been made proprietor of the Calcutta shop.

Nextly, there is the Hebanama (Exhibit H) a registered document by Kader Bux's brother Hazir Bux in favour of his sons, dated in November 1807, after the death of Kader Bux—as regards this document as well as Exhibit 3, the learned Judge in his judgment says they are not evidence though they were admitted and marked as exhibits. I have already expressed my opinion that the defendant's evidence (Exhibit 3) is evidence, and in my opinion the plaintiff's document (Exhibit H) is so. It was asserted in the evidence that Hazir Bux as partner was aware of and had assented to the alleged Heba, an allegation this document refutes. Now this document contains a recital of great importance in this case. This document runs as follows:—"I am Sheikh Hazir Bux son of Sheikh Rahat Ali deceased, sect Shaikh, occupation Zemindari, money-lending and trade, inhabitant of Mouza Kotwari, Parganah Lakhneswar, District Balia.

"Whereas I and Haji Kader Bux, deceased, were full brothers, I and the said deceased brother jointly started hide and money-lending business at different places wherein our shares were half and half, which are by the grace of God going on up to this time. So that (we) established a firm for Hide Commission Agency business in the town of Calcutta, wherein the business of Hide Commission Agency is carried on and which is at present situate at No. 3, Damzen's Lane, Chinapara, in the town of Calcutta, and the name of the firm is Haji Kader Bux Hazir Bux. In the capital thereof, out of the sixteen annas of the whole capital a share of seven and a-half annas belongs to me and a share of seven and a-half annas to Haji Kader Bux (my) deceased brother aforesaid, and a

share of half an anna to Shaikh Muhammad Amin of Kotwari and a share of half an anna to Shaikh Abdul Latif of Kotwari. It is a period of about ten or twelve years since my deceased brother Shaikh Kader Bux owing to its being considered advisable (literally by reason of some advisability) substituted the name of his son Shaikh Muhammad Ibrahim in the place of his own name in the papers of the said shop, such as books, accounts, etc., and having also declared his son Shaikh Muhammad Ibrahim to be the owner of his share of capital, got the credit and debit entries in respect of capital, profit, loss, etc., made in the name of Shaikh Muhammad Ibrahim aforesaid in the papers of the shop, so that the credit and debit entries in respect of capital and profit, loss, etc., of the Commission Agency firm in Calcutta are up to this time made in the name of Shaikh Muhammad Ibrahim aforesaid in the papers of the shop but the name of the firm continues to be Haji Kader Bux Hazir Bux as before." After some further matter not relevant, it says: "There is also a house in Calcutta purchased by a bill of sale which belongs to me and my deceased brother Haji Kader Bux and is situate at No. 47, Taltolla Lane, in the town of Calcutta. I and my deceased brother Haji Kader Bux are half and half owners and co-sharers thereof. The partners of the Calcutta firm have no connection with the said house."—The words "by reason of some advisability" have been at the request of the parties translated by Mr. Justice Imam as "for some politic reasons." To my mind the first passage very clearly indicates that there was no real Heba. It states that he was a sharer with his brother "up to this time," which means all along, i.e., with Kader Bux and his representatives, for Kader Bux was then dead. This could not be so, if there was the first Heba, for he would have shared with Ibrahim, not with Kader Bux, in that case. It very carefully avoids all mention of a Heba and states the fact that "for some politic reasons" he (Kader) substituted the name of his son in the books of the firm which appears to be a fact, and declared his son to be owner and that the entries are in the name of Ibrahim, though the name of the firm was the same as before. If there was a gift, why not mention it? What is men-

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tioned is a declaration for "some politic reasons" and transfer entries; and the share of Kader Bux, who is supposed to have transferred it to his son, is stated "to be going on up to this time." This evidence very clearly in my opinion negatives the Heba. It is unexplained how a person like Hazir Bux, who was in a position to know the real facts and, so far as it appears, had no interest to misrepresent them, should thus either impugn or ignore the first Heba. The explanation that all these statements were due to his illness seems to be absurd. The statement is obviously a carefully considered one. I have already referred to the statement in this document regarding the Taltolla house, which also negatives the Heba.

Then we find that an application was made on 9th June 1903 by Muhammad Ibrahim for a certificate of guardianship of the person and property of his minor brothers, and in this document no mention is made of either of the first or second Heba and in the schedule of properties, 3rd of which is declared to belong to the minors, is included, both the house No. 47, Taltolla Lane, and the outstandings of the Calcutta business in which, if the first Heba were a reality, the minors had no interest whatever. The explanation given as regards this is that his servant Budhraj wrote saying that the business was suffering for want of a certificate. An application was sent to Ibrahim and he says he signed it without looking at it—thinking it was the usual thing. Now so far as regards an absence of mention of the second Heba, it does seem unlikely that Ibrahim would knowingly have done anything which would negative a Heba, which had already been set up in the alleged release by the daughter of the deceased in the January previous. This, however, only applies to the absence of mention of the second Heba for the interest of the brothers is admitted in the release as in the application for certificate. It is quite possible that Ibrahim might have been satisfied with the document as substantially affirming the rights of the parties as set out in the release without reference to the title by which they were acquired. But assuming that he did not know at all what was in the document, how is it that this document is in the form

which it is, seeing that it was drawn up by Budhraj, who had been two years in service and is admitted to have been aware of both the Hebas? Assuming again that Ibrahim was not aware of what was in the document, how did it come to be drawn up in the way in which it is drawn up, which, whilst being in conformity with the release, is to that extent, as explained later, not in conformity with the case set up as regards the first Heba?

I now, therefore, pass to the alleged release which was drawn up by Pleaders under the instructions of the defendant Ibrahim. In that document the widows and daughters of the deceased are alleged to have said as follows:—

"We declare that the late Haji Kader Bux, the predecessor of the declarants, was the proprietor of the moveable and immoveable properties detailed below and his intention was to give away the whole of his properties to his three sons, Muhammad Ibrahim, Muhammad Solaiman and Abdus Samad, and with this object he made his eldest son Muhammad Ibrahim the proprietor of the shop in Calcutta, and prior to his demise, the late Haji Saheb, in the presence of us the declarants and of Muhammad Ibrahim, Muhammad Solaiman and Abdus Samad and other relatives and kinsmen of his, made a gift of and gave away all his moveable and immoveable properties situate in District Balia, Calcutta and Muzaffarpore to his sons aforesaid, made (them) proprietors and put (them) in possession of the same and in accordance with the oral gift and grant aforesaid all the three sons of the Haji Saheb aforesaid are holding and possessing all the properties as proprietors and it is their names which have been registered in the Sarkari papers* * * our brothers aforesaid are in every way proprietors of all the same.

"Clause the third:—We the declarants do in every way confirm and admit the oral gift and grant which has been made by our husband and (our) father in favour of our brothers, and (our) sons Mahomed Ibrahim, Mahomed Solaiman and Abdus Samad, and Mahomed Solaiman, Mahomed Ibrahim and Abdus Samad have in every manner become proprietors (in place of) Haji Kader Bux deceased. Therefore, we do execute this declaration of relinquishment so that it may

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come to use in time and remain as a document."

After giving the names of the declarants and the amount of consideration money, it sets out the schedule as follows:—

"Schedule of the estate and property of Haji Kader Bux, the ancestor deceased; which in accordance with the oral gift and grant aforesaid are held and possessed as proprietors by Mahomed Ibrahim, Mahomed Solaiman and Abdus Samad, sons of the Haji Saheb aforesaid.

"Schedule of Trading and Banking firms (1) A firm of Arath (Commission Agency) for hire, the name of which firm is Haji Kader Bux Hazir Bux situate in the town of Calcutta, Chinapara, Damzens Lane, No. 3, together with the funds and capital, the trading and Arath business and articles of merchandise and household furniture, etc., lying in the firm together with all the things and rights, etc., appertaining thereto, wherein out of the sixteen annas, the right and share to the extent of seven annas and half belonged to Haji Kader Bux the ancestor deceased and which are held and possessed by Mahomed Ibrahim, Mahomed Solaiman and Abdus Samad, sons of the Haji Saheb aforesaid, as proprietors."

Then omitting some further particulars we have: "(1) A brick built house situate in the town of Calcutta, Taltolla Lane No. 47, which is let out on hire, wherein right and share to the extent of half belong to Haji Kader Bux, the ancestor deceased, and which are held and possessed as proprietors by Mahomed Ibrahim, Mahomed Solaiman and Abdus Samad, sons of the Haji Saheb aforesaid."

This document is in my opinion very strong evidence against the first Heba and as it is a document prepared on behalf of the defendant Ibrahim, it is of exceptional importance. Before dealing with this document it is necessary to recall that the case of the latter now is that there was in 1897 a valid Heba legally effective which transferred to him the Calcutta business, which from that date formed no part of the estate of the deceased. This document impugns each of these points. It was drawn up at the instance of Ibrahim in consultation with several lawyers who were well aware what a Heba or gift is and its effect. Now it starts by saying that

Kader Bux made Mahomed Ibrahim "the proprietor" of the Calcutta shop just as the Heba of Hazir Bux says that Kader Bux for "some politic reasons" declared his son to be its "owner." Something may have taken place in 1897. But was the transaction meant to be and was it in fact a valid Heba? If it was, it is curious that the lawyers did not use the word gift or Heba, the more particularly that they do so immediately afterwards in connection with the second Heba—why not say that Kader Bux gave his son the Calcutta business, if such be the fact? If the matter rested there, this criticism might be said to be refining on words. It does not, however, rest there, for we find throughout only one gift (not two) mentioned, under which all Kader Bux's properties (not excluding the Calcutta business) were given to the three sons (and not to Ibrahim alone). How could Kader Bux have given all his properties to his three sons if the most valuable property of all, the Calcutta business, had already been given to Mahomed Ibrahim? He could only do so if there were no legal valid first Heba. It is possible that there was no valid first Heba, but that for "some politic reasons" Ibrahim was declared proprietor or owner of the property now alleged to be covered by it and that the release refers to this fact: but that it was not a valid gift and that, therefore, objection was taken on behalf of the minors to its being so described in the release or given effect to as such. This is, it is true, only a matter of speculation put forward as a possible explanation of how in this document two transactions are referred to, only one of which is called a gift. But the document itself and its schedule leaves me in no doubt as to its meaning. For after the body of the document had stated that all the properties had been given to the three sons, the schedule clinches the matter by showing what those properties were. It in the most express terms affirms that half of the Calcutta business belonged to Kader Bux (not to Ibrahim as now alleged), though according to the present case Ibrahim had been holding the property from ten years before this document and his father had nothing to do with it, it, secondly, affirms that this business was the property

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of the three sons, and thirdly, that it was their property by virtue of the oral gift, that is, the one gift referred to in the body of the document under which all three sons took.

It further goes on to make a similar affirmation as regards the Taltolla house, half of which is said to have belonged to Kader Bux though this is now said not to be so, and which, if it were purchased out of the monies of the Calcutta business as alleged by the defendant Ibrahim, would in the event of these being a valid first gift have belonged to him alone. Mr. Jackson has not given any explanation of this except that this only occurs in the schedule. But this is no answer. The schedule merely affirms the body of the document for we must read the body and schedule consistently if we can; and moreover the schedule is no trifling thing and the whole document was drafted by lawyers on the instruction of Ibrahim. In my opinion this release disposes of the case as to the first Heba. It merely alleges that, as is possible, there was some transaction in 1897 which did not amount to a valid gift but that what was the subject of that transaction was subsequently transferred with other properties to all the three sons. It seems to me impossible that this document could have been framed as it is, had there been a valid Heba in 1897. In that case, all that it was necessary to say was that the Calcutta business had been given to Mahomed Ibrahim and the rest of the properties to him and his brothers. As the matter stands if the second Heba is an effective document, then all the sons of Kader Bux are interested in the Calcutta business.

I have no doubt that there was no valid first Heba in 1897. I may here point out that of the evidence by which the two Hebas are sought to be supported all except two witnesses gave their evidence on commission, and we are, therefore, in no worse position than the learned Judge who heard the trial. Of these witnesses the Commissioner, who was entitled by law to do so, noted his observations as to the demeanour of some of the witnesses. Of Abdus Sattar, on whom great reliance is placed and whose evidence I distrust—the Commissioner says he was evasive. Of Mahatabo Bibi, Hakima Bibi, and Hadi Hasan

he records the observation that they appeared to him to have been tutored. If they were tutored they must have been tutored by or on behalf of Mahomed Ibrahim, for he is the person most interested and for whose advantage only it would be done. That he is not altogether scrupulous is shown by Exhibit F, in which he shows himself a party to bribery.

A suggestion was put forward that the Commissioner had dishonestly made these adverse comments because of a dispute as to his fee. This charge against the Commissioner who is a Munsif is based on the fact that the observation on the demeanour of one witness was made sometime after he had given his evidence and after the date on which the dispute is supposed to have arisen. But the other observations were made before that date. The allegation is without substance and evidence only of the length to which the defence is prepared to go in support of the case which it sets up. It is then said that the Commissioner was not in a position to observe the witnesses because they were Pardanashin. The observation cannot apply to the two men witnesses and it is feasible, as I have often done, to judge of the character of a witness's testimony without seeing her face by the manner of and delay and so forth in answering questions, the character of the answers and so forth.

The learned Judge says that Ibrahim and Siddik appeared to him to be truthful and reliable witnesses and that he preferred them to the evidence of Abdul Hamid, the plaintiff's husband. That may well be so for the latter, in my opinion, is an unreliable and unscrupulous person and the last to have represented his wife's interests in the matter of the release. I am not prepared myself to place such trust on these two witnesses or to put aside all the probabilities and inferences arising from the documentary evidence because they do not fit in with Mahomed Ibrahim's story. That story must, in my opinion, fit in with them or it is not entitled to acceptance. The learned Judge does not in his judgment deal with a large number of the considerations which were dealt with and had they been present to his mind, he might not improbably have taken a different

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view of the value of Ibrahim's evidence which is directly contradicted by the documents. It is further to be remembered that he is a very interested party who is claiming the bulk of the property for himself, for the value of the Calcutta business is said by him to be about 3 lakhs.

A question was argued as to whether if the Heba was made, legal effect was given to it by transfer of possession. If the evidence is accepted and it is held that there was a real Heba, then that same evidence would seem to establish that possession was given. But as I am not satisfied that there was a Heba of 1897, I need not further discuss this matter. I will only add that the contention that if there was any transaction in 1897, it was a *benami* and not a Heba, was raised in the lower Court as appears both from the judgment and evidence. The submission that this is not so is without foundation.

The question of the second Heba is one of greater difficulty. For there are not against it the same improbabilities. It is said to have been made shortly before Kader Bux's death in favour of all his three sons, and if there were ground for impugning the alleged first Heba that might in itself be a reason for executing a second. There is, however, no mention of the second Heba in the Heba, of Hazir Bux, who, as having an interest in the other properties, might reasonably have been expected to refer to it, as he did to the transfer of entries made at the date of the alleged first Heba. It is not mentioned in the application for a certificate of guardianship. Though there were Zeminaries, no evidence is adduced to show by revenue records that there was such a transfer, and the effect given to it. It is true that there is a reference to registration in the Sarkari papers in the release, and in so far as this release is brought home to the plaintiff this is some evidence. But we have not these papers and do not know their contents. There are different provisions for transfers *inter vivos*, and by inheritance. If these papers do not show a transfer *inter vivos*, they would be evidence against the existence of the second Heba. The presumption on this point is against the defendant Ibrahim who has

not produced these papers. For all that we know they may show a mutation effected in accordance with inheritance and the alleged custom excluding females. Then as I have above pointed out, the release does refer to the second Heba but speaks only of one gift, and if the facts are correctly recorded there, the second gift operated over property other than that which is said to be its subject in the evidence. For if the first Heba be not established, the defendants could not claim as against the plaintiff in this suit the Calcutta business, for that would be to give them relief upon a new case. The present case made on the evidence is that the Calcutta business is not covered by the second Heba. The evidence and the release have suggested the argument which is not without foundation that Mahomed Ibrahim, who admitted the title of his brothers to the Calcutta business in 1908, is now trying to take it from them. There is also to be considered the fact that by this Heba, which would seem to be unnecessary if there was the custom alleged (for the story of Kader going on pilgrimage is spoken to by Ibrahim alone, who at first said there was no necessity for it) Kader Bux is said to have made over his property to his sons without making any provision whatever for the female members of the family.

This Heba again is unsupported by any document and has the application for guardianship against it, for whatever that circumstance may be worth. It might have been supported by revenue papers showing that the properties were claimed by transfer, but such are not produced. There is nothing but the word of some of the witnesses to it, some of whom the Commissioner thought gave their evidence in tutored fashion. Moreover in the absence of corroborative evidence, the view one takes as to the oral evidence given in support of the first Heba must necessarily re-act upon the evidence of the witnesses to the second Heba where these are the same. I hold, therefore, that the existence of the second Heba has not been established. I need not then go into the question whether if it took place in fact, it was valid in law, at any great length. It has been said to be based on the doctrine of *musha*. Amongst other authorities a passage is cited from Fatawa Alamgiri,

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Vol. IV, p. 549, Ed. Cal., in which Al Hakim states: "A man makes a gift of a house to two of his sons one of whom is adult and the other is a minor and the adult son takes possession (of it). The gift is absolutely void and this is the correct view. For the gift in favour of the minor is complete at the very moment of the declaration of the gift because the seisin or possession of the father is equivalent to his (minor's) seisin or possession (*qabz*): Whereas the gift in favour of the adult son stands in need of acceptance. Thus the gift in favour of the minor precedes (that in favour of the adult) and thus confusion (*shuyn*) is occasioned. And the device is that he (father) should deliver possession of the house to the adult son and then make a gift of it to both of them. Thus it is laid down in the Wajiz of Al Kardari."

There is no evidence of such a device being resorted to here and one may reasonably question whether Kader Bux was aware of such technicalities. I am not prepared to say that the fact, if it be a fact (which I cannot hold), that Kader asked Ibrahim to accept the gift for himself and his brothers, whilst it would interpose some one who does not appear to be the legal guardian between the alleged donor and the infant donees, whose share is not expressly stated, brought the case strictly within the device according to which Kader should first have transferred possession to Ibrahim and then made a joint gift to Ibrahim and his minor brothers. It is, however, unnecessary for me to give a formal decision on this point. I should have been sorry to decide the case upon so technical a ground and am relieved from doing so by my finding that the existence of the second Heba has not been made out.

I now pass to the concluding point, the alleged release of her rights by the plaintiff.

Abdul Latif, when asked what was the necessity for the execution of the deed of release by the ladies, answered "to confirm the two verbal Hebas by Kader Bux." I have already pointed out that it was not a confirmation of the alleged first Heba.

If the Hebas were real, it is noteworthy that it was thought necessary according to the evidence to mention and thus confirm the first at the date of the second and to confirm the last by a release, the de-

ceased Kader Bux having, it is said, meanwhile expressed a wish to confirm them in writing, which was not done. Shortly after the death of Kader Bux on 28th August 1907 steps were taken to secure Ibrahim from any claim by the ladies and it was he who suggested that they should give him a release of their claims, if any. The idea of the release originated, he says, with him. These ladies are illiterate Pardanashin, who from the evidence I should say entirely in the hands of the male members of the family. Indeed as appears from the evidence as to the alleged custom, women are not of much account in this community for fear, according to one of the witnesses, that they might be spoiled. Now it is not suggested that the plaintiff had any direct knowledge of the alleged first Heba, at the time it was made. If she was told anything it does not seem that she was told that there was a Heba in 1897 giving the Calcutta business solely to Ibrahim and that his brothers had no share in it, for we do not find any such statement in the document which she is said to have executed and which was drawn up by Ibrahim's lawyers. Ibrahim gives some vague evidence to the effect that he told his mother "that his father wanted to execute a document like that" and he wanted a document in which his father's intention should be stated and that if the ladies desired payment for this, he would do so. The second Heba is alleged to have been made in a loud voice in the presence of many persons including the ladies. According to the evidence the second gift was of property other than that disposed of by the first, a fact which is, as I have shown, contrary to what is stated in the release and its schedules. We must take it then either that the evidence is not true or that the document which the plaintiff is said to have signed is an incorrect statement of the facts. The release also states that under the alleged custom the females get nothing. This the plaintiff denies and it is a different custom from that pleaded. We thus find, that this release affirms facts which I find on the evidence not proved, namely, the two Hebas and the custom and without doubt (even on the defendants' own showing) contains statements not consistent with the evidence and case now made.

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Ibrahim got this document prepared by his lawyers. Maulvi Abul Barkut, the defendant's witness, says that the draft was taken to him by Haji Ahmed and Abdul Hamid who "were in a hurry" and they were sent over to a Pleader. The document received a great deal of legal attention in the interest of Ibrahim, but it never occurred to him that the ladies might properly require legal advice as to their rights. He cannot say whether they were aware of their rights under the general Muhammadan Law, nor does it appear that they knew what the law requires in the case of custom in derogation of the law and what is necessary to the legal perfection of a Heba. There were matters as to which legal assistance was clearly necessary. The facts again as regards the alleged first Heba were not in their direct knowledge. The document is then said to have been explained no less than five times to the different ladies by Mahomed Amin, Hadi Hossain and the Registrar and, it is said, executed for the plaintiff by her husband, who on his own evidence was a person willing for a consideration to cheat her. This same person Hamid is also said to have had the handling of the money Rs. 4,500, which is said to have gone into the hands of the plaintiff as the consideration for the release. It is admitted that the plaintiff had no legal advice though this is, in my opinion, a case where it was necessary that she should be rightly advised of her rights before signing them away. I am not satisfied that she had any proper advice or protection. Certainly her husband was not the sort of person from whom it might have been expected, and the other ladies of the family were no better situated than herself. Learned Counsel admits that he cannot support altogether the case made by his clients that the release was never read to her or that it was represented to be a Muktearnamah. That particular case must be held to fail. How little is the value to be attached to the so-called explanation of the document of release is shown by the facts mentioned and in particular by the following. An argument as to its meaning, which it may be argued is capable of various possible interpretations, has occupied us for several days. I do not refer to some alleged slips in translation which do not appear

to me to affect the case, even if established. If the release was explained to the plaintiff as if it acknowledged two valid Hebas, was the alleged mistake in the schedule which is contrary to such acknowledgment brought to her notice? If the release was explained as a document which recited only one valid legal disposition of the property, which is the interpretation which makes the body of the document and its schedules consistent, then the document was explained in a sense contrary to that in which the respondent has now used it. The reading of documents to illiterate Pardanashins is sometimes a meaningless formality of which the present case is a conspicuous illustration. Whatever be the deficiencies in the plaintiff's case on this point, it will, however, still remain on the defendant, who sets up the release, to show that it is an operative bar to the plaintiff getting that share of the inheritance to which she is entitled under Muhammadan Law. If she is entitled to share in the Calcutta business, she has not had anything like her rights, even assuming she received the whole or any portion of the Rs. 4,500, of which I have considerable doubt. It is to be noted that it is not possible to trace the sum of Rs. 13,500, for it is said to have been paid in rupees. It is usual to make payment of consideration in notes capable of identification. It is said that rupees were given because the ladies specially asked for it, Rs. 13,500 was brought, it is said, in 9 bags and counted out and, according to one witness, all this hard coin was paid into the outstretched hands of the ladies behind the Pardah. The story has a physiognomy common to this class of cases, but is not on that account the more convincing. The Registrar's note is evidence of payment, and it may be, and probably is the case, that money was produced and counted out in his presence, but whether it or the whole of it remained with the ladies, is another matter. It is significant in this connection to refer to the evidence of Hakima Bibee, who appears to have had Rs. 1,200 or so only. She says "the sum of Rs. 2,800 has been spent up in our hide business at home." When this witness was asked whether her male relatives—who were supposed to have been giving her Rs. 4,500—nevertheless looked to her for pecuniary assistance, she says she

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was told to give them the money to be used for the business—"so I gave." I have no confidence that Rs. 4,500 found its way into the hands of the plaintiff even though it may have been produced before the Registrar. As, however, the onus on this point is on the plaintiff and her Counsel did not press her statement on this matter for our acceptance, I am obliged to hold that she has not established that she did not receive the money. Her rights, however, are in excess of this, if there be no custom against inheritance and if her father did not divest himself of everything he possessed in favour of his sons and left his daughters and other female defendants with nothing. On my finding as to the alleged custom and the Hebas, the release was executed in misconception of the true facts and of the plaintiff's rights and is in consequence not binding upon her.

On these findings it is not necessary to enquire into the question of jurisdiction, but even if the first Heba had been established, the Court would, in my opinion, have jurisdiction. The plaintiff's cause of action is the release which purported to operate over property within and without Calcutta. The mere fact that the defendant might make a case as regards the Calcutta properties would not deprive the Court of the right to deal with the rest of the properties covered by the same document. The result, therefore, is that, in my opinion, the suit should, subject to the remarks about to be made, be decreed with costs in terms of the prayers of the plaintiff other than clauses (g) and (h). Any relief, the subject of these clauses, may, however, be made the subject of independent application. On the account the plaintiff will have to be debited with the sum of Rs. 4,500 which, I have found, she must on the evidence be taken to have already had. As I have no doubt that the judgment is erroneous I would, therefore, reverse the decree under appeal and decree the suit and appeal with costs in both Courts.

MOOKERJEE, J.—The litigation, which has culminated in this appeal, was commenced by the appellant on the 3rd January 1911, for declaration of her title to a 7/88th share of the estate left by her father, Haji Kader Buksh, who died on the 28th August 1907 and left two widows, three sons and five

daughters. Kader Buksh had a brother, Hazir Buksh, who died on the 5th November 1907 and left two sons. The relationship of the parties to this suit will be apparent from the annexed genealogical table. The case for the plaintiff is that her father left an estate of considerable value, which has been unlawfully seized by her brother Ibrahim, the first defendant. She further alleges that on the 9th January 1908 she was induced to execute a registered instrument in Urdu language and character on the representation that it was a general power of attorney, but which she has subsequently ascertained was a release of her rights in the estate of her deceased father in favour of her three brothers. She consequently prays that the deed of release may be declared void and inoperative, that she may be held entitled to the share mentioned in the estate left by her father, and that she may be awarded possession upon partition as also incidental reliefs. The first defendant, who contested the claim of the plaintiff, filed his written statement on the 14 June 1912, which disclosed a threefold defence, namely, *first*, that the parties belonged to a community called Erakis, which, though governed in all other respects by the Sunni School of Muhammadan Law, is, like the Khojas and Memons, governed in matters of succession and inheritance by the Hindu Law, so that the plaintiff is not entitled by the custom prevalent in the community to any share of the estate of Haji Kader Baksh; *secondly*, that Haji Kader Baksh did not, at the time of his death, leave any estate, as whatever properties he had were validly transferred by him by way of two gifts on the 22nd April 1897 and 19th July 1907; and *thirdly*, that if the alleged custom and the gifts are not established, the plaintiff has relinquished her right in the estate of her father for a consideration of Rs. 4,500 and executed a release on the 9th January 1908. Mr. Justice Greaves found upon the first question against the defendant and upon the second and third questions against the plaintiff. In this view, he dismissed the suit with costs. On the present appeal, the three questions stated have been elaborately argued by Counsel on both sides, and I shall examine them in the order I have mentioned.

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As regards the question of custom, reliance has been placed by Counsel for the appellant upon a statement in the work on Castes and Tribes of the North-Western Provinces and Oudh by Mr. Crookes, prepared at the instance and published by the authority of the Government of that Province. Reference, I think, may legitimately be made to the work of Mr. Crookes as an authoritative statement of customs prevalent among the Eraki sect of Mahomedans, but it is of no real assistance to the plaintiff. The issues were not framed till the 5th April 1915, and the fifth issue was expressed in the following terms:

"Is there a custom amongst the Eraki community, to which the parties to this suit belong, excluding females from inheritance."

It will be observed that the issue framed is not in conformity with the custom alleged in the third paragraph of the written statement; the custom set out there was, not the absolute exclusion of females from inheritance, but a limited exclusion as prevails amongst the Khojas and Memons. [*Khojas and Memons case, Hirbae v. Sonabae and Rahimatbae v. Hadji Jussap* (9)]. Before this issue was framed, however, a large number of witnesses had already been examined on commission on behalf of the plaintiff from the 14th September 1913 to the 6th November 1913. These witnesses, as may be anticipated, were examined and cross-examined with reference to the custom pleaded in the written statement, and not with reference to the custom subsequently set up in the issue. The evidence taken in Court later on, it may be generally stated, seeks to establish that in no circumstances do females take by inheritance in the Eraki community, while the evidence on commission seeks to support the case that females are excluded only to a limited extent as amongst the Khojas and Memons. The evidence of Muhammad Ibrahim on this part of the case is not consistent with the evidence of his witnesses, who, as I have already stated, are not agreed amongst themselves as to whether the exclusion is absolute or qualified. The statement in the work of Mr. Crookes tends to show that in certain contingencies, women do take by inheritance, and consequently discredits the witnesses who support a case of complete exclusion. The custom alleged

(9) *Perry's Oriental Cases* 110; 4 Ind. Dec. (Q. S.) 100.

has not met with acceptance in any Court of Justice, and such documents as we have do not support the defendant. It is also plain that the custom does not possess two at least of the essential attributes for its validity, viz., uniformity and certainty: *Hurpershad v. Sheo Dyal* (3), *Rajah Vurmah Valia v. Ravi Vurmah Kunhi Kutty* (10) and *Mahamaya Debi v. Haridas Haldar* (11). The fact that the custom was not pleaded in litigations between members of the community where it might have been pleaded, is, I think, also relevant evidence, and the question of its relevancy is not affected by the circumstance that some of these suits were still pending at the time of the trial in the Court below. I do not think reliance can be implicitly placed upon the oral evidence adduced by Muhammad Ibrahim in support of the custom, because most of the witnesses who came forward to testify to the custom had excluded their female relations and were deeply interested to establish that the exclusion was justifiable. Some weight must also be attached to the circumstance that Kader Buksh deemed it necessary to make gifts in favour of his sons and that the first defendant thought it prudent to take a release from his sister; neither the gifts nor the release would have been necessary if the custom of exclusion of female heirs, either entirely or to a limited extent, had been as well known to members of the community as we are now asked to believe. I feel no doubt, on the first question, that the first defendant has failed to establish the custom of exclusion of female heirs, whether we look to the qualified custom pleaded in the written statement or the more comprehensive custom raised in the issue.

As regards the second question, it is alleged by the first defendant that his father had divested himself of all that he possessed by means of two oral gifts, the first made in his favour on the 22nd April 1897 in respect of what has been described in this proceeding as the Calcutta Hide Business, and the second made in favour of himself and his two infant brothers on the 19th July 1907 in respect of all the other properties mentioned in

(10) 4 L. A. 76; 1 M. 235; 1 Ind. Jur. 134; 3 Sar. P. C. J. 637; 3 Suth. P. C. J. 382; 1 Ind. Dec. (N. S.) 156.

(11) 27 Ind. Cas. 400; 42 C. 455 at p. 472; 20 C. L. 183; 19 C. W. N. 208.

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the schedule to the plaint. It may be stated here parenthetically that one of these properties is a house in 47, Taltola Lane Calcutta, which, it is said, was acquired out of the funds of the Calcutta business and must consequently be regarded as the property of the owners of that business. We have thus to consider the factum and validity of the two gifts separately.

By the first gift, it is alleged that Kader Buksh gave away his share of the Calcutta business to Muhammad Ibrahim, at that time his only son. There is no documentary evidence in support of the gift, but we have the statements of witnesses, of whom two were examined in Court and the others on commission. We have further entries in the books of account of the firm. The plaintiff asserts that there was no gift at all and that if the parties went through the form of a gift, it was never intended to be a real and operative transaction. She further contends that the gift, if it did really take place, did not satisfy the requirements of the Muhammadan Law. I am not prepared to reject entirely the evidence that in 1897, some transaction apparently in the nature of a gift did take place; but I am of opinion that what Kader Buksh did was never intended by him to take effect as a real gift. In the case of a transfer for consideration, where the question arises whether the ostensible purchaser is also the real purchaser, it is possible to apply the familiar test, usually conclusive in this class of cases, namely, what is the source of the purchase-money. In a case of gift, however, when it is alleged that the transaction was fictitious, this test naturally fails, and we have to rely upon other aspects of the matter, namely, the surrounding circumstance contemporaneous with the gift and the subsequent conduct of the parties concerned. Now, in the case before us, Kader Buksh was, in 1897, a man in business and in good health. His only son Ibrahim was a lad 15, 16 or 17 years old. His property, so far as we can gather, consisted of the hide business. What was the motive which could possibly have moved a man in that position to transfer to his boy, by way of gift, all that he had, namely, a flourishing business in Calcutta? No plausible explanation has been offered. If Kader Buksh

was anxious to advance his son in life, he might possibly have taken him as a partner, but no theory has even been so much as suggested why he should retire from business completely and leave it in the hands of a youth, even though his brother was a partner. No reason has been put forward why Kader Buksh should deprive his possible issue of their share in the patrimony. As a matter of fact, at the time of the alleged gift, one of his wives was in the family way, and his second son was born, within eight months of the gift, on the 30th December 1897. Reliance, however, has been placed on what is called positive testimony. That testimony may point to the conclusion that some transaction in the way of an apparent transfer did take place at the time, but it does not establish with certainty that the transaction was intended to be real. The sheet anchor of the case for the defendant is the account books, extracts from which have been explained before us with great care and lucidity by Mr. Rasul. These accounts may be classified under three heads, namely, first, partnership accounts in the name of Kader Buksh Muhammad Ibrahim; secondly, the personal drawing account of Kader Buksh; and, thirdly, the deposit account of Ibrahim in respect of money given to him by Kader Buksh. These accounts, in my opinion, are by no means of a conclusive character, for it is well known that when parties have decided to enter upon a fictitious transaction, the accounts are made carefully to correspond to the apparent state of things; but, apart from this, there are inherent improbabilities in this case, which cannot be overlooked. Thus, the deposit account of Ibrahim shows that in 1897 the sum of Rs. 14,386.1.0 stood to his credit. No explanation has been offered why such a large sum as this should be placed at the disposal of a boy of 15. His father was the source of this money and was presumably the owner. On the 22nd April 1897, the partnership account was altered, and the name of Muhammad Ibrahim was introduced. This, in my opinion, does not necessarily indicate that Muhammad Ibrahim thereby replaced his father as a partner of the firm. The change of name may be consistent with the theory of gift, but does not necessarily indicate that there was a gift

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for it is significant that no trace of a mention of gift is to be found in the account books. If there had been a real gift, it would have been only natural to recite it in the account books, when the substitution of name was made. In this connection, it may be observed that while one of the witnesses, Amin, says that Ibrahim was a partner from before, other witnesses maintain that he was only employed in the business. The mere entry of the name of Ibrahim accordingly does not show that there was a gift in his favour. To take one illustration, the Motihari business account was also transferred to the name of Ibrahim. But it has not been suggested that there was a gift of that business to Ibrahim. Much stress was laid by the defendant on the deed of dissolution of partnership, dated the 7th February 1907, between Abdul Gani and others and Muhammad Siddique. This, in my opinion, was admissible to establish the factum of dissolution of a firm recited therein as "carried on by Muhammad Ibrahim, Hazir Buksh, Muhammad Amin, Abdul Latif and Muhammad Siddique in co-partnership between them." This enumeration of partners is, however, really of little assistance, because if there was a *benami* in 1897, the parties would adhere to the *benami* when the partnership was dissolved in 1907. We have, on the other hand, the significant fact that in 1897 when, it is alleged, the interest of Kader Buksh was transferred by way of gift to his son Muhammad Ibrahim, no notice was given to the public, and though the name was changed in the books of account, the original firm name was retained and used in transactions with the public. We have further the important fact that the gift was not recited in the account books, nor was there a written instrument, though the subject-matter of the transaction was property of considerable value. We have, besides all this, the incident of the purchase of the Taltola house on the 13th October 1904, when Abdul Bari, Abdul Majid and others sold the house to Hazir Buksh and Kader Buksh. The consideration for this transfer was money advanced to the vendors from the Calcutta business. The transfer, however, was not to Muhammad Ibrahim as a partner of the firm, but to Hazir Buksh and

Kader Buksh. A desperate effort was made to establish that this was in reality a transfer to the firm. In my opinion, that attempt has entirely failed. Besides, Hazir Buksh, in his registered deed of gift, which, I think, was admissible in evidence, stated on the 1st November 1907 that the Taltola House belonged to himself and his deceased brother Kader Buksh, half and half. Indeed, in the schedule to the release, dated the 9th January 1908, the house is treated as the property of Kader Buksh. This could only be so if the consideration paid therefor belonged to Kader Buksh; and, as the purchase-money came from the Calcutta business, it is plain that in 1904, notwithstanding what might have happened in 1897, Kader Buksh was still treated as the proprietor of the income of the business. This, in my opinion, constitutes a serious difficulty in the way of acceptance of the case for the defendant that there was a real gift in his favour in 1897. The release, in fact, furnishes strong evidence against the reality of the gift of 1897. It was drawn up at the instance of Muhammad Ibrahim; yet it mentions only one Heba (the other is apparently a *bukhsinam*), whereby all properties (not excluding the Calcutta business) were given to the three sons. The description of the properties in the schedule shows that one-half of the Calcutta business belonged to Kader Buksh and not to Ibrahim, and consequently passed to the three sons by virtue of oral gift. Besides, in his deed of gift, Hazir Buksh further stated that ten or twelve years before, his brother Kader Buksh had, "for some politic reasons," substituted the name of Muhammad Ibrahim in the place of his own name in the papers and accounts of the firm and on declaration that Muhammad Ibrahim was the owner of his share of capital got the credit and debit entries in respect of capital, profit and loss made in the name of Muhammad Ibrahim. This clearly is a plain statement by Hazir Buksh that the transaction of 1897, which, be it noted, he does not describe as a gift, was not real and operative. We have, in addition to all this, the remarkable fact that in an application for guardianship of his infant brothers, made

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by Muhammad Ibrahim on the 9th June 1908, no trace is found of the alleged gift of 1897; on the other hand, the schedule describes that a two-thirds share of the Calcutta business and the Taltola House belonged to the infants, an allegation wholly irreconcilable with the theory of a real gift of the Calcutta business to Muhammad Ibrahim in 1897. On a review of all these circumstances, I do not see any escape from the conclusion that there was no real gift of the Calcutta business to Muhammad Ibrahim in 1897. I am not unmindful that in this country, as in England, the settled rule is that the burden lies on the appellant to satisfy the Court that the finding of the trial Court which he assails is not supported by the evidence on the record: *Lalljee Mahomed v. Dadabhai Jivanji Guzdar* (12) and *Colonial Securities Trust Co. v. Massey* (3), but the appellant has, I think, discharged this burden. In the view I take, it becomes needless to consider whether, if there was a real gift, it fulfilled the requirements of the Muhammadan Law. I am not unmindful that under the Muhammadan Law as administered by British Indian Courts, where the subject of the gift is incorporeal property not susceptible of physical possession, a gift thereof may be completed by such transfer of control as may be appropriate and possible in the circumstances: *Ameeroonnissa Khatoon v. Abedounissa Khatoon* (13), *Mullick Abdool Guffoor v. Muleka* (14), *Anwari Begam v. Nizam-ud-din Shah* (15) and *Mahomed Buksh Khan v. Hosseini Bibi* (1). But the question whether the gift of a share in a partnership business can be validly effected by delivery, and, if so, by what form of delivery, under the Muhammadan Law presents a problem of some nicety, as is clear from an examination of the following texts, and I reserve my opinion thereon:—

TEXT I.

When one of two partners says to his co-

(12) 34 Ind. Cas. 807; 23 C. L. J. 190 at p. 204; 43 C. 833.

(13) 2 I. A. 87; 15 B. L. B. 67; 23 W. R. 208; 3 Sar. P. O. J. 423; 3 Suth. P. O. J. 87 (P. C.).

(14) 10 C. 1112 at p. 1123; 5 Ind. Dec. (N. s.) 743.

(15) 21 A. 165; A. W. N. (1899, 8; 9 Ind. Dec. (N. s.) 815,

partner, "I make a gift to thee of my right in the profit," they (the jurists) say the gift is not valid if the property (*i.e.*, capital stock) itself be in existence; because it is the gift of a *Musha* with respect to what is capable of division. But if the partner has consumed, destroyed, wasted the property, the gift is valid; because owing to its loss, destruction, it becomes a debt and a debt is not capable of division. Thus it is the gift of *Musha* with respect to what is not capable of division; therefore it is valid. (Fatawa Qadi Khan, Vol. IV, p. 282, Ed. Lucknow).

* * * *

TEXT II.

If a person makes a gift to his partner, of his share in the partnership stock, capable of division, it is invalid, because of the invalidity of the gift of an undefined part of a divisible subject. (Hidayah, Vol. VII, p. 491, Ed. Cairo).

* * * *

TEXT III.

If one of two partners says to his co-partner, "I make a gift to thee of my share in the profit;" if the property be in existence it is not valid; if destroyed, it is valid. (Fatawa Sirajiyah, p. 138, Ed. Lucknow).

* * * *

TEXT IV.

If one of two partners makes a gift to the other of his share in the profit; if the property be in existence it is not valid because of its being capable of division; if it be destroyed, it is valid, because a debt is not capable of it (division). Thus it is laid down in the *Muhit*. (Bahr-al-Ra'iq, Vol. VII, p. 312, Ed. Cairo).

* * * *

TEXT V.

When one of two partners says to his co-partner, "I make a gift to thee of my share in the profit," they (the jurists) say it is not valid if the property be in existence because of its being a gift of *Musha* with respect to what is capable of division. But if the partner has destroyed the property, the gift is valid, because of its being then *isqat* (extinction). Thus it is laid down in the *Zahiriyah*. (Fatawa Alamgiri, Vol. IV, p. 531, Ed. Calcutta).

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TEXT VI.

When one of two partners says to the other, "I make a gift to thee of my share in the profit," and the property is in existence, it is not valid because it is a gift of Musha with respect to what is capable of division. But if the partner has destroyed it, it (gift) is valid. (Radd-al-Muhtar, Vol. IV, p. 796, Ed. Constantinople).

* * * * *

By the second gift, it is alleged that Kader Bukhsh, on the 19th July 1907, that is, about a month before his death, gave the remainder of his properties to his three sons. This raises two questions, namely, first, whether there was in fact such a gift, and, secondly, if there was, did it fulfil the requirements of the Muhammadan Law. It is worthy of note at the outset, before either of these questions is examined, that the second gift, even if established, would not affect the Caloutta business and the Taltola House, because the evidence does not show that these two properties form the subject-matter of the gift. The evidence to prove the second gift is based on the assumption that there was a real gift of the Caloutta business in 1897, and, consistently with that theory, seeks to establish that the transfer of the remainder of his estate was effected by Kader Bukhsh, by this supplementary gift. As regards the second gift, I am not satisfied on the evidence that it did as a matter of fact take place and was completed. There is no doubt oral evidence adduced by the defendant, but there are unexplained difficulties which cannot well be ignored. There is no mention of the second gift in the application for guardianship to which reference has already been made. The explanation is, to my mind, not quite satisfactory. Muhammad Ibrahim must be deemed to have been fully aware that the matter was of grave importance to him, and one would have expected him, as a man of ordinary prudence, to set out the title under which he claimed. There is also the fact that no document was executed; here again, any cautious man would have insisted upon the execution and registration of a deed of gift, when the result of that gift would be to deprive all the heirs, except the three sons of the donor, of what would otherwise devolve on them by right

of inheritance. We have, in addition to this, the circumstance that no attempt appears to have been made to give effect to the alleged gift, either by change of names in the records of the Collector or in the books of the various firms. There is, besides, the noticeable fact that Hazir Bukhsh makes no mention of the second gift in his deed of gift. We cannot also overlook that the document makes no provision whatever for the female members of the family, namely, the two wives of the donor and his five daughters. No reason has been assigned why a man in the position of Kader Bukhsh, possessed of considerable wealth, should make no provision whatsoever for his own wives and daughters, and leave all that he had to his three sons, two of whom were six and ten years old. In the face of these difficulties, should we accept the oral evidence on the record? I am clearly of opinion that how far the testimony of these witnesses is reliable, must be judged by the surrounding circumstance. In this connection, I may advert to the remark made by the Commissioner about the demeanour of some of the witnesses examined before him. Abdul Sattar is described as evasive and not trustworthy. Mahtabo, Hakima and Hadi Hassan appeared to him to have been tutored; it is difficult to say in whose interest they could have been so tutored, other than that of Muhammad Ibrahim. The letter written by Muhammad Ibrahim on the 9th February 1902 to Abdul Hamid furnishes some indication that Ibrahim was not above recourse to bribery. In this Court, a forlorn attempt was made to impute dishonesty to the Commissioner, who was a Judicial Officer of some standing. In my opinion, there is no foundation whatever for this charge. I think there is also no force in the contention that the Commissioner could not have really appreciated whether a Pardanashin lady under examination before him was or was not a trustworthy witness; whether a witness is reliable or not may be judged, not merely from demeanour, but also from the mode and manner in which the answers are given. I do not overlook that Mr. Justice Greaves thought that Muhammad Ibrahim is truthful and reliable and that the husband of the plaintiff is just the reverse;

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Bombay Cotton Manufacturing Co. v. Raja Bahadur Motilal Shivalal (16) and *Rivers Steam Navigation Co. v. Hathor Steamship Co.* (8), but we cannot at the same time overlook that Muhammad Ibrahim is deeply interested in the result of this litigation, and when the probabilities and the documentary evidence cannot be reconciled with his assertions, I cannot implicitly accept his assertions. My conclusion is that the evidence does not establish the second gift.

If, however, the second gift is deemed to be established by the evidence, the question arises whether it is valid under the Muhammadan Law. Upon an examination of the authorities, I have arrived at the conclusion that this question must be answered against defendant as is clear from the following texts:—

TEXT I.

If one person makes a gift of it (house) to two persons it is not valid according to Abu Hanifah, but it is valid according to Abu Yusuf and Muhammad. (Al Qaduri, Vol. II, p. 10, Ed. Delhi).

TEXT II.

"If one person makes a gift of it (house) to two persons, it is not valid according to Abu Hanifah, but it is valid according to Abu Yusuf and Muhammad." For this is a gift of the entire (house) to two persons (jointly) as it is by a single act of transfer. Therefore no Musha is occasioned, as when (a house) is mortgaged with two persons. But according to him (Abu Hanifah), it is a gift of half the house to each of them. Therefore if it (the gift) is with respect to something incapable of division like a slave or slave-girl and one of them (donees) accepts it, it is valid (with respect to his share). Also because property is established for each of them (donees) with respect to the half and therefore the transfer would be likewise as it (property) is its (transfer's) effect. This is contrary to mortgage, as its effect is detention and it is established for each of them perfectly. Therefore if the debt of one of them (mortgagees) is paid, nothing of the mortgaged property

(16) 29 Ind. Cas. 229; 42 I. A. 110; 39 B. 386; 21 C. L. J. 528; 28 M. L. J. 593; 17 M. L. T. 408; (1915) M. W. N. 788; 2 L. W. 521; 17 Bom. L. R. 455; 19 C. W. N. 617 (P. C.).

will be returned. (Al-Jawharat-al-Nayyirah, Vol. II, p. 10, Ed. Delhi).

TEXT III.

If he makes a gift of a house to two of his sons one of whom is a minor in his charge, the gift is invalid according to all. (Fatawa Qadi Khan, Vol. IV, p. 183, Ed. Lucknow).

TEXT IV.

The Hedayah (Vol. VII, p. 496, Ed. Cairo) reproduces Texts I and II.

TEXT V.

"If two persons jointly make a gift of a house to one man it is valid." In the converse case it is not valid according to Abu Hanifah, but the two disciples declare it to be valid. (Al-Inayah, Vol. VII, p. 495, Ed. Cairo).

TEXT VI.

The Kifayah (Vol. VII, p. 496, Ed. Cairo) reproduces the reasons for the difference of opinion between the master and his disciples given in text II.

TEXT VII.

The gift of a house jointly by two persons to one man is valid. But its converse is not valid (according to Abu Hanifah) contrary to them (i.e., the opinion of the two disciples)—(Multaqa'l-Abhar by Ibrahim, b. al-Halabi d. 953 H. H²=1549 A. D., p. 137, Ed. Constantinople).

TEXT VIII.

If he makes a gift of a house to two persons one of whom is an infant and the other adult and the infant is in his charge, the gift is not valid (*lam tajuz*) unanimously. For at the very moment of making the gift he becomes possessed of the share of the infant and thus the other half remains in a state of Musha. Thus it is laid down in the *Muhit* (Bahr-al-Raiq, Vol. VII, p. 315, Ed. Cairo).

TEXT IX.

If he makes a gift in favour of an adult person and in that of an infant in the charge of the adult; or in favour of two of his sons, one infant and the other adult, it is not valid (*lam tajuz*) unani-

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mously. (Durr-al-Mukhtar, Vol. III, p. 498, Ed. Lucknow).

* * *

TEXT X.

Al Hakim states—A man makes a gift of a house to two of his sons one of whom is adult and the other is a minor and the adult son takes possession (of it). The gift is absolutely void and this is the correct view. For the gift in favour of the minor is complete at the very moment of the declaration of the gift because the seisin or possession of the father is equivalent to his (minor's) seisin or possession (*Qabz*): Whereas the gift in favour of the adult son stands in need of acceptance. Thus the gift in favour of the minor precedes (that in favour of the adult) and thus confusion (*shukn*) is occasioned. And the device is that he (father) should deliver possession of the house to the adult son and then make a gift of it to both of them. Thus it is laid down in the *Wajiz* of Al Kardari (Fatawa Alamgiri, Vol. IV, p. 549, Ed. Calcutta).

* * *

TEXT XI.

Al-Tahtawi (Vol. III, p. 400, Ed. Cairo), the celebrated commentary on the Durr-al-Mukhtar, reproduces Text X.

* * *

TEXT XII.

"If he makes a gift of a house to two persons, etc." Al-Ramti says that it is obvious from this that if the two persons be both infants in his charge, it is valid and what is stated in the Bazzaziyah indicates this. But all this is in accordance with the opinion of the two disciples (Abu Yusuf and Muhammad) and not according to his (Abu Hanifah's) opinion. (Here Text III is quoted). *Manhat-al-Khaliq*, Vol. VII, p. 315, Ed. Cairo. It is a commentary on the *Bahr-al-Ra'iq* by Ibn Abidin, the author of the *Radd-ul-Muhtar*, d. 1835 A. D.)

* * *

TEXT XIII.

"Or in favour of two of his sons etc." Text III and XI is quoted here. (*Radd al Mukhtar*, the celebrated commentary on the *Durr-al-Mukhtar* by Ibn Abidin d. 1835, Vol. IV, p. 514, Ed. Cairo).

* * *

I do not overlook the unfavourable judicial

comments made from time to time upon the principle of Musha, specially, the observation of Sir Barnes Peacock in *Muhammad Mumtaz Ahmad v. Zubaida Jan* (5):—

"The doctrine relating to the invalidity of gifts of Musha is wholly unadapted to a progressive state of society and ought to be confined within the strictest rules" [see also *Mahomed Buksh Khan v. Hosseini Bibi* (1), *Ibrahim Goolam Ariff v. Saiboo* (17), *Kalidas Mullick v. Kanhaya Lal Pundit* (18), *Alabi Koya v. Mussa Koya* (19) and *Jahedunnessa Bibi v. Najibul Islam* (20)]. But it is plain that the doctrine, though not favoured, cannot be altogether ignored or repudiated: *Vahazullah Sahib v. Boyapati Nagayya* (21) and *Ibrahim Goolam Ariff v. Saiboo* (17). In my opinion the case before us falls within the strict letter of the texts on the subject [*Nizam-ud-din v. Zabeda Bibi* (4)], and this indeed appears to have been realised by the defendant himself and his advisers I refer to the remarkable passage in the deposition of Mahomed Ibrahim in which he describes the mode in which the gift was effected:—

"My father said that he had already disposed of his share in the Calcutta firm in my favour, and he was disposing of the rest of his properties in favour of myself and my two younger brothers, and my father asked me to accept the same for myself and on behalf of my younger brothers, and he made over all the documents in respect of these properties as also in respect of the Zemindari to me, requesting me to take charge of them on behalf of myself and of my two younger brothers." I confess that this does bear the appearance of an attempt, in course of evidence, to show that the requirements of the law were satisfied. It is extremely improbable that Kader Bux was aware of the device whereby the law of Musha could be avoided as described in the *Fatawa*

(17) 34 I. A. 167; 35 C. 1; 6 C. L. J. 695; 11 C. W. N. 973; 9 Bom. L. R. 872; 4 A. L. J. 572; 17 M. L. J. 408; 2 M. L. T. 479; 4 L. B. R. 154 (P. C.).

(18) 11 I. A. 218; 11 C. 121; 8 Ind. Jur. 636; 4 Sar. P. C. J. 578; 5 Ind. Dec. (N. s.) 839 (P. C.).

(19) 24 M. 513; 11 M. L. J. 227.

(20) 8 Ind. Cas. 38; 15 C. W. N. 328.

(21) 30 M. 519; 17 M. L. J. 562.

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Alamgiri. But it is plain that, even if the evidence be accepted, the device was not strictly carried out. My conclusion is that the evidence does not conclusively establish the second gift, and that if it does, the gift was not valid and operative under the Muhammadan Law.

As regards the third question, Mr. Justice Greaves has found that the plaintiff has failed to establish her allegation that the release was obtained from her upon a misrepresentation as to the nature of the instrument. No attempt has been made in this Court to support the contention that the document was represented to be a power of attorney; in fact, that allegation has been abandoned in this Court. But the validity of the release has been questioned on the ground that it was executed under circumstances which do not make it binding upon a Pardanashin lady, and the view has been maintained that the Court, when called upon to deal with a deed executed by a Pardanashin lady, must satisfy itself upon the evidence, first, that the deed was actually executed by her, or by some persons duly authorised by her, with a full understanding of what she was about to do; secondly, that she had full knowledge of the nature and effect of the transaction into which she is said to have entered; and, thirdly, that she had independent and disinterested advice in the matter. How far the tests indicated are inflexible rules of law may be a matter for controversy, and it may not be easy to reconcile all the dicta to be found in various decisions of the Judicial Committee where the validity of deeds executed by Pardanashin ladies came under review. The cases on the subject will be found analysed in the judgments of this Court in *Bindubashini Dasi v. Giridhari Lal Roy* (22), *Alikjan Bibi v. Rambaran Shah* (23) [*Moonshee Buzloor Ruheem v. Shumsoonnissa Begum* (24)], *Geresh Ohunder Lahoree v. Musammam Bhuggobutty Debia* (25), *Syud Fuzzul Hossein v. Amjud Ali Khan* (26), *Ashgar Ali v.*

Delroos Banoo Begum (27), *Tacoardeen Tewarry v. Nawab Syed Ali Hossein* (28), *Sudisht Lal v. Musammam Sheobarat Roer* (29), *Shambati Koeri v. Jago Bibi* (30), *Amarnath Sah v. Achan Kuar* (31), *Mahomed Buksh Khan v. Hosseini Bibi* (1), *Sajjad Husain v. Abid Husain Khan* (32), *Ismail v. Hafiz Boo* (33) and *Kali Bakhsh Singh v. Ram Gopal Singh* (2)]. In view of the weighty observation of Lord Haldane, L. C., in *Kreglinger v. New Patagonia Meat and Cold Storage Company* (34) as to the proper use of judicial procedure as binding authorities, it is plain that no useful purpose would be served by an analysis of the facts of each of these cases, which fall broadly into two groups, namely, first, where the person who seeks to hold the lady to the terms of her deed is one who stood towards her in a fiduciary character or in some relation of personal confidence; and, secondly, where the person who seeks to enforce the deed was an absolute stranger and dealt with her at arm's length. In the former class of cases, the Court will act with great caution and will presume confidence put and influence exerted; in the other class of cases, the Court will require the confidence and influence to be proved intrinsically; this is a fundamental distinction which does not appear to have been always kept in view. A great deal will also depend upon the intellectual attainments of the lady, and the Court will naturally not be inclined to set aside the deed, where the lady is proved to have been of business habits, to have been literate and to have possessed capacity to judge for herself. Tested in the light of these principles,

(27) 3 C. 324; 3 Sar. P. C. J. 749; 3 Suth. P. C. J. 444; 2 Ind. Jur. 601; 1 Ind. Dec. (n. s.) 794.

(28) 1 I. A. 192; 13 B. L. R. 427; 21 W. R. 340; 3 Sar. P. C. J. 868.

(29) 8 I. A. 39; 7 C. 245; 4 Sar. P. C. J. 222; 5 Ind. Jur. 270; 3 Ind. Dec. (n. s.) 707.

(30) 29 I. A. 127; 29 C. 749; 6 C. W. N. 682; 4 Bom. L. R. 444; 8 Sar. P. C. J. 304 (P. C.).

(31) 19 I. A. 196; 14 A. 420; 6 Sar. P. C. J. 197; 7 Ind. Dec. (n. s.) 637 (P. C.).

(32) 16 Ind. Cas. 197; 39 I. A. 156; 34 A. 455; 16 C. L. J. 613; 14 Bom. L. R. 1055; 16 C. W. N. 869; 23 M. L. J. 210; 10 A. L. J. 364; 12 M. L. T. 351; (1912) M. W. N. 976; 15 O. C. 271 (P. C.).

(33) 33 I. A. 86; 33 C. 773; 3 C. L. J. 484; 8 Bom. L. R. 379; 10 C. W. N. 570; 16 M. L. J. 165; 3 A. L. J. 353 (P. C.).

(34) (1914) A. C. 25 at p. 39; 83 L. J. Ch. 79; 103 L. T. 802; 58 S. J. 97; 30 T. L. R. 114.

(22) 3 Ind. Cas. 330; 12 C. L. J. 115.

(23) 7 Ind. Cas. 163; 12 C. L. J. 337.

(24) 11 M. L. A. 551 at p. 585; 8 W. R. P. C. 3; 2 Suth. P. C. J. 59; 2 Sar. P. C. J. 259; 20 E. R. 203.

(25) 13 M. L. A. 419; 14 W. R. P. C. 7; 2 Suth. P. C. J. 389; 2 Sar. P. C. J. 579; 20 E. R. 607.

(26) 17 W. R. 523 (P. C.).

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how does the case before us stand? Here is a deed obtained by a brother from her sister. By that deed she parts with all her interest in the estate of her father for a sum of Rs. 4,500. There is no shadow of a doubt that the amount itself is wholly inadequate as the price of her share in the patrimony. It is represented to her that by the custom of the community, she is excluded from the inheritance. She is further told that her father had divested herself of all he possessed by two oral gifts. No doubt we have evidence given that the deed was read over to her and explained to her and that she had the advice of her husband. It is clear, however, that the deed is so expressed that its meaning and effect are by no means quite beyond doubt even with the aid of the elucidation by learned Counsel. It is to my mind equally clear that the husband of the plaintiff was absolutely untrustworthy and was ready to sacrifice the interest of his wife for the sake of his personal benefit. If, as a matter of fact, the custom of exclusion existed, if in truth the oral gifts were real transactions and were operative in law, a deed of release was wholly superfluous. The deed, after the most careful consideration of attendant circumstances, does not impress me favourably; I do not attach much importance to the recitals, some of which at any rate may be deemed exhibitions of the art of the conveyancer which, whether mediæval or modern, cannot be permitted to mislead the Court. I do not overlook the statement of the Registering Officer, which shows that the parties were careful to conform to all the formalities; but the substance of the matter still remains that the deed was obtained from the plaintiff by her brother on representation of a state of facts untrue in material particulars. In these circumstances I do not think the deed can stand. I am not unmindful of the importance of the rule that a settlement of a disputed or doubtful claim is a valid and binding arrangement which the parties thereto are not permitted to deny, ignore or repudiate. This principle is deducible from a long line of cases which will be found collected in the judgment of this Court in *Upendra Nath Bose v. Bindeshri Prasad*

(35), but that principle is not applicable to the circumstances of this case. The defendant does not assert that there was a compromise to put an end to dispute and to terminate or avoid litigation, and that the consideration for the compromise was, not the sacrifice of a right, but the abandonment of a claim. What we have here is a surrender of the rights of the plaintiff for a nominal consideration, obtained from her on the representation that she had no rights whatsoever; this cannot be deemed an honest settlement of an existing dispute which a Court of Justice should not permit the plaintiff to question.

As regards the actual payment of the consideration, the plaintiff has failed to satisfy me that she did not receive the money, so that she can be permitted to have her deed cancelled only on re-payment of that sum. This sum must consequently be debited against her when the accounts are taken under the decree.

I hold accordingly that this appeal must be allowed, the decree of Mr. Justice Greaves set aside and the suit decreed with costs in both Courts in the terms indicated in the judgment of Mr. Justice Woodroffe.

Appeal allowed.

(35) 32 Ind. Cas. 468; 22 C. L. J. 452 at p. 476; 20 C. W. N. 210.

ALLAHABAD HIGH COURT.
ORIGINAL CIVIL SUIT No. 1 of 1917.

May 22, 1918.

Present:—Mr. Justice Piggott and Mr. Justice Walsh.

GOPI LAL AND OTHERS—PLAINTIFFS—
PETITIONERS
versus

LAKHPAT RAI AND OTHERS—DEFENDANTS
—RESPONDENTS.

Evidence Act (I of 1872), s. 126—Communication made to Vakil in course of employment, admissibility of—Communication, modes of.

For the purposes of section 126 of the Evidence Act, it is immaterial whether the communication

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which is sought to be protected was verbal, that is to say, by word of mouth, or by demonstration. [p. 606 col. 2.]

In a suit for the revocation of a patent in which the question for decision was the formation and process of working of a stove owned and used by the defendant, the plaintiff tendered in evidence a Vakil who had been employed by the defendant in some previous proceedings and had, in the course and for the purposes of his employment, visited the defendant's premises at the latter's invitation, in order to make himself acquainted with the working of the stove:

Held, that the knowledge acquired by the Vakil as to the formation and process of working of the stove amounted to a communication made to him by his client in the course and for the purposes of his employment and that, therefore, his evidence was inadmissible under section 126 of the Evidence Act. [p. 606, col. 2.]

Dr. Surendra Nath Sen, for the Petitioners.

Mr. Remfry (with him Mr. Kamala Kanta Varma), for the Opposite Party.

JUDGMENT.

WALSH, J.—It is necessary for us to dispose of a question which has arisen under section 126 of the Evidence Act. The proceedings before us are a suit or petition brought by the applicant or petitioner to revoke certain Letters Patent granted to the respondent firm, consisting amongst others of a member named Lakhpat Rai, and the question which arises for decision is the formation and the process of the working of a certain stove owned and used by the respondent firm for the manufacture of *banslochan*. In the course of the proceedings on behalf of the petitioner a Vakil of the name of A. K. Banerji was tendered in evidence on behalf of the petitioner to prove the formation and the process of the working of this particular stove which was then in the possession of the aforesaid Lakhpat Rai. In the year 1895 the Municipal authorities took proceedings against the said Lakhpat Rai, or the firm of which he was then a member, for a nuisance by smell in the preparation of *banslochan*. The witness was employed by the firm to represent them as defendants in answer to that charge and in his capacity as a Vakil he, at their invitation, visited their premises in order to make himself acquainted with the stove which it was alleged created the nuisance. A question was raised by a member of the Court as to whether any question could be asked from this witness as to the information conveyed to him by his

clients with regard to the subject-matter in respect of which he was representing them. The decision of that question turns upon the language of section 126:—"No Vakil shall at any time be permitted unless with his client's express consent" (in this case the witness has got no consent from Lakhpat Rai) "to disclose any communication made to him in the course and for the purpose of his employment as such Vakil by or on behalf of his client." Mr. Banerji told us that any knowledge which he had acquired as to the formation and the process of the working of the stove in question was acquired by him only in the course of and for the purpose of his employment as such Vakil. The only question, therefore, which remains is as to whether any communication within the meaning of the section was made to him by his client. The exact fact which he proposed to prove was not disclosed and the nature of the communication was not given. We thought it undesirable to hear the evidence without first deciding whether it could under any circumstances be admissible. We think that as a matter of law it is immaterial whether the communication was verbal, that is to say, by word of mouth, or by demonstration. To our mind if the communication were of such a nature that the client had, for the purpose of enabling his Vakil to defend the charge of nuisance, described the formation and the process of the working of the stove in his own language, it would be impossible to contend that such conversation would not be excluded by the rule of professional privilege laid down in section 126. We think it follows that if the client, instead of giving the Vakil a verbal description of the process itself, told him to go himself to see it, or pointed it out to him, that would equally be a communication within the meaning of the section.

This view is borne out really by proviso (2) of the section. In England there has been some discussion in the decided cases as to whether the rule of professional privilege applies to facts brought to the knowledge of a professional gentleman by his senses, *i.e.*, facts observed by him; and it was decided, at any rate in one well-known case, that where a matter is in Court, and by his senses the Counsel

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becomes aware that an entry in a book has been fabricated or altered after its production in evidence before the Court, this is a matter which is brought to his senses by observation independently altogether of his client and is a matter which he is bound to disclose. But the Code says that any fact observed by the Vakil in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment, is not protected. That clearly indicates that facts observed may be just as much communication as other communication in the ordinary way by word of mouth. The rule is a statutory rule and ought to be strictly applied, for at least two reasons. It is in the interest of the proper and honourable conduct of an honourable profession. If communications coming either directly or indirectly to the knowledge of the Vakil or lawyer in the course of and for the purpose of his employment are not protected, it is easy to conceive cases in which the Vakil might become acquainted with circumstances, for example of crime, which it would be the ordinary duty of a citizen to communicate to the proper authorities, and he would render himself liable for prosecution under the Penal Code for not disclosing such information to the proper authorities. It is clear that professional gentlemen who do their duty ought not to be placed in a position of that kind. Secondly, it is of importance to the public that they should be protected in the right which the law gives them to defend themselves against proceedings of all kinds with absolute freedom, untrammelled by the embarrassment of the possible consequences of failure to disclose the full facts within their knowledge to the expert assistance on which they rely for the conduct of their cases. It would be impossible for the ordinary man to consult a lawyer with anything like confidence, for example, about some machinery or system in his own premises about which he is litigating with a rival in trade, if, when the public authorities threatened him with a case for nuisance, he had to call a lawyer to assist him in answering that charge without knowing whether or not the lawyer might not the next day turn round

and present his opponent in the civil suit with all the information which the lawyer had obtained from his otherwise unauthorised visit to his client's premises.

One word I should like to add. It was suggested to Dr. Sen that he should open his case by giving some indication of the broad lines on which he would proceed to tender evidence. I attach great importance to that duty. I am afraid, judging from the cases which come in appeal before this Court, it is not always as strictly regarded in the Courts of Subordinate Judges as it ought to be, so that the legal gentleman who represents the plaintiff or petitioner fails to give sufficient indication of the lines on which he proposes to present his evidence in Court. Counsel are here to assist the Court, and in a delicate matter of this kind (as far as we can see, the respondents to this application had no intimation or warning that this question was going to be raised), a party in our opinion has a right to be warned that a professional gentleman previously employed by him is going to be put in the box to disclose a communication made to him in the course and for the purpose of his employment, in order that he may have a full opportunity, not in the hurry and suddenness of surprise, but with care and deliberation, to decide whether he shall exercise the undoubted option he possesses in his own interest, in the interest of the Court or in the interest of public time, to waive his objection.

In addition to this, as my brother has remarked in the course of the argument, there are a number of authorities on the Indian law as codified. It is better where a delicate question of this kind is going to be raised, that warning should be given so that an opportunity is provided for seeing whether the question is quite as clear as may be supposed by the legal gentleman intending to produce the evidence.

PIGGOTT, J.—This is a suit for revocation of a patent. It was agreed that the evidence taken in the previous suit, which we have just disposed of, should be admissible in this suit. Upon the broad issue of fact, namely, that the patent is bad in law, either because it has been

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anticipated, or because it is not a proper subject-matter for a patent, we have made up our minds against the plaintiff for reasons which are contained in the judgment in First Appeal No. 178 of 1917 [*Lakhpai Rai v. Sri Kishan Das* (1)] delivered to-day and which may be found there by the applicant if he cares to read them. We do not think, having listened to Dr. Sen's argument and to the testimony of the witnesses Gopi Lal and Kunji Lal, given orally before us, that they have succeeded in shaking the conclusions arrived at by us in the other suit. No serious question has been raised about our jurisdiction to entertain this suit, and we must simply dismiss it with costs upon the ground that the claim has not been proved. We were invited to read certain learned authors on the subject of the ancient process of manufacture of *banslochan*. We declined to do so. So far as they were matters of opinion on admitted facts, there was no necessity for us to read them; so far as they were tendered for the purpose of proving any controverted fact in the suit, we were unable to discover any section of the Evidence Act which entitled us to read them. We, therefore, hold them to be inadmissible. The suit is dismissed with costs.

Suit dismissed.

(1) 48 Ind. Cas. 450; 16 A. L. J. 941.

PATNA HIGH COURT.

APPEAL FROM ORIGINAL ORDER NO. 234 OF 1917.

October 25, 1918.

Present:—Mr. Justice Roe and Mr. Justice Jwala Prasad.

KARIMULLA SHAH—PLAINTIFF—
APPELLANT

versus

Mirza MUHAMMAD RAZA—DEFENDANT
—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXXIV, r. 6—Mortgage decree—Compromise providing for sale of properties not subject to mortgage—Order of Court, whether necessary—Procedure.

A compromise in a mortgage suit provided that if the amount due under the mortgage was not realised by sale of the mortgaged properties, the other properties of the judgment-debtor should be pursued in due course. A decree was passed in accordance with the compromise and the mortgaged properties having been sold; the decree-holders sought to proceed against the other properties of the judgment-debtor:

Held, that a formal order under Order XXXIV, rule 6, of the Civil Procedure Code was a necessary preliminary before proceeding against the properties not covered by the mortgage. [p. 608, col. 2.]

Appeal from an order of the Subordinate Judge, Gaya, dated the 11th November 1917.

Messrs. *Mohammad Fakhruddin* and *Panchanan Banerjee*, for the Appellant.

Messrs. *Kailas Pati* and *D. N. Sirkar*, for the Respondent.

JUDGMENT.—These proceedings arose from a decree made upon a mortgage in accordance with a compromise. That compromise provided that if the amount due under the mortgage was not realised by sale of the mortgaged properties, the other properties of the judgment-debtor should be pursued in due course. The properties covered by the mortgage were sold. It is not contested that there is a balance outstanding, but on the decree-holder's seeking to proceed against the other properties of the judgment-debtor two objections were made, *firstly*, that the judgment-debtors were minors and could not be pursued without guardians, and, *secondly*, that there had not been any order under rule 6 of Order XXXIV and until that order was made no proceedings against properties other than the mortgaged properties could be taken.

In the first objection, there appears, on the merits, to be no substance whatsoever, but there is substance in the contention that the making of a formal order under rule 6 is a necessary preliminary to pursue properties not covered by the mortgage. This has been the universal view taken, and the position is not altered by the fact that the original decree was a compromise decree. All that that compromise in effect does is to create an undertaking on the part of the judgment-debtor not to contest an order under rule 6. The benefit of an order under rule 6 is that a proper account is taken, the parties know exactly where they stand, and

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the proceedings are in order. As at present framed the proceedings are not in order. We, therefore, direct that a proper order be made under rule 6, stating the amount of the indebtedness of the judgment-debtor and formally authorizing the decree-holder to proceed against the properties not covered by the mortgage.

Order accordingly.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 729
OF 1916.

April 3, 1918.

Present:—Mr. Justice Fletcher and Justice
Sir Syed Shamsul Huda, Kt.

SAINUDDIN—PLAINTIFF—APPELLANT

versus

Srimati LATIFANNESSA BIBI AND OTHERS

—DEFENDANTS—RESPONDENTS.

Muhammadian Law—Divorce—Tafveez—Post-nuptial delegation of power of divorce, validity of—Restitution of conjugal rights, suit for, maintainability of.

Under the Muhammadian Law, post-nuptial delegation of the power of divorce or *tafveez-i-talaq* made by a Muhammadian husband in favour of his wife and contained in a registered *kabin-namah* executed after marriage is valid and operative. [p. 609, col. 2.]

(Authorities reviewed.)

The plaintiff, a Muhammadian, executed a *kabin-namah* sometime after his marriage in favour of his wife, which provided amongst other matters that he would not take a second wife without the permission of his first wife, and that in case of violation of this condition the latter might, when she chose, divorce him and take a second husband. Thereafter without taking the permission of his wife the plaintiff took a second wife and upon that the first wife exercised the right of divorce contained in the *kabin-namah*. The plaintiff then sued her for restitution of conjugal rights:

Held, that the suit did not lie, as the wife had exercised the power of divorce given to her by the husband and had thus put an end to the marital relation between herself and her husband. [p. 611, col. 2.]

Appeal against the decree of the District Judge, Tipperah, dated the 9th December 1915, affirming that of the Munsif, 1st Court, Comilla, dated the 23rd December 1914.

Babu Ramdayal De, for the Appellant.

Babu Sasadhar Roy (Sr.), for the Respondents.

JUDGMENT.

SHAMSUL HUDA, J.—This appeal arises out of a suit brought by the plaintiff for restitution of conjugal rights against his wife, the defendant No. 1. The facts of the case are shortly these. The parties were married in 1308, when a *Kabin-namah* was executed but not registered. This document was subsequently lost. A dispute then arose between the parties, which was settled by the execution and registration of a second *Kabin-namah* in 1313. Among other matters the new *Kabin-namah* provided that the plaintiff would not take a second wife without the defendant's permission. The document concluded as follows:—'Be it noted that if I violate any of the aforesaid conditions or any portion thereof, I delegate to you my own power of giving three *talaqs* such as is possessed by males. Whenever you choose you may *talaq* or repudiate your person three times and then take another husband.'

It is found that between 1313 and 1320 the plaintiff-appellant took a second wife without obtaining the permission of the defendant. When the present suit for restitution of conjugal rights was instituted, the wife gave herself three divorces in accordance with Muhammadian Law under the authority given to her by the husband. Both the lower Courts have dismissed the plaintiff's suit and hence this appeal.

It has been contended before us that a post nuptial delegation of the power of divorce, or *tafveez-i-talaq* as it is called by Musalman lawyers, is not valid. No authority has been cited for such a proposition. A reference to books on Muhammadian Law makes it abundantly clear that such a delegation is valid. In fact most of the instances of *tafveez* given in the books are post nuptial and refer to authority given by a person to another who is already his wife. Reference may be made to Baillie's Digest of Muhammadian Law, page 241. The more difficult questions, however, that have been raised before us are the following:—

1. That the authority given to the wife could only be exercised immediately in the *majlis* in which it was given and was lost not being so exercised.

2. That the authority should have been exercised immediately on the happening of the event upon which it was contingent.

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3. That the delegation was revocable and the institution of the suit amounted to such revocation.

Before proceeding to a discussion of these questions, it would be convenient to refer to certain well-established principles of Muhammadan Law with reference to which the law on the subject of 'delegation' has been discussed in the text books. Muhammadan lawyers make a distinction between *isbatat* or acts which create rights and *isqatats*, i.e., acts which only extinguish existing rights. Mr. Justice Abdur Rahim refers to the distinction in his extremely valuable work on Muhammadan Jurisprudence at page 195. *Tamleek*, which means making another the *malik* or owner of a thing and includes ordinary cases of sale, gift and similar other transactions, belongs to the former.

The *isqatat* include release, divorce, emancipation of slaves, etc. Leaving aside exceptions to the general rule, it is a well-established rule of Muhammadan Law that in cases of *tamleek*, *taleeq* is not valid, i.e., it is not valid to make the transaction dependent on any condition or contingency.

* * * * *

All *tamleeks* must, as a rule, be unconditional, they must be accepted immediately in the *majlis* (sitting) itself and it is open in such cases to the *mumallik* (i.e., the person making another the *malik* of his rights) to revoke the *tamleek* before acceptance. Whereas in *isqatat*, (i.e., acts causing extinction of rights) *taleeq* is valid, i.e., these may be made dependent on conditions and generally acceptance in the *majlis* is not necessary nor is the authority revocable. The Muhammadan lawyers have found it difficult to apply to cases of delegation or divorce all the incidents of a *tamleek*. They argue that this is a special kind of *tamleek*, for the reason that in ordinary cases of *tamleek*, or the transference of a right, the transferor is completely deprived of his right which after the transfer vests in the transferee, but in the case of a delegation of the authority to divorce, the husband is not deprived of his right and both the husband and the wife have in their hands the power of divorce. It is also not strictly included in the *isqatat*, because the delegation does not by itself extinguish any rights though the exercise of the delegated au-

thority does. They hold that the delegation of an authority to divorce partakes only partially of the character of *tamleek*. It, therefore, admits of *taleeq*, that is, it may be made dependent on conditions. Accordingly they lay down special rules for cases of this class. These may be stated thus:

(1) That where the delegation is unconditional and the woman is present in the *majlis*, the delegated authority must be accepted and exercised then and there or as the Muhammadan lawyers call it, 'in the *majlis*' as in ordinary cases of *tamleek*.

(2) That unlike ordinary *tamleeks* acceptance in the *majlis* is not essential, so that if the woman is absent, she may accept the delegation in the *majlis* in which she hears of it and must exercise the authority then and there, unless any time is fixed or she is expressly allowed to exercise the power at any time she chooses.

(3) That there is no power of revocation in such cases.

(4) That the delegation may be contingent or be subject to conditions and in such cases the contingency must have happened and the condition must have been fulfilled before the delegated authority could be exercised. This is unlike *tamleek* which, when coupled with any condition, either the condition becomes void or it vitiates the transaction. In cases of conditional or contingent delegation, the power must be exercised as soon as the contingency has happened or if the fulfilment of the condition is not in the immediate power of the wife, when the condition is fulfilled unless, as in the case of conditional delegation, words are used to indicate that the power is to be exercised within a particular period or at any time the wife chooses.

The following passages translated from text books on Muhammadan Law amply establish these propositions. The original texts are quoted* in the appendix to this judgment.

(1) It is stated in the *Zakhira* that this *tamleek* (i.e., delegation of the right of divorce) is different from other *tamleeks*, inasmuch as it continues after the *majlis* when the woman is absent and is not dependent on acceptance. It is, therefore, clear that this kind of *tamleek* does not require

* Not quoted in this report.—Ed.

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the acceptance on which the validity of other *tamleeks* depends, because it is a *tamleek* which ends alone with the person giving it without an acceptance and is not capable of being revoked—*Fat-hul-Qadeer*, a commentary on the *Hedaya* by Shaikh-ul-Islam Ibn-i-Hamam, Volume III, page 411, Calcutta Edition.

(2) The woman is authorised (to exercise the power of divorce that may be delegated to her) in the *majlis* in which she comes to know of the delegation either by being present when the delegation is made or (if absent) when she hears of it. But if she allows one or more days to pass, she is not entitled to exercise the authority after the *majlis* except where the husband adds, to the expression 'divorce yourself' or similar expressions, words such as 'when you desire' or 'whenever you desire', in which case the exercise of the authority will not be confined to the *majlis* and the husband has no right to revoke the authority given—*Dar-rul-Mukhtar*, Book 2, pages 475, 476, Egyptian Edition.

(3) The use of the words 'when' or 'whenever' embraces all times as if the man had said 'at any time you desire' and the delegation is not confined to the *majlis*—*Rad-dul-Mukhtar*, Volume II, page 437, Egyptian Edition.

(4) A delegation is confined to the *majlis* but where words 'when you choose' are added, the woman is authorised to divorce either in the *majlis* or after it.—*Bah-rur-Raiq*, Volume III, page 354, Egyptian Edition. (Exactly the same language is used in *Hedaya*, Egyptian Edition, page 435).

(5) If a man says to his wife your business is in your hand when or whenever you desire, it is open to her to divorce herself at once in the *majlis* or outside it at any time she desires—*Fatawa-i-Alamgiri*, Volume I, page 562, Calcutta Edition.

(6) A man left the business of his wife in her hand on this condition that when he beat her without fault, she could divorce herself whenever she wished. Then she went out of the house without her husband's permission. The husband then beat her. Would her business be in her hand? It is said it would not be in her hand if her prompt dower has been paid but if it is not paid, it is open to her to

go to her father's house without his permission or to refuse her person to him for the realisation of her prompt dower. In that case her going out of the house will not be a fault (and the beating being without fault she would have the right to divorce herself)—*Alamgiri*, Volume I, page Calcutta Edition.

In this case there was a clear delegation of the right of divorce which the defendant was expressly allowed to exercise 'whenever she chose.' She has exercised that power and thus has put an end to the marital relation between her and her husband. The suit for restitution of conjugal rights cannot, therefore, lie and has been rightly dismissed. The appeal fails and is dismissed with costs.

FLETCHER, J.—I agree.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL No 25B OF 1917,
April 10, 1918.

Present:—Mr. Kotwal, A. J. C.

LAXMINARAYAN—DECREE-HOLDER—
APPELLANT
versus

Musammat PURNABAI—PURCHASER, AND
Musammat JAWAHAR BAI WIDOW OF
—MUKUNDRAM—JUDGMENT-DEBTOR—
NON-APPLICANTS.

Civil Procedure Code (Act V of 1908), O. XXI, rr. 54 (2), 67, 68, 90—Execution of decree—Sale—Proclamation, formalities, necessary for—Omission to comply with necessary formalities, effect of.

A copy of the proclamation of sale must, under rule 67 read with rule 54 (2) of Order XXI of the Civil Procedure Code, be affixed upon a conspicuous part of the Court house, and under rule 68 of the Order the sale must take place after the expiration of at least 30 days from the day on which the copy of the proclamation is so affixed. An omission to comply with any of those formalities is a material irregularity in the publication of the sale within the meaning of Order XXI, rule 90, of the Civil Procedure Code and vitiates the sale. [p. 612, col. 1.]

Appeal against the order of the 2nd Additional Divisional Judge, Amraoti, dated the 25th June 1917, in Execution Case No. 23 of 1909.

KHETTRA MOHAN SINGH v. SHIB DAS CHANDER.

Messrs. K. V. Desker and S. K. Duram,
for the Appellant.

Mr. M. V. Joshee, for Respondent No. 1.

JUDGMENT.—The appellant is the assignee of a decree for sale passed on foot of a mortgage in favour of one Sadasukh Jankidas. A house, the subject of the mortgage, was ordered to be sold on the 29th March 1917. The appellant, who has been substituted as the decree-holder, bid at the sale, and the house was knocked down in his favour for Rs. 6,000. As he did not deposit the 25 per cent. of the price of the sale, the sale Amin put up the house for sale again, but there was no bid. On the executing Court receiving the sale Amin's report, it ordered a fresh sale proclamation to issue and a fresh sale to be held on the 14th May 1917. On this date the house was knocked down to the respondent for a sum of Rs. 650. The appellant applied to the executing Court to set aside the sale but the application was summarily dismissed. An appeal has now been filed to this Court by him.

On looking through the record I find that there was a material irregularity in the publication of the sale. A copy of the proclamation of sale must, under Order XXI, rule 67, read with rule 54 (2), be affixed upon a conspicuous part of the Court house, and under rule 68 the sale must take place only after the expiration of at least 30 days, from the day on which the copy of the proclamation has been affixed on the Court house of the Judge ordering the sale. The proclamation announcing the 2nd sale bears an endorsement, dated 14th May 1917, that a copy of it is affixed to the board. I take this *prima facie* to mean that it was affixed on that day. The house was sold on the 1st occasion for Rs. 6,000 and is said to fetch a rent of Rs. 80 per month. Its sale for Rs. 650 only on the second occasion cannot but be said to have resulted in a substantial injury to the decree-holder. I set aside the 2nd sale of the 14th May 1917 in favour of the respondent Purnabai. The question remains whether the first sale in favour of the decree-holder should be upheld. In view of the fact that the decree-holder took no steps to have the order of the executing Court, dated 5th April 1917, ordering a fresh sale set aside, I do not consider it necessary to

interfere with that order. The result will be that a fresh sale will have to be held after the necessary preliminary formalities. As regards costs the appellant is to blame for not having taken proceedings to have the order of the executing Court, dated 5th April 1917, set aside. I direct that he will pay the costs of the respondent Purnabai throughout, including the costs of the sale certificate and Rs. 15 as Pleador's-fee in this Court. The appeal is allowed to the extent indicated above.

Appeal partly allowed.

CALCUTTA HIGH COURT.

CIVIL RULE No. 312 OF 1918.

July 26, 1918.

Present:—Mr. Justice Teunou and Mr. Justice Cuming.

KHETTRA MOHAN SINGH AND ANOTHER,
—PETITIONERS

versus

SHIB DAS CHANDER—OPPOSITE PARTY.

Provincial Small Causes Courts Act (IX of 1887), s. 23—Return of plaint in suit involving question of title—Court, power of.

Under section 23 of the Provincial Small Causes Courts Act a Small Cause Court has power to return a plaint, to be presented in the Court having jurisdiction to determine the question of title raised in the suit, even though the question is alleged to be *res judicata* by reason of a previous suit between the plaintiff and the lessor of the defendant [p. 613, col. 1.]

Rule against the order of the Court of Small Causes, Sealdah.

Babu Pitaram Banerjee, for the Petitioners.—This Rule was directed against an order passed under section 23 of the Provincial Small Causes Courts Act in a suit for recovery of damages for wrongful use and occupation. The learned Small Cause Court Judge has improperly exercised his jurisdiction in ordering the return of the plaint simply because the defendant raised a question of title. The learned Judge should have considered that the question of title now raised was decided in a former suit between the plaintiff and the person set up by the defendant as his lessor.

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Under section 23 a Court of Small Causes is not debarred from determining a question of title, and if it does try the question it becomes *res judicata*. The learned Judge has looked at the thing from a wrong standpoint. His duty was to see whether the plaintiff had proved his title, but he has not done that. Again, when the defendant set up a title in favour of a third person, the Court should have seen which of the two persons had got a better title. The question whether the plaintiff or the person set up by the defendant has got a better title as his lessor, is also *res judicata* in view of the previous case between them in which the question of title was decided in plaintiff's favour.

Refers to *Gopi Nath Chobey v. Bhugwat Pershal* (1), *Ran Bahadoor Singh v. Lucho Koer* (2)

No one appeared for the Opposite Party.

JUDGMENT.—This is an application under section 25 of the Provincial Small Causes Courts Act. It is directed against an order by which, proceeding under section 23 of that Act, the Judge of the Court of Small Causes has returned the plaint to be presented to a Court having jurisdiction to determine the question of title raised in the suit. That the right of the plaintiffs in the suit in question did depend upon proof of plaintiffs' title to immoveable property cannot be disputed, and we see no ground for thinking that in returning the plaint the Judge of the Court of Small Causes has improperly exercised the discretion vested in him under section 23 of the Act. It has been suggested that the question of title is in fact *res judicata* by reason of a suit brought in the preceding year between the present plaintiffs and the lessor of the present defendant. But for the reasons given by the Subordinate Judge and also by reason of the fact that the Court of Small Causes cannot finally determine a question of title, we cannot accede to that contention. This Rule is accordingly discharged.

Rule discharged.

(1) 10 C. 697; 5 Ind. Dec. (N. S.) 468.

(2) 6 C. 406; 7 C. L. R. 251; 3 Ind. Dec. (N. S.) 265.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 588 OF 1917.

July 18, 1918.

Present:—Mr. Justice Roe and Mr. Justice Courts.

Thakur DEBENDRO NATH SAH DEO—
APPELLANT

versus

—DEO NANDAN SINGH—RESPONDENT.

Impartible property, transfer of, whether subject to right of maintenance of younger members—Custom, proof of.

Where it is alleged that a transfer of impartible property is subject to the right of maintenance of the younger members of the family of the transferor, the allegation must be supported by proof of a custom to that effect existent in the family. [p. 614, col. 1.]

Appeal from a decision of the Subordinate Judge, Ranchi, dated the 12th February 1917, modifying that of the Munsif, Gamla, dated the 15th December 1915.

Mr. Amir Hasan for Mr. Mohammed Fakhr-uddin, for the Appellant.

Rai Gurusaran Prosad, for the Respondent.

JUDGMENT.—The appellant in this case was a purchaser of an impartible estate situated in Chota Nagpur, the respondent being one of the younger brothers of the transferor. The suit by the respondent was for the recovery of a 1/3rd share of the property transferred. The learned Munsif dismissed his suit. The learned Subordinate Judge, on the ground that the respondent was entitled to maintenance out of the property alienated, held that in equity the respondent was entitled to a decree for a share in the property in lieu of the maintenance that he had lost by the transfer, and in this view of the case gave a decree for a 1/4th share of the property transferred. Against that decision there is an appeal and a cross-appeal.

In our view the appeal must succeed. The authority quoted by the learned Subordinate Judge [*Durgadut Singh v. Rameshwar Singh* (1)] cannot be interpreted in the way suggested by him, and indeed it was interpreted in a directly contrary fashion in the Munsif's Court. Where there has already been a grant made for maintenance

(1) 4 Ind. Cas. 2; 36 C. 943; 13 C. W. N. 1013; 6 M. L. T. 68; 19 M. L. J. 567; 10 C. L. J. 223; 6 A. L. J. 847; 11 Bom. L. B. 901; 36 I. A. 176 (P. C.).

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from impartible property, we may concede that the transfer of the property would not destroy the grant made, but where it is alleged that the transfer of such impartible property is subject to the right of maintenance, that is in the younger members of the family, that suggestion must be supported by proof of a custom existent in the family. It is brought to our notice that there are still other properties left with the head of the family. It will be open to the plaintiff to institute any suit against his own family for suitable maintenance. The appeal must be decreed, and the cross-appeal dismissed, and the plaintiff's suit dismissed in all Courts with costs.

Appeal decreed.

CALCUTTA HIGH COURT.

CIVIL RULE No. 349 OF 1918.

August 19, 1918.

Present:—Mr. Justice Fletcher and Mr. Justice Walmesley.

**BIBHUTI BHUSAN CHAKRAVARTY
AND OTHERS—PETITIONERS**

versus

UMESH CHANDRA MUKHERJEE—

OPPOSITE PARTY.

*Civil Procedure Code (Act V of 1908), s. 115—
Revision—Question of law—High Court, power of
interference of.*

A High Court cannot interfere under the terms of section 115, Code of Civil Procedure, with a decision at the instance of persons who complain of the decision on a point of law. [p. 614, col. 2.]

Rule against the decision of the District Judge, Bankura.

Babus Shib Chander Palit and Jadunath Mondal, for the Petitioners.

Babus Bepin Behari Ghose (II) and Bejoy Kumar Chatterjee, for the Opposite Party.

JUDGMENT.

FLETCHER, J.—This is an application made by the decree-holders who purchased certain property in execution, asking the Court to set aside an order made by the District

Judge affirming the decision of the Munsif. The District Judge has found that the applicants obtained by fraudulent suppression of sale-notices a property of considerable value for an inadequate price of Rs. 49 only. The decree-holders, being aggrieved by the judgment of the District Judge, have applied to this Court to have the order set aside. The first question that arises is this: Had the opposite party an interest entitling him to come to Court under the provisions of Order XXI, rule 90, Code of Civil Procedure. The opposite party had a mortgage—a mortgage securing the payment of paddy—and apparently there were endorsements on the deed. The learned Judge held that the opposite party had an interest. It is quite true that the learned Judge departed from the duties of a Judge when he stated that the mortgagors were morally bound to pay off the debt. But notwithstanding that, he in his capacity as a Judge adjudicated on the rights of the parties and held that the opposite party had a subsisting interest on the terms of the mortgage. That is a pure question of law. Whether or not the opposite party has under the terms of the mortgage an interest in the property is a matter on which, as far as I can see, the Judges of this Court are not all agreed as to what is the nature of the mortgage and what is the article of the Indian Limitation Act that applies to the case. But this is a question of law and it is quite clear that the Court will not and cannot interfere under the terms of section 115, Code of Civil Procedure, at the instance of the persons who complain of the learned Judge's decision on a point of law.

The next point that has been seriously pressed by Mr. Palit on behalf of the petitioners is as regards the finding of the learned Judge with reference to the applications to set aside the sale, having regard to the facts of the case, being within the time allowed to make such an application. It is quite true that if one takes that as the first part of the judgment and alone, the finding is not sufficient. Of course, it would have been much better if the finding had been given in clear and conclusive terms in an earlier part of the judgment. But what the learned Judge meant to say is quite clear. If one reads the next

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part of his judgment which is not dealing with the question of limitation, and takes the findings made therein coupled with the earlier portion of the judgment, it is quite clear that the learned Judge meant to find facts on which he could come to the conclusion that the application to set aside the sale was within time. I think in this case no ground has been shown to us to interfere with the decision of the learned District Judge. The present Rule, therefore, fails and is discharged with costs, one gold mohur.

WALMSLEY, J.—I agree.

Rule discharged.

MADRAS HIGH COURT.
SECOND CIVIL APPEALS NOS. 1307 TO 1357,
1359 TO 1367, 1369 AND 1370 OF 1916.
October 31, 1917.

Present :—Mr. Justice Seshagiri Aiyar
and Mr. Justice Napier.

KAMULAMMAL AVERGAL, ZEMIN-
DARINI OF BODINAICKANUR—
PLAINTIFF—APPELLANT

versus

ATHIKARI SANGALI SUBBA PILLAI
AND OTHERS—DEFENDANTS—
RESPONDENTS.

Madras Estates Land Act (I of 1908), ss. 6 (2), 23, 45, 163—Landlord and tenant—Rent, right to recover, from persons not regular tenants—Jurisdiction of Revenue Courts—Grant of land for cultivation without fixity of property or tenure, validity of—Indefiniteness—Kandetha poruppuguthagai, payment of—Status of person paying—Permanent tenure, grant of, whether binding on grantor or his successor—Evidence Act (I of 1872), ss. 64, 65—Copy of document exhibited by consent of parties—Appellate Court, power of, to reject copy.

Under the provisions of sections 45 and 163 of the Madras Estates Land Act read with the Explanation to section 6, clause (2) of the Act, a claim for rent against persons within an estate who occupy ryoti land, either by legal right or otherwise, must be instituted in the Revenue Court. [p. 618, col. 2.]

A grant allowing the grantees to cultivate whatever and whenever they like is not a grant with any fixity of property or of tenure, which the law will recognize as conferring a heritable right. [p. 619, col. 1.]

Except under the provisions of the Madras Estates Land Act, a permanent settlement of rent by a landlord is not binding on his successors. The burden is on the grantee to show that there is a grant of the kind mentioned in section 26 of the Act. [p. 619, col. 2.]

Where a copy of a document is exhibited in the trial Court with the consent of both parties, the Appellate Court has no jurisdiction to reject it on the ground that the original has not been produced. [p. 617, col. 1.]

Per Seshagiri, Aiyar J.—Where the relationship of landlord and tenant is admitted, the mere fact that the tenant has not paid rent for a long number of years will not bar the landlord's right to recover what he considers to be a reasonable rent. [p. 620, col. 1.]

Per Napier, J.—Where there has been a bona fide mistaken belief that a document has been properly proved and where that document is of fundamental importance for the decision of the questions at issue between the parties, the Appellate Court should always give the parties an opportunity of producing proper evidence on the point. [p. 620, cols. 1 & 2.]

Obiter.—A grant on payment of a *kandetha poruppuguthagai*, i.e., by payment of a fixed rent, will not make the grantee a landlord but only a tenant. [p. 621, col. 1.]

Second appeals against the decrees of the District Court, Madura, in Appeal Suits Nos. 444 to 494, 496 to 504, 506 and 507 of 1915, preferred respectively against the decrees of the Court of the Deputy Collector, Usalampatti Division, in Summary Suits Nos. 817 to 827, 829, 831 to 834, 836 to 839, 841 to 844, 846 to 850, 852, 857 to 859, 861 of 1912, 1036 to 1038, 1041, 1042, 1044, 1045, 1047, 1050, 1053, 1054, 1056, 1057, 1060, 1062, 1063, 1064, 1066, 1067, 1069, 1072, 1073, 1074, 1077, 1081, 1086, 1089 and 1090 of 1913.

Messrs. K. V. Krishnaswamy Ayyar and K. V. Seshu Ayyangar, for the Appellant.

Mr. S. Panchapagesa Sastri, for Mr. K. S. Jayarama Ayyar, for the Respondents.

JUDGMENT.

SESHAGIRI AIYAR, J.—The same point arises in all these second appeals. Second Appeals Nos. 1307 to 1340 arise out of suits by the landlord for rent in the Revenue Court. Second Appeals Nos. 1341 to 1370 are from suits by tenants against the landlord to set aside revenue sales. The first group of cases relates to the rent of Fasli 1318. The second group of cases relates to the sales for the rent due for Fasli 1321. The landlord is the Zemindarini of Bodinaickanur. The tenants are known as Mannadies and reside in the village of Agamalai within the Zemindari. The plaintiff, by which expression I refer to the landlord throughout

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this judgment, sued for rent, on the ground that Agamalai is within her Zemindari, that she is the landlord and that defendants are her tenants. The plea of the Mannadies is that the plaintiff is not their landlord, that from time immemorial, they have been paying a Bil Mukta amount of Rs. 50 a year known as Poruppuguthagai, that the said payment was not made by them in the capacity of tenants, that, consequently, this suit brought in the Revenue Court does not lie and also that the claim for rent is barred by limitation.

The Deputy Collector found against most of the contentions of the defendants, but he held that the suit was barred by limitation, that the defendants were not tenants and that consequently the plaint should be returned for presentation to the Civil Court. The judgment was practically confirmed in appeal by the District Judge. Some of the points raised by the tenants are not supported by any document filed in the case. The Courts below have drawn largely from the District Manual of Madura compiled by Mr. J. H. Nelson in arriving at their conclusions. Even this compilation does not help us in finding a solution for many points of antiquarian interest which have been raised by the defendants.

Before considering the points argued before us, I may state that we have been assisted a great deal in our task by the well-arranged and clearly thought out judgment of the Deputy Collector. The points which have to be considered in deciding whether the Revenue Court or the Civil Court has jurisdiction are these:— (a) Whether the village in which the properties in question are situated is part of an estate; (b) whether the plaintiff is a landlord; (c) whether the lands, in respect of which rent is claimed, is a *ryoti* land; (d) whether the defendants are tenants; (e) and, lastly, what is the amount of rent payable in respect of the holdings of each of the defendants?

As regards the 1st question, the Deputy Collector was of opinion that Agamalai is part of the Bodinaikkanur estate. The District Judge has differed from him, mainly on the ground that the Sannad relating to Bodinaikkanur has not been exhibited in the case. The original of the Sannad-un-

doubtedly was not filed. But, it is clear that both parties agreed that a copy of it printed in a Privy Council record may be exhibited in the place of the original. The District Judge says that the Sannad was not mentioned as an exhibit in the list of documents in the lower Court's judgment. His opinion was that the Deputy Collector, without exhibiting the document, perused it and used it irregularly in arriving at a conclusion on the question whether Agamalai was within the Bodinaikkanur Zemindari. The learned District Judge is clearly under misapprehension on this question. What happened was that the printed book was put in before the Deputy Collector. He marked that portion of it relating to the Sannad as Exhibit 62 and put his initials thereunder. Apparently the printed copy was returned to the party without getting a certified copy filed under Order XIV, rule 9 of the Code of Civil Procedure. This is undoubtedly an irregularity which has apparently misled the District Judge. But there is no ground for saying that the copy of the Sannad was not exhibited before the Deputy Collector. Apparently the District Judge is of opinion that a copy should not have been allowed to be filed. If he thought that the original should be referred to, he should have given the parties an opportunity of producing it, having regard to what took place in the Court below. Before us, the Vakil for the tenants conceded that the copy exhibited is a true copy of the original Sannad. We also find, on referring to the printed book, that this same copy was filed as an exhibit on a previous occasion in the Munsif's Court. We suggested to the Vakil for the respondents that if he desired to have an adjournment in order that the original may be compared with the copy we were willing to grant him time. But the learned Vakil said that there is no necessity for the original being sent for, the copy having been exhibited with the consent of both the parties it was not open to the District Judge to have rejected the Sannad. The Appellate Court has, no doubt, large powers in rejecting documents on the ground of their not being relevant. But on the question whether the original should have been produced and whether the lower Court was justified in putting on the file a copy,

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I do not think the Appellate Court had any right to reject a document exhibited. The reason of the rule is that if one party objected to the copy going in, the other party could have taken steps to produce the original. As was pointed out by the Judicial Committee in *A. B. Miller, Official Assignee of the Estate of Ramkisher Das v. Babu Madho Das* (1), while the Appellate Court has jurisdiction to reject a document on the ground of its not being relevant, it has no right to object to a document on the ground of insufficiency of proof. This principle was recognised in *Padman v. Hanwanta* (2), *Uppara Hanumanthu v. Peddapalle Samacharlu* (3), *Ohimmai Govind. Godbole v. Dinkar Dhondev Godbole* (4) and *Akbur Ali v. Bhyea Lal Jha* (5). Mr. Justice Benson and Mr. Justice Sundara Aiyar, after reviewing all the authorities on the question, point out in *Sri Rajah Parakasrayanim Garu v. Venkata Rao* (6) "consent or want of objection to the reception of evidence which is irrelevant cannot make the evidence relevant. But consent or want of objection to the wrong manner in which relevant evidence should be brought on record of the suit disentitles parties from objecting to such evidence in a Court of Appeal." I entirely agree with this statement of the law and hold that the District Judge was wrong in not having considered the Sannad which was admitted in evidence by the Deputy Collector. On perusing the Sannad, it is clear that Agamalai is one of the villages within the ambit of the Bodinaickanur Zemindari. That was the view taken by the Deputy Collector and I agree with him. Therefore, the first requisite is satisfied, namely, that the suit village is part of an estate.

On the second point it is not easy to follow the tenants' allegations. In their written statement they say that the village originally belonged to the Travancore Government, that during that reign, the Mannadies themselves were landlords and paid a sort of quit rent to the Travancore Government, that after the British Government assumed sovereignty over this part of the country, their rights as landlords continued to subsist, that consequently when the village became a part of the Bodinaickanur Zemindari, the Zemindar could have been assigned only the right of collecting Poruppuguthagai or quit rent which was all along being paid by the Mannadies first to the Travancore Government and then to the British Government. There is nothing in the documentary evidence produced before us to support this contention. The reference in Nelson's District Manual does not support the contention that the defendants were landlords. Even if they had any special rights under the Travancore regime, unless they were recognised or continued by the British Government, they are not entitled to it, *Secretary of State for India v. Bai Rajbai* (7). On the other hand, there are two unimpeachable documents which show that the British Government did not recognise any proprietary rights in the Mannadies. Exhibit N is of the year 1802. It gives a list of the names of the Mannadies as cultivators and regards the Government as landlords. Exhibit N (1) is to the same effect. In both these documents Agamalai is mentioned as being within the Bodinaickanur Palayapat. The Jama-bandhi account Exhibit O (1) gives the boundaries of the village and speaks of a Nattamai as the lessee of the village. Apparently the village was not given to the Bodinaickanur Zemindars until the year 1834. In Exhibit BB, which is a statement recorded by the Tahsildar in the course of an enquiry regarding boundary disputes between the Zemin village of Agamalai and the neighbouring Government village, it is stated that the

(1) 19 A. 76 at p. 92; 23 I. A. 106; 7 Sar. P. C. J. 73; 9 Ind. Dec. (N. s.) 50 (P. C.).

(2) 29 Ind. Cas. 807; 29 M. L. J. 307; 17 Bom. L. R. 609; 18 M. L. T. 54; 2 L. W. 645; (1915) M. W. N. 500; 22 C. L. J. 172; 19 C. W. N. 929; 13 A. L. J. 801; 93 P. R. 1915; 11 P. L. R. 1916; 110 P. W. R. 1915 (P. C.).

(3) 33 Ind. Cas. 188; (1916) 1 M. W. N. 9.

(4) 11 B. 320; 11 Ind. Jur. 342; 6 Ind. Dec. (N. s.) 209.

(5) 6 C. 666; 7 C. L. R. 497; 3 Shome L. R. 260; 3 Ind. Dec. (N. s.) 432.

(6) 21 Ind. Cas. 319; 33 M. 160; 25 M. L. J. 360; (1913) M. W. N. 800.

(7) 80 Ind. Cas. 303; 39 B. 625; 29 M. L. J. 242; 19 C. W. N. 1087; 23 C. L. J. 1; 13 A. L. J. 953; 17 Bom. L. R. 730; 18 M. L. T. 179; 2 L. W. 731; (1915) M. W. N. 563; 42 I. A. 229 (P. C.).

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village belonged to the Bodinaikanur Zemindari. Apparently by this time the Government had granted the village to the Zemindars.

The next document of importance is Exhibit 6. That is a Takeed from the Collector to the Tahsildar, in which the latter officer is asked to inform the Zemindar "that he himself may collect from the 5th instalment the Teervai due in respect of the aforesaid land belonging to Zemindars and that, for realising the *kist* due for the four instalments from the *ryots* who ploughed his said land, if the Zemindar distrains their property according to law and sends the Yadast to the Huzur, the Commissioner will be ordered to put the same to auction, realise the money and pay it (to the Zemindar)." This was on the 7th March 1836. By this time the Government had completely severed their connection with the village; they had no doubt intended to directly deal with the Mannadies because, as was stated in Nelson's District Manual, the Government wanted to have control over these hill-tracts as they were places of refuge for bandits. The same authority points out that the Collector, Mr. Hurdiz, tried the experiment for one or two years to come to some settlement with the Mannadies and that he ultimately gave up the task and handed over the village to the Zemindars. This is all the evidence available in the case regarding the history of the village. There is practically no evidence on the side of the defendants to substantiate their contention that they were themselves the landlords. There is the unquestioned fact that the Eruvadees have recognised the Bodinaikanur Zemindars as their landlords. There is no reason for supposing that the Mannadies occupied a different position towards the Zemindar from the Eruvadees. I must hold with the Deputy Collector that it has been established that the Bodinaikanur Zemindars are the land-holders.

The third question is as to whether the land is a *ryoti* land. Section 23 of the Estates Land Act enacts that where the question is, whether the land is old waste or *ryoti* land, the presumption is that it is a *ryoti* land. But this is a presumption which can be rebutted. The question as to whether the land in respect of which rent is claimed is *ryoti* land has not been

considered by the Courts below and although there is this presumption in favour of the landlord, I am not prepared to hold at present that these lands are *ryoti* lands. That is a question which will have to be considered by the Court of first instance.

The fourth question is whether the defendants are tenants. Mr. K. V. Krishnaswamy Ayyar argued that, where the lands are within a Zemindari and they are *ryoti* lands if a person is in possession of them, he can be proceeded against in a Revenue Court. Section 163 of the Estates Land Act provides for ejectment of a trespasser by a Civil Court. On the other hand section 45 of the Act enables a land-holder to recover from a person unlawfully in possession of *ryoti* land rent in the Revenue Court. When sections 45 and 163 are read together with the explanation to section 6, clause 2, it is clear that a claim for rent against persons within the estate who occupy *ryoti* land, either by legal right or otherwise, must be instituted in the Revenue Court. Therefore, even if it is found that the defendants are not regular tenants, the jurisdiction of the Revenue Court will not be ousted. But I think that in this case, having regard to the pleadings and to the defence raised by the defendants, there is hardly any room for doubt that the defendants are tenants. We asked the learned Vakil for the respondents to state the exact position he contended for his clients. If we reject the interesting but unfounded theory that the Mannadies were themselves landlords, we have to see what their status is otherwise. It was suggested rather faint-heartedly that they may have been Inamdars. There is not a scrap of paper to support this. Then it was argued that under Exhibit J they acquired a permanent right to be on the land not necessarily as tenants but as having a sort of under-tenure on payment of a favourable quit rent.

Now as regards Exhibit J, a document on which apparently the Deputy Collector and the District Judge have relied, I may at once say that I see no reason for holding that it is not receivable in evidence. It purports to have been written by a clerk of the Collector's Office, and he boldly quotes a statement of a Karnam who in the discharge of his duty compiled a list and

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the descriptive memoir added to the list. It was admitted that, excepting for the heading which says "that this is an account of the village taken from the statement of Chinnayya Asari, Karnam of the village," the rest of it is a verbatim report of the Karnam himself. I think that this is receivable in evidence as being an official record compiled in the course of business, under section 34 of the Evidence Act.

Now, as regards the value and effect of this document the tenants contend that by this document they obtained a right for all time to come to cultivate whatever extent of land they liked and wherever they liked and to pay only Rs. 50 per annum for such cultivation. There is no doubt the language in the document is in their favour. I may at once say that I do not agree with the contention of the learned Vakil for the appellant that this right must be confined to certain particular forest tracts and not to the cultivable portion of the village. This construction would do violence to the language of the document. The real question is, whether such a comprehensive grant can convey any heritable right to the grantees. It is to be remembered that we have not any written grant. The Karnam purports to embody in this statement an oral promise said to have been made to the tenants by the Zemindar. As the grant is vague, there is no fixity of property nor fixity of tenure. That such a grant cannot confer a heritable right was laid down in *Bhaskarappa v. Collector of North Kanara* (8). Mr. Justice West points out at page 584: "Even in the case of a grant of a definite quantity of land, but of undefined locality, the two eminent lawyers Yorke and Talbot, both afterwards Lord Chancellors, said: 'We are of opinion that, in regard to the place where the said lands lie is not described, nor any method provided by which the same may be ascertained, such grant..... is by reason of the uncertainty thereof absolutely void in law.'" Again he says: "As there must be certainty in a grant as to the area conferred, so must there be certainty as to the area, or at least as to the identity of

the object occupied, if the occupation is to raise the presumption of a grant of acquiescence in definite occupation: *talis enim præsumitur titulus processisse qualis apparet usus et possessio.*" In the present case there is no ascertained locality; and an indefinite promise to allow the Mannadies to cultivate wherever and whatever they liked is not a grant which the law will recognise as conferring a heritable right. I must, therefore, hold that Exhibit J did not confer a perpetual tenure in favour of the tenants. There is a further difficulty in this case and that is that, even supposing that the grant was capable of conferring a permanent right, it is not available against the successors of the Zemindar who granted it. It was conceded that the original grantee is dead and that there have been three generations since his time. Section 26 of the Estates Land Act provides that except in the case of grants made by a Zemindar to enable the grantee to clear the jungle and to bring the waste land into cultivation, a permanent settlement of rent by a predecessor is not binding upon the successors. I do not want to say that it is not open to the defendants to show that the grant was made for the purpose mentioned in clause 1 of section 26, but the burden is on them to show that there was a grant of that nature and that it is binding upon the present Zemindarini. But it is unnecessary for the landlord to invoke the aid of section 26, as I have held that Exhibit J did not confer a fixed tenure.

It was argued before us that even though defendants may be tenants, they are not liable to pay anything more than Rs. 50 agreed to under Exhibit J. It was suggested in this Court that the defendants have acquired a limited prescriptive right to continue to hold the lands in their holding by paying an amount considerably less than what otherwise is being demanded in the present suits. There can be no question that until the present suits were brought the tenants have not been asked to pay anything like the amount now claimed against them. It may be that by long payment they have acquired a right to continue that payment, as argued in this Court. But that would not oust the jurisdiction of the Revenue Court, I express no opinion on

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the amount of rent payable by the tenants or on the question of prescription raised.

My conclusion is that the Revenue Court has jurisdiction to hear and determine these suits. I must, therefore, reverse the decrees of the Court below and remit the case to the Court of first instance to determine whether the land in respect of which rent is claimed is *ryoti* land, and what is the amount of rent payable by each of the tenants in respect of the lands in his possession.

It was rightly conceded before us that, if these defendants are tenants, the mere fact that for a long number of years they have not paid any rent, will not bar the right of the landlord to recover what he considers to be reasonable rent. Really no question of limitation can arise under the circumstances, excepting it be in respect of the particular sums claimed in the suits.

The costs hitherto incurred will be provided in the revised decree.

In disposing of the cases the right said to have been conceded in the Courts below and recorded in paragraph 41 of the Deputy Collector's judgment, will have to be borne in mind. As regards the Vakil's fee in this Court, we award Rs. 500 and direct that it be distributed, if costs are awarded against them or in their favour, among the tenants. The costs of printing will be similarly distributed.

NAPIER, J.—I agree. The District Judge was undoubtedly in error in supposing that the copy of the Sannad had not been properly exhibited in the case. I am satisfied that, by consent of parties, the printed copy was put on the file instead of the original. It is not suggested to us that it is not a correct copy, and indeed it must be so, being a print made for the purpose of an appeal to the Privy Council. Even if the District Judge had been right, he should not, in my opinion, have dealt with the case without giving the plaintiff an opportunity of producing the original Sannad. Where there has been a *bona fide* mistaken belief that a document has been properly proved and where that document is of fundamental importance for the decision of the question at issue between the parties, an Appellate Court should always give the

party an opportunity of producing the proper evidence. The District Judge has, however, considered the case on the assumption that the copy is a true one, and has decided that, although the village in question is within the ambit of the Zemindari, the Zemindar is not a land-holder in respect of it within the meaning of section 3(5) of the Estates Land Act and that the defendants who hold possession are not *ryots* within the meaning of sub-section 15 of the same section. He has accepted the theory of original tenure of this village and of its dealings by the British Government which, I think, is not supported by the evidence. He considers it proved that this village was not originally a part of the Zemindari but belonged to the defendants' ancestors and that, therefore, the inclusion of it in the terms of the Sannad could not affect their vested rights. During the argument on appeal the claim of the defendants was put in two ways, one on the lines of the judgment of the District Court and the other on the theory of a perpetual grant from the Zemindar. I agree with my learned brother that neither of these contentions has been made out. There is nothing, in my opinion, in the information gathered from the District Manual of Madura to support this theory of an original grant to the defendants; and whatever may have been their rights under the previous Government, there can be no question that, at the time of the cession, Government dealt with this village as being at its own disposal unfettered by any previous grants. It appears from the District Manual that the Collector recommended the retention of this village in the hands of Government for the time being, as it was situated in the hills and was occupied by lawless persons who required close observation. This proposal was accepted by the Board of Revenue, who agreed with the Collector that the hill villages must be kept under Sarkar management. In pursuance of this policy the Collector fixed the rent payable for the village at 47.5 Pans by Jamabandi in 1802, but no period is mentioned in the document Exhibit O evidencing this transaction and it is obviously a settlement for one year only. It is clear that this temporary arrangement continued for a number of years but was subsequently put an end to,

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Exhibit VI, dated the 7th March 1836, is an entry in the book containing the orders of the Collector of the Madura District. It is an instruction to the Tahsildar to inform the Zemindar that he might collect Teervai from certain lands in the Agamalai village as those lands were comprised in his Agamalai village and not in the adjacent Tenkarai Government village. It recites that there had been a dispute between the Bodinaikanur Zemindar and the Government with regard to the boundary between the two villages, which dispute had terminated in favour of the Zemindar. And we have in Exhibit BB the evidence of a witness called during that boundary dispute to prove the true boundary between the villages. It appears in the form of an Attakshi given on the 1st September 1834, and the witness deposed that the land in question was in the village of Agamalai attached to the Bodinaikanur Zemindari. There can be no doubt, therefore, that some time before 1834 the Government had decided no longer to retain possession of this village but had granted it to the Bodinaikanur Zemindar. This grant was subsequently made permanent by the Sannad of 1880. I am constrained, therefore, to differ from the District Judge in his conclusion on this point.

The next line of argument is that there had been a perpetual grant of the ownership of the village to the *ryots* proved by the statement of the Karnam in Exhibit J. I agree with my learned brother that this document is receivable in evidence under section 34 of the Evidence Act. The statement is as follows: "Coming to know that the other *ryots* were not able to pay Porupuguthagai, the Kandetha Porupuguthagai was fixed for all time at Rs. 50 per annum, as per the oral orders of the late Zemindar in Fasli 61 (1852), whatever be the extent of land cultivated and wherever be the place cultivated by these *ryots*, and the said *ryots* had to pay the same in the Zemindar's Cutcherry and it was not included in the village Jamabandi. No documents have been secured in writing regarding the said lease." The contention for the defendants is that they thereby became the land-holders, they were not tenants within the meaning of clause 15, section 3. With regard to the argument that they were the

land-holders by virtue of being "persons owning an estate or part thereof," I agree with my learned brother that this statement by the Karnam does not prove a grant of title to defendants' ancestors. The village is a forest tract and the cultivation is Kumati. All that the Zemindar purported to do was to permit the *ryots* to cultivate in this peculiar manner such land as they required at a fixed rent of Rs. 50. It is admitted that in the same area there are and have been for a great many years, a number of tenants not descendants of the original *ryots* who are known as Erewadees, and a number of grants on Darkhast to such persons by the manager of the Zemindari during the minority of one of the Zemindars have been put in (*vide* Exhibit VII series), and there is a mass of other evidence showing the same thing which is not disputed in this case. The existence of these other tenants made it impossible to hold that the Zemindar ever purported to make a grant of ownership of any definite portion of the tract. It is clear, therefore, that the defendants are not land-holders. They contend that they are not tenants, as it is not shown that they hold for the purpose of agriculture *ryoti* land in an estate on condition of paying rent to the land-holder. It is not necessary at this stage to decide the questions raised on this point. Land in a Zemindari which is not excepted under clauses (a), (b) and (c) of sub-section 16 of section 3 is *ryoti* land, and section 23 raises a presumption in favour of the Zemindari. That question is one which will have to be decided. If it is found that the land in question is *ryoti* land it will, in my opinion, be difficult for the defendants to make out that they are not *ryots*. The contention has been raised before us that their liability being limited to pay Rs. 50 a year, that is not rent within the meaning of the Act because it cannot be increased. During the argument I asked for any authority for this proposition or for any case in which it had been held that persons holding under a Zemindar in this manner, who were not land-holders themselves within the meaning of section 3 (5), were still not *ryots* within the meaning of sub-section 15, and no such authority was brought to my notice. It is quite open to question whether the right to cultivate

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as much land as they required at a fixed rental of Rs. 50 is still binding on the estate. It may be that the defendants can show that under the provisions of section 26, clause (1), they are entitled to pay only this fixed rent, but it rests on them to show this, if such rent is found to be lower than the rent payable upon land of similar description in the neighbourhood [vide section 26 (3)].

In the result I agree with my learned brother in reversing the decrees of the lower Appellate Court and remitting the cases to the Court of first instance to determine whether the land is *ryoti* land and what is the amount of rent payable by each of the tenants in respect of the lands in his possession.

M.C.P.

*Appeals allowed;
Cases remitted.*

CALCUTTA HIGH COURT.

ORDINARY ORIGINAL CIVIL JURISDICTION.

SUIT No. 980 OF 1917.

May 21, 1918.

Present:—Mr. Justice Greaves.

E. D. MURRAY—PLAINTIFF

versus

EAST BENGAL MAHAJAN FLOTILLA
Co., LTD.—DEFENDANTS.

Civil Procedure Code (Act V of 1908), O. XXV—Security for costs—Insolvent, undischarged, suit by—Cause of action accruing after adjudication—Security, whether can be demanded—Principles applicable?

An undischarged insolvent suing to recover a sum due to him from the defendant and earned by him subsequent to the adjudication cannot be compelled to give security for costs merely because he is an insolvent, unless he is a nominal plaintiff acting on behalf of the trustee or for the benefit of others. [p. 622, col. 1.]

An application for an order that the plaintiff, who is an undischarged insolvent, be directed to give security for costs of the suit is not covered by any provision of the Civil Procedure Code and should be dealt with under the general law. [p. 622, col. 2.]

It is well settled in English Law that a bankrupt is the proper plaintiff to sue in respect of property acquired by him after adjudication and that anything recovered by him remains in the bankrupt until the trustee intervenes, and the same principles are applicable in this country under the Presidency Towns Insolvency Act. [p. 622, col. 2; 623, col. 1.]

Mr. Hyam, for the Plaintiff.

Mr. N. Sincar (with him Mr. S. O. Bose), for the Defendants.

JUDGMENT.—This is an application by the defendant Company for an order that the plaintiff be directed to give security for the costs of the suit. The plaintiff is an undischarged insolvent and he is suing to recover from the defendant Company a sum of Rs. 33,731 for brokerage, said to have been earned by him subsequent to his adjudication. The total liabilities of the insolvent are said to amount, according to his schedule of affairs, to Rs. 11,604. In reply to an enquiry addressed by the defendant Company to the Official Assignee on the 22nd January 1918 as to whether he claimed any interest in the suit and if it had been instituted with his knowledge or consent, he replied on the 25th January 1918 that the suit would be continued by him; but so far as I am aware, he has not taken any steps with regard to it.

It is admitted that this application is not covered by any provision in the Code of Civil Procedure, but that Code is not exhaustive, and I must deal with it under the general law. It is well settled in English Law that a cause of action which accrues to a bankrupt subsequent to the adjudication in respect of after-acquired property, remains vested in him and does not vest in his Trustee in Bankruptcy and that he is the proper plaintiff to sue in respect thereof, and that anything recovered by him remains in the bankrupt until the Trustee intervenes, see William's Bankruptcy Practice, 11th Edition, pages 242 to 250, and I see no reason to doubt that the same principles are applicable in this country under the Presidency Towns Insolvency Act.

Again, it is well settled in English Law that a plaintiff will not be compelled to give security for costs merely because he is a pauper or a bankrupt, see Chitty's Archbold, Volume I, Part 5, Chapter 33, page 398, quoted with approval by Lindley, L. J., in *Rhodes v. Dawson* (1), and see *Cook v. Whellock* (2), where Vaughan Williams

(1) (1886) 16 Q. B. D. 548 at p. 553; 55 L. J. Q. B. 134; 34 W. R. 240.

(2) (1890) 24 Q. B. D. 658; 59 L. J. Q. B. 329; 62 L. T. 675; 38 W. R. 534.

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J., states at page 659 that a plaintiff suing in respect of a cause of action accruing subsequently to the bankruptcy cannot, simply because he is an undischarged bankrupt, be called upon to give security for costs unless he is acting on behalf of the Trustee and that the order for security as to costs only applies where the plaintiff is a nominal plaintiff suing for the benefit of others, and Lord Esher states at page 662 that if the undischarged bankrupt gets a benefit, he is not a nominal plaintiff, see also *Cowell v. Taylor* (3), and the judgment of Bowen, L. J., at page 38.

I think that the same principles are applicable in this country.

What, therefore, I have got to decide on this application is, whether the plaintiff here is a nominal plaintiff suing only for the benefit of the Official Trustee. I think that he is not. I will assume in favour of the defendant Company that the letter of the Official Assignee of the 25th January 1918 amounts to an intervention by him, so that he will claim up to the sum of Rs. 11,604 any sum recovered by the plaintiff in the suit, but the claim is for Rs. 33,731 and accordingly any sum recovered in excess of Rs. 11,604 remains for the plaintiff's benefit, so that I cannot say that the plaintiff in any event gets no benefit and is a nominal plaintiff. In certain events he gets a substantial benefit and on this ground I dismiss the application with costs.

Application dismissed.

(3) (1886) 31 Ch. D. 34; 55 L. J. Ch. 92; 53 L. T. 483; 34 W. R. 24.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 566 OF 1917.

August 31, 1918.

Present:—Mr. Batten, A. J. C.

NAGO AND OTHERS—DEFENDANTS—

APPELLANTS

versus

PAIKU—PLAINTIFF—RESPONDENT.

C. P. Tenancy Act (XI of 1898), s. 35 (4)—

Surrender, implied, doctrine of, applicability of—Occupancy tenancy, alienation of, by female holder—Necessity, want of—Alienee, possession of, whether adverse to reversioner.

The doctrine of implied surrender contained in section 35 (4) of the Central Provinces Tenancy Act is intended to apply to normal circumstances where the landlord or the person put in by him holds adversely to the tenant. Where, however, a female holder alienates an occupancy tenancy and the alienation is not for legal necessity, the alienee does not begin to hold adversely to the ultimate reversioner until the death of the female holder, and the doctrine of implied surrender has no application to such a case. [p. 624, col. 1.]

Appeal against the decree of the Additional District Judge, Wardha, in Civil Appeal No. 141 of 1917, dated the 26th September 1917, arising out of the Civil Suit No. 27 of 1917, decided by the Sub-Judge No. 3, Wardha, on the 25th July 1917.

JUDGMENT.—The holding to which the appeal relates was the occupancy holding of Raghoba. He died on the 27th August 1893, leaving a widow Lakshmi and a daughter Tulsi by another wife, Jai. Jai kept Lakshmi out of possession, and Lakshmi recovered possession by a decree, dated 29th March 1894.

On 5th October 1894 Lakshmi transferred the holding to Nama, the 1st defendant-appellant's father, who was Raghoba's sister's son. The transfer was with the Malguzar's consent. The plaintiff-respondent Paiku is Tulsi's son, and sued for possession about 5 months after Lakshmi's death. It has been found that the transfer to Nama was not for legal necessity. After the transfer Nama and his adopted son, the appellant, have been in continuous possession, the landlord has accepted them as tenants and received rent from them and at Settlement they have been recorded as occupancy tenants. The defendants pleaded, among other things, that in the circumstances there was an implied surrender by Lakshmi under section 35 (4) of the Tenancy Act. The learned Additional District Judge has held, following *Vithu v. Mendri* (1), that the suit is maintainable and that the doctrine of implied surrender does not apply to the case. The suit in *Vithu v. Mendri* (1) was for a declaration during the lifetime of the female holder, but the principles enunciated are applicable

(1) 4 Ind. Cas. 702; 5 N. L. R. 172.

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to a suit brought by the reversioner after the death of the female holder.

The learned Advocate for the appellants relies on implied surrender, and points out that the question of implied surrender was not raised in *Vithu v. Mendri* (1); and he seeks to distinguish the present case on that ground. I have looked into the records of *Vithu v. Mendri* (1) and find that though the question of implied surrender was not put in issue, the transferee from the limited female holder had been accepted by the landlord as tenant. It is difficult to believe that the learned Judicial Commissioner entirely overlooked the rule of implied surrender and would not have taken it into consideration, if he had considered it applicable. The circumstances of the two cases are identical. Both the suits are governed by the Tenancy Act of 1883, under which a transfer was voidable by the landlord unless it was consented to by him. It is argued that the 1st appellant has become a tenant as he was put in possession by the landlord, and, therefore, can plead implied surrender according to the rulings of this Court, and that there has been constructive surrender by the widow by non-cultivation and by non-payment of rent for over two years. It has been held in *Gunpat v. Trimbak* (2) that a minor's rights are lost by a transfer by his guardian followed by possession by the landlord for over two years with failure to cultivate or to pay rent on the part of the minor tenant, and it is argued that a reversioner is not in a better position than a minor.

This is one of the cases where a difficulty arises in reconciling the Hindu Law with the special provisions of the Tenancy Act. It appears to me, as at present advised, that the doctrine of implied surrender contained in section 35 (4) of the Tenancy Act is intended to apply to normal circumstances where the landlord or the person put in by him holds adversely to the tenant. Where the alienation is not for legal necessity the alienee does not begin to hold adversely to the ultimate reversioner, until the death of the female holder. It is true that Nama was accepted as a tenant by the landlord, but it appears to me that this must be held to have been subject

to the claim of the reversioner on Lakshmi's death. For these reasons I think the Additional District Judge was right in following the case of *Vithu v. Mendri* (1) and I dismiss the appeal with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 1792
OF 1916.

July 16, 1918.

Present:—Mr. Justice Newbould and Mr.
Justice Panton.

DINABANDHU PATRA—DEFENDANT
No. 2—APPELLANT
versus

SANATAN DANDAPAT—PLAINTIFF
AND BIKRAM KAR—DEFENDANT No. 1—
RESPONDENTS.

Evidence Act (I of 1872), s. 71—Mortgage bond signed by attesting witnesses before completion—Execution, proof of.

A statement by the attesting witnesses to a mortgage deed that they signed the blank paper and not the completed deed is sufficient to attract the operation of section 71 of the Evidence Act and entitles the mortgagee to prove execution by evidence other than that of the attesting witnesses. [p. 625, col. 1.]

Appeal against the decree of the Subordinate Judge, 1st Court, Midnapur, dated the 25th of May 1916, modifying that of the Munsif, 3rd Court at that place, dated the 22nd of December 1914.

Babus Amarendra Nath Bose and Karunamoy Bose, for the Appellant.

Babu Satcowripati Roy, for the Respondents.

JUDGMENT.—This appeal arises out of a suit on a mortgage bond. The execution of the bond was admitted by defendant No. 1, the sole executant. Defendant No. 2 is a purchaser of a part of the mortgaged property. He alone contested the suit, his main objection being that the bond was invalid for want of consideration. This point was decided in his favour by the first Court; but that finding has been reversed by the lower Appellate Court and the suit has been decreed against both the defendants.

As regards the issue of payment of consideration, the finding of the lower Appellate Court is final in second appeal, but it is now contended that the suit

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should be dismissed on the ground that there has been no proof of execution of the bond or that it has been attested according to law.

As regards the question of execution, this, it is stated, was admitted in the written statement of defendant No. 1. It also appears to have never been denied by defendant No. 2 and further, the defendant No. 2 in his evidence stated that the bond had been signed in his presence. It cannot, therefore, be held that there was no evidence to support the finding of the lower Appellate Court and, if there was any evidence at all, this finding is final.

As regards the question of attestation, evidence in this case was first given on the side of the defence and the attesting witnesses were examined and they stated that they had signed blank papers and not the completed deed. This statement by these witnesses is sufficient to attract the operation of section 71 of the Evidence Act and enable the plaintiff to prove execution by other evidence than that of the attesting witnesses; and this, it has been held, he has been able to do. It has been found that the deed was attested and this also is a finding of fact. Though there seems to be no direct evidence of attestation, this fact could have been inferred from the signatures of the attesting witnesses on the deed when their story of how those signatures came to be there had been disbelieved.

The appeal fails and is dismissed with costs.

Appeal dismissed.

PATNA HIGH COURT.

FULL BENCH.

APPEAL FROM ORIGINAL DECREE No. 418 OF 1915.

August 2, 1918.

Present:—Sir Dawson Miller, Kt., Chief Justice, Mr. Justice Mullick, Mr. Justice Jwala Prasad, Justice Sir Ali Imam, Kt., and Mr. Justice Thornhill.

August 6, 1918.

Present:—Sir Dawson Miller, Kt., Chief Justice, and Justice Sir Ali Imam, Kt.

UMA SHANKAR PRASAD PARASARI—
PLAINTIFF—APPELLANT

versus

Musammat NAGESWARI KOERI AND

OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Mitakshara School—Succession—

Spiritual benefit, whether test for preference among rival bandhus—Maternal uncle, whether to be preferred to sister's daughter's son—Appeal—Appellate Court, interference by, on finding of fact—Evidence, weighing of.

By THE FULL BENCH.—(Sir Dawson Miller, C. J., and Sir Ali Imam, J., dissenting).—In a family governed by the Mitakshara school of Hindu Law the maternal uncle of the last male owner is preferred to the sister's daughter's son as next heir to the estate. [p. 639, col. 1; p. 656, cols. 1 & 2; p. 662, col. 2.]

Per Mullick, J.—Both the Dayabhaga and the Mitakshara recognize the principles of propinquity of blood and religious efficacy. The only difference is that in the Dayabhaga religious merits arising from the celebration of the Parbana Sradh is accorded greater weight and that in the absence of religious merit accruing from Parbana rights, the ability to benefit the deceased by some other religious ceremony is a sufficient foundation of a title to inherit. The Mitakshara, on the other hand, regards oblations presented by cognate kinsmen as secondary and conferring no claim against the whole body of agnates. The Dayabhaga, admitting that the oblations are secondary as compared with agnates of the same line, insists that the Parbana Pindas conferred by cognates should prevail against agnates of a remoter line. The true view is that nearness of blood determines the heritable right while the doctrine of spiritual efficacy determines the preferential right. [p. 633, col. 1.]

The test of religious and spiritual benefit can and should be applied to determine the preferential right, that is to say, where the principle of affinity by blood relationship does not clearly indicate with which claimant the preference lies. [p. 639, col. 1.]

Per Jwala Prasad, J.—The first and foremost rule of preference among several claimants is that the nearest in degree, ascertained by the simple method of counting given in the Mitakshara, excludes those more remote and when the degree is equal only then other considerations might be resorted to for the purpose of preference among the rival claimants. [p. 645, cols. 1 & 2.]

The rule that the heirs *ex parte paterna* should be preferred to those *ex parte materna* is not to be found in the text relating to Bandhus in the Mitakshara and there is no authority for supplying any omission in that text. [p. 649, col. 1.]

Per Imam, J.—In the Mitakshara religious efficacy is not the determining guide for the purpose of inheritance. [p. 657, col. 2.]

Per Thornhill, J.—As between Bandhus of the same class a rule of preference may be found in the quantity of spiritual benefit which they confer. [p. 662, col. 1.]

By THE DIVISION BENCH. (Sir Dawson Miller, C. J., and Justice Sir Ali Imam).—A Court of Appeal should not readily disturb the findings of fact arrived at by the trial Judge even if it might be inclined to take a different view from reading the evidence, but if the Appellate Court is satisfied beyond all reasonable doubt on considering the evidence that the findings are erroneous, then it ought to interfere. Or again, if the reasons given by the Judge of the lower Court for arriving at his conclusions are such that they

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cannot be supported then the Court of Appeal is clearly entitled to disregard those findings and form its own independent judgment of the facts from the evidence and probabilities of the case. [p. 664, col. 1.]

Appeal from the decision of the Additional Subordinate Judge, Gaya, dated the 16th June 1915.

ORDER OF REFERENCE.

MILLER, C. J., AND IMAM, J. — (May 20th, 1918).—In this case an important question of law is involved as to the succession of Bandhus under the Mitakshara Law and the question for determination is, whether in a family governed by the Mitakshara school of law a sister's daughter's son is to be preferred to the maternal uncle of the last male owner as his heir. Having regard to the importance of the question and the apparent conflict of decisions on the point we think it desirable that the case should be referred to a Full Bench for an expres-

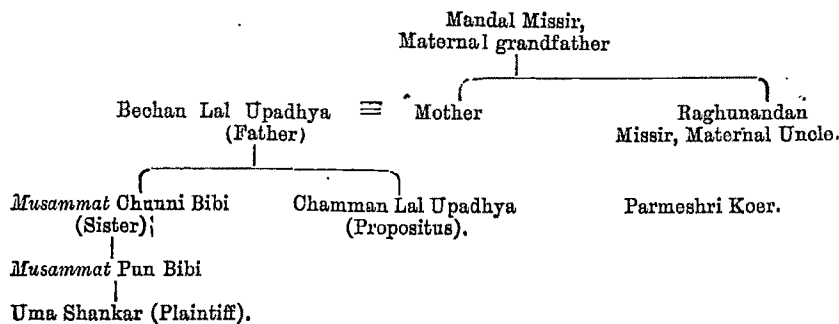
sion of opinion on the point of law involved. A Full Bench will be appointed to consider this question at an early date.

Messrs. *Krishna Sahay, Abani Bhusan Mukherjee and Panchanan Banerjee*, for the Appellant.

Messrs. *Kailaspati and Mrityunjay Lal*, for the Respondents.

JUDGMENT.

MILLER, C. J.—The question for determination in this reference is, whether in a family governed by the Mitakshara school of law the sister's daughter's son or the maternal uncle of the last male owner is to be preferred as next heir to his estate. The pedigree set out below shows the relationship between the parties. The last male owner of the property in suit was Chamman Lal Upadhya.



The persons whose claims to succeed to Chamman Lal's estate have to be considered are (1) the plaintiff Uma Shankar, and (2) Raghunandan Missir. The former is Chamman Lal's sister's daughter's son, the latter is his mother's brother. Chamman Lal died childless in the year 1910 and his widow Musammat Parmeshri Koer succeeded to his estate. She died in 1912 and the plaintiff Uma Shankar claimed to succeed to the estate as nearest Bandu and next heir to Chamman Lal. His claim was opposed by one Ganesh Prasad Panday, a nephew of Parmeshri Koer, Chamman Lal's widow, and by Musammat Nageshri Koer, a sister of the same lady. The nature of their claims is not material to the present issue. They

were based on a transfer and an adoption alleged to have been made by the widow. During the course of the trial, however, it transpired that Raghunandan Missir, the maternal uncle of Chamman Lal, was alive. He had made no claim to the estate, but the learned Additional Subordinate Judge at Gaya who tried the case came to the conclusion that even if the plaintiff could succeed in establishing his case in other respects, the maternal uncle of Chamman Lal would succeed to his nephew's property in priority to the plaintiff whose relationship was that of sister's daughter's son. On appeal to this Court, the question, being considered one of importance in which there was some conflict of authority, was referred to a Full Bench.

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It is contended on behalf of the respondents (defendants) that although under the Mitakshara consanguinity may determine the right to inherit in the first instance, nevertheless as between rival claimants of the same class the efficacy of religious offerings is the determining factor establishing priority. In the present case both the plaintiff and Raghunandan Missir are Atma Bandhus of the propositus. Raghunandan Missir could confer some spiritual benefit on the deceased by his offerings. The plaintiff could confer none. The appellant contends that whatever may be the rule prevailing under the Bengal school, the right to inherit under the Mitakshara as well as the order of succession are determined solely by nearness of blood, subject to certain rules founded on the text itself or based by analogy on the principles to be deduced therefrom and that the efficacy of religious oblations forms no part of the scheme of succession prescribed by the Mitakshara. It is true that under the Mitakshara the nearest agnates who succeed are those who confer the greatest spiritual benefit on the deceased proprietor, but when the more distant agnates are considered it is clear that their claims to inherit in priority to near cognate relations, such as the sister's son whose religious offerings rank much higher than those of distant agnates up to the 14th degree to whom he is postponed, cannot be based on any considerations of religious efficacy. Mr. Mayne, in his well-known treatise on Hindu Law and Usage, says: "The doctrine that heirs are to be placed in the direct order of their spiritual merit was announced for the first time by Jimuta Vahana and has been expanded by his successors," and points out that this necessitated a remodelling of the order of succession in the Bengal system, the cognates being shuffled in amongst the agnates to the exclusion of those mentioned in the Mitakshara and whereas in Bengal the inheritance follows the duty of offering sacrifices, elsewhere the duty follows the inheritance. According to that learned author the cardinal distinction between the two schools of Hindu Law governed by the Dayabhaga and the Dayakrabha Sangraha on the one hand and the Mitakshara on the other is that in the former the order of succession

is based on the efficacy of religious offerings and in the latter on consanguinity. Mr. Mayne goes so far as to say that the Mitakshara in dealing with succession never once alludes to the test of religious merit. There is a passage in the Mitakshara which might appear to conflict with this dictum where the commentator distinguishes between Sapindas and Samanodakas, stating that the former succeed before the latter and that the former offer funeral cakes and the latter only libations of water. This Mr. Mayne explains as merely a way of indicating different degrees of propinquity and not as evidencing different degrees of religious merit, and there is certainly no room for doubt that under the Mitakshara those who confer high religious benefits on the deceased owner are in many cases postponed to those who confer little or none. Sir Ernest Trevelyan, an authority of weight on this subject, when dealing with the difference between the law of inheritance prescribed by the Mitakshara and that of the Bengal school, also says: "In the system of inheritance under the Mitakshara school of law propinquity of relationship is the guiding principle for determining the order of succession." (Hindu Law, 2nd Edition, page 377.) Colebrooke's celebrated paraphrase of the word Sapinda in his translation of the Mitakshara as "connected by funeral oblations" no doubt afforded material for the supposition that Vijnaneswara has in mind the efficacy of religious offerings, and not propinquity, as the criterion determining the order of succession. This translation of the word Sapinda made over a century ago would hardly appear to be justified by reference to other passages in the Mitakshara which have more recently been translated, but its effect has undoubtedly been felt in many of the judgments dealing with questions of inheritance under the Mitakshara Law. That part of the Mitakshara known as the Acharakanda which was not translated by Colebrooke makes it clear beyond doubt that the meaning attributed to the word Sapinda by Vijnaneswara himself was blood relationship. He says: "Sapinda relationship arises between two people through their being connected by particles of one body," and truly enough observes that "the word Sapinda on account of its etymological import (connected by having in common

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particles of one body) would apply to all men", and accordingly restricts its signification as shewn in the text to relations connected by a common ancestor not more than 6 degrees removed from either. It is true this passage does not occur in that part of the text which deals with inheritance, but there is nothing to suggest that the use of the same word in other portions of the commentary was meant to have a different signification. I have stated that Colebrooke's translation has been accepted by learned Judges when dealing with questions of inheritance under the Mitakshara Law, but in such cases it does not appear to have been questioned. In *Omrit Koomaree Dabee v. Luckhee Narain Chuckerbutty* (1) decided in 1868 the question was whether a person could be heir to his maternal uncle as a Bandhu, although not one of those specially named in the text of the Mitakshara. Dwarka Nath Mitter, J., in dealing with Colebrooke's translation of the Mitakshara, Chapter II, section 5, verse 3, made some observations which may be urged as shewing that that learned Judge accepted Colebrooke's rendering of Sapinda in connection with the definition of Bandhu. He says at page 81: "It will be observed that two conditions are necessary to meet the requirements of this definition, namely, first that the claimant should be a kinsman sprung from a different family and second that he should be connected by funeral oblations." Colebrooke's translation is as follows: "For kinsmen sprung from a different family but connected by funeral oblations" (Sapindaship) "are indicated by the term cognate (Bandhu)." Both these conditions were fulfilled in that case by the claimant, a sister's son of the propositus, and it did not become necessary to discuss the accuracy of Colebrooke's translation nor does it appear to have been questioned. But in a later passage the learned Judge says: "It is perfectly true that the lawyers of the Benares school sometimes use the word Sapinda in the sense of consanguinity or mere connection through the body," and on either view he decides that the sister's son was a Bandhu. The real point decided in that case was that the enumeration of Bandhus in the

(1) 2 B. L. R. (F. B.) 28; 10 W. R. (F. B.) 76 at p. 6; 1 Ind. Dec. (N. s.) 592.

Mitakshara was illustrative and not exhaustive, which was the view also taken by their Lordships of the Privy Council in *Gridhari Lall Roy v. Bengal Government* (2) decided in the same year. In the latter case also Colebrooke's translation was accepted without comment but it was not necessary to consider the point. In 1880 the case of *Lallubhai Bapubhai v. Cassibai* (3) came before their Lordships of the Privy Council. It was a Bombay case and concerned the claim of the widow of a paternal cousin, who was a Gotraja Sapinda of the deceased, to succeed in preference to a more remote male heir, also a Gotraja Sapinda. It was contended *inter alia* that the passages in the Acharakanda of the Mitakshara defining Sapinda relationships connected by particles of one body should apply also to the same word in the parts of the text which treat of inheritance. The Court below had so decided. Their Lordships in dealing with this proposition said they were "prepared to assent to the conclusion to which the Judges of the High Court upon consideration of the authorities arrived that by the Law of the Mitakshara as interpreted and accepted in Western India, the preferential right to inherit in the classes of Sapindas is to be determined by family relationship or the community of corporal particles and not alone by the capacity of performing funeral rites."

In the same year the case of *Umaid Bahadur v. Udoi Chand* (4) was decided by a Full Bench of the Calcutta High Court. In that case the rival claimants to the property of the last male owner were the plaintiff whose father had purchased from the widow of the deceased owner and the defendant who was his sister's daughter's son. His relationship to the propositus was identical with that of the plaintiff Uma Shankar in the present case. The question turned upon whether the defendant as sister's

(2) 1 B. L. R. P. C. 44; 12 M. I. A. 448 at pp. 457, 466; 10 W. R. P. C. 31; 2 Suth. P. C. J. 159; 2 Sar. P. C. J. 382; 3 Mad. Jur. 386; 20 E. R. 408; 1 Ind. Dec. (N. s.) 28.

(3) 5 B. 110; 7 I. A. 212 at pp. 232, 234; 4 Sar. P. C. J. 164; 3 Suth. P. C. J. 795; 4 Ind. Jur. 533; 3 Shome L. R. 245; 7 C. L. R. 445; 3 Ind. Dec. (N. s.) 75.

(4) 6 O. 119; 6 C. L. R. 500; 5 Ind. Jur. 585; 3 Shome L. R. 146; 3 Ind. Dec. (N. s.) 73.

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daughter's son of the propositus could be an heir. This depended upon the meaning to be attached to the word Sapinda in Chapter II, section 5, verse 3 of the Mitakshara. The defendant was certainly not connected by funeral oblations with the deceased. The Court consisting of Sir R. Garth, C. J., and four other Judges came to the conclusion that the word Sapinda should be used throughout the Mitakshara in the same sense, *viz.*, connected by particles of one body as explained by the author himself in the Chapter on rituals and that Colebrooke's translation was wrong. They accordingly decided that the defendant was entitled to inherit. In this judgment reference is made to a further passage in the Mitakshara (Acharakanda), where the author cites a text of Vrihat Manu dealing with Sapinda relationship and that of Samanodakas in the case of agnates and says with regard to it: "Sapinda relationship with the father does not arise by reason of connection through funeral cakes but through the connection of particles of one body." This is significant, as the Sapinda relationship referred to in the text of Manu was evidently that of Gotraja Sapinda. Reference to other parts of the Mitakshara also supports the view that propinquity and not religious efficacy is the principle on which the selection of heirs is based. In Chapter II, section 3, verse 3, the mother is preferred to the father as an heir on the ground that "the father is a common parent to other sons (obviously meaning by another wife) but the mother is not so and since her propinquity is consequently greatest, it is fit she should take the estate in the first instance conformably with the text to the nearest Sapinda the inheritance belongs." This quaint process of reasoning is based on the doctrine that man and wife are Sapindas to each other as they together beget one body but the privilege of the husband to a plurality of consorts, which is not shared by the wife, is supposed to place him in a category more removed from his children than that of their mother. As the mother presents no oblations to her son whilst the father does, this is not only a striking instance of the meaning of the word Sapinda as used in the text dealing with inheritance but also indicates the

doctrine on which priority of inheritance is based. A consideration of the Bandhus specifically named in the Mitakshara also discloses the fact that 4 out of the 9 mentioned confer no spiritual benefit at all on the means of the deceased. These are the 5th, 6th, 8th and 9th in the order given in the text. (Mitakshara, Chapter II, 6.) Moreover, after enumerating the 3 classes of Bandhus the text continues:—

"Here by reason of near affinity the cognate kindred of the deceased himself are his successors in the first instance, on failure of them his father's cognate kindred; or if there be none, his mother's cognate kindred. This must be understood to be the order of succession here intended."

The Mitakshara also bases the claim of the daughter to inherit upon consanguinity alone and not, as in the Dayabhaga, on the expectation of religious offerings from her son and neither the sonless widows nor the barren are excluded as in the Bengal system (Mitakshara, Chapter II, section 2, verses 2—4). The question, however, appears to have been finally determined in so far as, Vijnaneswara's conception of the meaning of Sapinda is concerned, by the decision of their Lordships of the Privy Council in the case of *Ramchandra Martand Waikar v. Vinayak Venkatesh Kothe*. (5) in the year 1914, where it is stated: "Mr. Colebrooke in his rendering of the Mitakshara has paraphrased Sapinda as a relation 'connected by funeral oblations', which resulted in virtually obliterating one of the main distinctions between the Benares and the Bengal schools. But it is now recognised that his paraphrase was erroneous and that the true theory of Sapinda relationship propounded by Vijnaneswara was based on community of blood."

There are no doubt passages to be found in many of the earlier cases which support the view that the order of succession in the Mitakshara is founded to some extent at least on the doctrine of religious benefits. It is not necessary to refer to those cases in detail. It would appear that in most, if not all, of them the translation of Sapinda as

(5) 25 Ind. Cas. 290; 18 C. W. N. 1154 at pp. 1167, 1168, 1173, 1174, 1175; 42 C. 384; 27 M. L. J. 333; 1 L. W. 831; 16 M. L. T. 447; (1914) M. W. N. 835; 10 N. L. B. 112; 16 Bom. L. R. 863; 12 A. L. J. 1281; 20 Q. L. J. 573; 41 I. A. 290 (P. C.).

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'connected by funeral oblations' was the foundation of the opinions therein expressed, and in some instances much ingenuity has been expended in an attempt to reconcile the clear evidence to be found in the text of the Mitakshara itself that consanguinity and not funeral oblations is the guiding principle governing the order of succession with Colebrooke's translation which for many years was accepted without question. Once it is conceded, as it must be, that this translation was erroneous, the authority of the cases which accepted it as accurate is materially diminished.

But our attention has been urgently directed by the learned Vakil for the respondents to certain passages in the case of *Buddha Singh v. Lattu Singh* (6). The actual point there decided was that as between agnates the great-grandson of the grandfather was to be preferred to the grandson of the great-grandfather. The nearer stock up to 3 generations from the common paternal ancestor had to be exhausted before the nearer descendants of a more remote stock of descendant could take. The decision depended upon the meaning of the word *Putra* as used by Vijnaneswara in the Mitakshara; and this was interpreted as including three generations in descent from the common ancestor. There is a passage, however, towards the end of their Lordships' judgment which, whilst recognising that the right of inheritance arises from *Sapinda* relationship or community of blood, points out that in determining propinquity amongst the Gotraja the preferential heir may be discovered by applying the test of the capacity to offer oblations, and a passage in the *Viramitrodaya* is referred to as supporting this proposition as well as an earlier ruling of the Board in the year 1870 in the case of *Bhyah Ram Singh v. Bhyah Ugur Singh* (7). The application of this test in the case of near Gotraja *Sapindas* up to three generations in descent from a common ancestor is no doubt one which can be safely resorted to in the cases named, but it does not determine the

vexed question of whether the inheritance follows the duty of offering oblations or the duty follows the inheritance. The whole question is discussed at length by Mr. Mayne in Chapter XVI of his treatise, where he comes to the conclusion that the Hindu Law of inheritance in its inception is founded on nearness of blood and not on the capacity to offer oblations, and that this is the governing principle regulating the rules of inheritance observed when the Mitakshara was compiled, whereas some three centuries later the effect of Brahminical influence resulted in a remodeling of the basic principle of inheritance in accordance with the religious doctrine as expounded by Jimuta Vihana and his followers. However this may be, it appears to me that when applied to the order of succession amongst *Bhinna Gotra Sapindas* the religious test fails at nearly every turn, and I am unable to accept the view that it was the intention of their Lordships in the cases last referred to to lay down a rule of universal application which should govern the order of succession in a class of cases not then under consideration. The case of *Adit Narayan Singh v. Mahabir Prosad Tewari* (8) decided by a Bench of this Court in 1916 undoubtedly took a contrary view and decided that superior efficacy of religious oblations should be applied in the case of *Bandhus* even to the extent of preferring a *Matri Bandhu* to the son of one of those named in the text as an *Atma Bandhu* and who, according to a previous decision of the Bombay High Court in *Bai Vilji v. Prabhalakshmi* (9), was himself an *Atma Bandhu*. Assuming that *Rajender* in that case was an *Atma Bandhu*, and there is a series of decisions in addition to the Bombay case above cited which support this view [*Krishna Ayyangar v. Venkatarama Ayyangar* (10); *Balusami Pandithar v. Narayana Rau* (11)], it is difficult to see on what ground the claim of a *Matri Bandhu* can be preferred to that of an *Atma Bandhu* in face of the express text of the Mitakshara to the contrary. The case, however,

(6) 30 Ind. Cas. 529; 20 C. W. N. 1; 29 M. L. J. 534; 2 L. W. 897; 13 A. L. J. 1007; 18 M. L. T. 409; 17 Bom. L. R. 1022; 22 C. L. J. 481; (1915) M. W. N. 772; 37 A. 604; 42 L. A. 208 (P. C.).

(7) 18 M. L. A. 373 at pp. 380, 390; 14 W. R. (P. C.) 1; 5 B. L. R. (P. C.) 293; 2 Suth. P. C. J. 330; 2 Sar. P. C. J. 566; 20 H. R. 591 (P. C.);

(8) 35 Ind. Cas. 637; 1 P. L. J. 324; (1917) Pat. 12; 2 P. L. W. 317.

(9) 9 Bom. L. R. 1129.

(10) 29 M. 115.

(11) 20 M. 342; 7 M. L. J. 1207; 7 Ind. Dec. (N. S.) 243.

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is decided on the hypothesis that none of the descendants of the named Atma Bandhus are themselves Atma Bandhus, and the reason given by the learned Chief Justice in that case for arriving at this conclusion is that if the descendants of an Atma Bandhu are entitled to succeed in preference to all the Pitri or Matri Bandhus expressly mentioned, it may easily happen that an obviously remote Sapinda may exclude a nearer Sapinda. I confess that it is with some hesitation that I venture to differ from the view here expressed by the learned Chief Justice for whose attainments and ability I entertain a profound respect, but I am unable to share in the difficulty which weighed with him and assisted to the conclusion to which he came. The number of heritable Bandhus is not indefinite but limited in any one line of descent. [See *Umaid Bahadur v. Udoi Chand* (4).] Within these limits those tracing through a nearer common ancestor may well be regarded as nearer in blood relationship to the propositus than others descended from a more remote ancestor though less removed from the common ancestor. In the present case the plaintiff is more remote from the common ancestor than Raghunandan, but he traces his descent through the father and mother of the propositus whereas Raghunandan traces through the maternal grandfather. This question was considered in *Balusami Pandithar v. Narayana Rau* (11), where preference was given to the sister's son's son over the mother's brother's son, although the latter was 2 degrees only and the former 3 degrees removed from the common ancestor. Two main principles were relied upon and given effect to in that case, (1) that amongst Bandhus of the same class those *ex parte paterna* are preferred to those *ex parte materna*, (2) that the nearer line is preferred to the more remote.

The earlier case of *Sundrammal v. Rangasami Mudaliar* (12) is also an authority for the first of the above propositions. In another case, *Subramania Mudaliar v. Ranganathan Chettyar* (13), the father's sister's son's son is preferred to the mother's brother on the same principle.

(12) 18 M. 193; 4 M. L. J. 275; 6 Ind. Dec. (N. S.) 484.

(13) 18 Ind. Cas. 506; 24 M. L. J. 301; 13 M. L. T. 213; (1913) M. W. N. 202.

The claims of the present plaintiff would appear to be even stronger than those of the successful claimant in the case last cited if it is admitted, as I think it must be, that the intervention of a greater number of females makes no difference except in cases where other tests fail. It has been so decided in Madras [*Krishna Ayyangar v. Venkatarama Ayyangar* (10), *Tirumalachariar v. Andal Ammal* (14)] and I see no reason to differ from the rule there followed. In Bombay also where women are permitted to inherit as Bandhus, the preferential claim of the father's line over that of the mother has been recognized to the extent of postponing the mother's full brother to the father's half sister [*Saguna v. Sadashiv Pandu* (15)]. The rule that the nearer line excludes the more remote is accepted by Sir Ernest Trevelyan (*Hindu Law*, 2nd Edition, page 401), subject to the rule that in each of the 3 classes of Bandhus preference is given to those related through the father over those connected through the mother. In laying down the order of succession, however, in the case of Atma Bandhus it is obvious that he does not exhaust the nearer line before bringing in the more remote. His reason appears to be that sons of daughters of the family (*i. e.*, daughters who would have inherited if they had been sons) come first, then sons of daughters' sons and lastly sons of daughters' daughters. Subject to this the nearer line is preferred to the more remote. But he follows consistently what he regards as the dominant rule that in each of the 3 classes the Bandhus of the deceased connected with him through his father have preference over those connected through his mother. In this he is supported by Dr. Rajkumar Sarvadhikari and Dr. Jogendranath Bhattacharya. The authority of the former as an expounder of Hindu Law has been recognized by their Lordships of the Privy Council on more than one occasion and the reputation of the latter is well known. The question for determination is, I feel, one of some doubt and difficulty, but I think the principles to be gathered from the text of the Mitakshara and the weight of authority on the subject favour the claim

(14) 30 M. 406; 17 M. L. J. 285; 2 M. I. T. 357.

(15) 26 B. 710; 4 Bom. L. R. 527.

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of the plaintiff and, in my opinion, the sister's daughter's son should be preferred to the maternal uncle.

MULLICK, J.—I am of opinion that the defendant must succeed. The term *Bandhu* is said to have been used for the first time in Hindu Law by Yajnavalkya. To him the term was synonymous with *Bandhava* and applied indiscriminately to relatives in general, both agnates and cognates, and even to friends. In some out of the 17 texts in which he uses the term, he applies it to the kinsmen on the mother's side reserving for other kinsmen related through a female the term "*Yonisamandha*." He was the first to prescribe obsequial offerings to maternal ancestors and their issue, and it would seem that his object in doing so was to find a reason for giving the heritable right to relations on the mother's side. In truth the concession was made in deference to the continuous disintegration of communistic life. Though economic causes had begun to operate long before Gautama and the sages compromised with individualism by adopting spiritual benefit as a condition of heirship, Yajnavalkya found a further advance necessary and brought widows, daughters and some others within the circle of heirs who were incapable of offering the funeral cake. Not so courageous was his predecessor Manu who, while bowing before the advancing wave and affirming the principle of affinity by blood relationship, seems still to have retained allegiance to the principle of spiritual benefit, rendering himself liable to the charge of indecision and inconsistency by such texts as "the funeral cake follows the family and the estate." "To three ancestors must water be given for three is the funeral cake ordained, but the fourth in descent is the giver of oblations to them and the fifth has no concern with the gift of funeral cakes." (Manu, IX-185, IX-187, IX-186.)

The efforts of the lawgivers, however, were powerless and compromises did not avail. Little use was it for Gautama to seek to stem the tide by ruling that "Those who are allied by the funeral cake should take the wealth of the deceased" or for Manu to temporize or for Yajnavalkya to extend the heritable right while

still clinging to Gautama's rule. The fact remains that by the time of Vijnaneswara, that is within the next 900 years, the doctrine of spiritual benefit had lost further ground. But the vitality of Hindu institutions is proverbial and although that commentator in clear and unequivocal terms declared *Sapinda* relationship to be dependent on community of blood, nevertheless between the 11th and the 15th centuries spiritual benefit still continued to affect the preferential right. In my opinion this explains why Vijnaneswara did not insist upon the father's line being exhausted before any of the grandfather's line were admitted.

The position in the 16th century is further elucidated by the Viramitrodaya, which repeatedly contains passages to the effect that "comparative propinquity is evidenced by the amount of spiritual benefit conferred on the deceased proprietor and that spiritual benefit can be conferred by the presentation of *Pindas* in the *Parvana Sradh* held in honour of the deceased and of his ancestors." (Viramitrodaya III, 1-11; III, 5-1.) Again in book II, section 1, verse 23 of that work, Mitra Misir, the author, gives the following remarkable opinion: "Blood relations alone are entitled in the first instance to celebrate *Parvana* rights of the deceased and their competence to benefit the *Bandhus* is in proportion to the nearness of their deceased relative. If we know the one, we know the other. Where there are many claimants to the heritage among the *Gotrajas* and the like, then the fact of conferring spiritual benefits on the deceased merely settles the question of precedence among the heirs."

The next stage in the development of the theory of religious benefit is furnished by the Dayabhaga, which finally and definitely recognised it as a ground of preference in the case of both agnates and cognates. Whereas in the Mitakshara no cognate is allowed to succeed in preference to an agnate, however superior the offerings of the former may be in religious efficacy, the Dayabhaga adopted the more logical basis and applied the test equally to both. The result was that many cognates, who were excluded by the Mitakshara, took precedence under the Dayabhaga over more

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distant agnates. It would be wrong, however, to say that the Dayabhaga discarded the principle of propinquity by blood. Equally wrong would it be in my opinion to say that the Mitakshara took no account of the principle of religious merit. In my opinion both systems recognise propinquity of blood and religious efficacy. The only difference is that in the Dayabhaga religious merit arising from the celebration of the Parvana Sradh is accorded greater weight and that in the absence of religious merit accruing from Parvana rights, the ability to benefit the deceased by some other religious ceremonies is a sufficient foundation of a title to inherit. The Mitakshara, on the other hand, regards oblations presented by cognate kinsmen as secondary and conferring no claim against the whole body of agnates. The Dayabhaga, admitting that the oblations are secondary as compared with agnates of the same line, insists that Parvana Pindas conferred by cognates should prevail against agnates of a remoter line. The point of difference between the two systems depends upon the interpretation of the scriptures relating to the efficacy of oblations presented by agnates and cognates. It would be wrong, therefore, to say that the doctrine of spiritual efficacy was, as has been observed by one learned author, a segment of the Brahminic brain in Bengal and that in the Mitakshara it has no place. The true view appears to be that nearness of blood determines the heritable right, while the doctrine of spiritual efficacy determines the preferential right.

The position of Bandhus could not fail to remain unaffected by the vicissitudes of the doctrine of religious efficacy and we find, therefore, that while Yajnavalkya left the question of their heritable right undetermined in his list of heirs and while he made express mention only of the "maternal uncle and the rest" in regard to their right to succeed a trader dying abroad, Vijñaneswara was the first to extend the list by the inclusion of nine selected cognates.

The next development that followed was the addition of the daughter's son as a special heir and for nearly four centuries thereafter the commentators appear to have recognised only ten Bandhus.

Next Mitra Misser added three, namely, the maternal uncle of the deceased, of his father and of his mother.

Since then the number does not appear to have been added to for the next 300 years till the claims of the maternal uncle and of the sister's son came up for consideration in the case of *Omrit Koomaree Dabee v. Luckhee Narain Chuckerbutty* (1). In that case Mitter, J., held that the list of Bandhavas given by Vridha Satatappa was not exhaustive and that although a sister's son was according to their Lordships a Pitri Bandhu, he took precedence over other Bandhus on the ground of superior religious efficacy.

Following the principles enunciated by their Lordships it seems to me clear that we must look to a large expansion of the list of heritable Bandhus, but at the same time there does not seem to me to be any doubt as to how the present case should be decided.

Now the first point for consideration is, whether the plaintiff and Raghunandan have any heritable right at all. They are undoubtedly cognate Sapindas. For the purpose of marriage Sapinda relationship is prescribed by the Mitakshara to extend to seven degrees when relationship is claimed through the father and five degrees when claimed through the mother. There was some divergence of opinion between text-book writers as to whether these limitations applied also for the purpose of determining the heritable right and Professor Golap Chandra Sarkar was of opinion that Sapinda relationship for purposes of inheritance extended to seven degrees both on the father's and the mother's side. Their Lordships of the Privy Council have, however, now ruled that the limits applicable to marriage also apply to inheritance, *Ramchandra Martanda Waikar v. Vinayak Venkatesh Kothekar* (5).

Professor Golap Chandra Sarkar also doubted the correctness of the dictum of their Lordships of the Calcutta High Court in *Umaid Bahadur v. Udoi Chand* (4) to the effect that in order to establish the heritable right Sapinda relationship must be mutual. On this point also their Lordships of the Privy Council in the above-mentioned case have pronounced in favour of the view of their Lordships of the Calcutta High Court,

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Their Lordships of the Privy Council have not, however, yet pronounced any opinion on the point whether Sapinda relationship through cognates can be claimed through an ancestor more remote than the father's or mother's grandfather. Professor Raj Kumar Sarbadhikari in his Tagore Law Lectures answers this question in the negative, basing his conclusion on the following passage of the Mitakshara where Vijnaneswara quoting the text of Vridha Satatappa observes as follows. I give the translation made by West and Buhler, which is now accepted as more correct than that made by Colebrooke and which differs from the latter on the point whether the term Sapinda means connected by particles of the same body or connected by funeral oblations. The passage runs thus:—

"On failure of agnates, the cognates are heirs. The cognates are of three kinds, related to the person himself, to his father, or to his mother, as is declared by the following text. The sons of his own father's sister, the sons of his own mother's sister and the sons of his own maternal uncle must be considered as his own cognate kindred. The sons of his father's paternal aunt, the sons of his mother's maternal aunt, and the sons of his father's paternal uncle must be deemed as his father's cognate kindred. The sons of his mother's paternal aunt, the sons of his mother's maternal aunt and the sons of his maternal uncle must be reckoned as his mother's cognate kindred. Here by reason of near affinity the cognate kindreds of the deceased himself are his successors in the first instance. On failure of them his father's cognate kindred, or if there be none, his mother's cognate kindred. This must be the order of succession here intended.", Mitakshara (II, section 6.)

This indeed is the only other text besides the text of Yajnavalkya regarding the goods of a trader dying abroad in the whole of Hindu Law as at present known to us which is of any assistance in determining the limits of the heritable right of Bandhus. From this text Professor Sarbadhikari derives the following rules:

"I. A Bandhu is a cognate Sapinda within four degrees counting (1) from the deceased

himself, in ascent or descent: (2) from any one of the four immediate ancestors of the deceased."

"II. The right of inheritance accrues to a Bandhu if the late owner and the person claiming the heritable right were related as Sapindas to each other, either directly through themselves or through their mothers or fathers.

"In other words, a heritable Bandhu is a cognate Sapinda within four degrees counting from—

"1. The deceased in ascent or descent.

"2. Deceased's paternal ancestor within four degrees.

"3. Deceased's maternal ancestor within four degrees.

"4. Deceased's father's maternal ancestor within four degrees.

"5. Deceased's mother's maternal ancestor within four degrees.

"N. B.—The word 'five' is to be substituted for 'four' in the case of father's Bandhus. If the deceased or his ancestor be related through father's mother, then five degrees instead of four should be counted in both directions. Thus grandson's daughter's grandson is related to the deceased (or his paternal ancestor) through father's mother.

"Rule of exclusion:—

"1. The cognate descendant of each of these classes is excluded from inheritance when (i) the deceased or (ii) the deceased's ancestor does not belong to—

"(a) His maternal grandfather's line.

"(b) His father's ditto.

"(c) His mother's ditto.

"2. The cognate ascendant of the deceased is excluded from inheritance when he does not belong to—

"(a) The deceased's maternal grandfather's line.

"(b) The deceased's father's ditto.

"(c) The deceased's mother's ditto."

The learned Professor proceeding upon these rules classifies Atma Bandhus into Atma Bandhus *ex parte paterna*, namely, the sons of the daughters of the family, sons of the daughters' sons of the family, sons of the daughters' daughters of the family; next into Atma Bandhus *ex parte materna* beginning from mother's father; next into

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Atma Bandhus *ex parte paterna* to whom the deceased was 'Atma Bandhu *ex parte paterna*; next into Atma Bandhus *ex parte materna* to whom the deceased was Atma Bandhu *ex parte materna*; next into Atma Bandhus *ex parte paterna* to whom the deceased was Pitri Bandhu; and finally into Atma Bandhus *ex parte materna* to whom the deceased was Matri Bandhu. He adopts the same method for Pitri Bandhus and Matri Bandhus.

Now it is to be observed that the learned Professor's two rules of exclusion are inconsistent with the text which includes within the circle of Bandhu heirs all who claiming through the mother are within five degrees of the common ancestor. Mr. Mayne in his work on Hindu Law would seem to partially accept Professor Sarbadhikari's view, for he does not seem to give the heritable right to the heirs of the maternal grandfather's grandfather though he gives him the 27th place in his chart. In the case of *Ramchandra Martand Walker v. Vinayak Venkatesh Kothekar* (5) to which I have referred above, Mr. Lowndes in his address to their Lordships of the Privy Council noticed this inconsistency between the text on marriage and the rule adopted by Professor Sarbadhikari, but it became unnecessary for their Lordships to decide the point. Following Professor Sarbadhikari, Professor Jogendra Nath Bhattacharya and Professor Trevelyan would seem to base their conclusion on that part of Vridha Satatappa's text which appears to limit Pitri and Matri Bandhavas to those descended from the mother's or father's grandfather. This conclusion might perhaps be justified if, as was thought by Mitter, J., in *Omrit Kumaree's case* (1), the term Bandhavas in Satatappa's text were synonymous with Bandhava, the plural of Bandhu; but Professor Jogendra Nath Bhattacharya has clearly demonstrated that this is not the case and that Bandhavas is not the plural of Bandhu and signifies what is known among Hindus as cognate brother or first cousin. Speaking with the greatest respect I think this is the correct rendering of the term and that Professor Sarbadhikari's rules of exclusion are not warranted by the text. I think also that I am supported in this view by Professors Golap Chandra Sarkar and Jogendra Nath

Ghose, whose works on Hindu Law have often been referred to by their Lordships of the Privy Council.

In my opinion Satatappa in enumerating the nine Atma, Pitri and Matri Bandhavas did not intend to limit heritable right to the descendants of the mother's and father's grandfather within five degrees. Nor is there anything to show that Vijnaneswara was of a different view to that which I have ventured to take.

If this is the correct interpretation of Satatappa's text, then it follows that the classification given in the text into Atma, Pitri and Matri Bandhus applies only to the nine Bandhavas specially enumerated therein. All other Bandhus are subject to one and only one limitation, namely, that given in the text on marriage.

In support of the view I take, it is to be noticed that neither Professor Sarbadhikari, nor Professor Bhattacharya, nor Mr. Mayne are agreed as to the classes within which certain heirs should be grouped. Indeed it has been said that Professor Sarbadhikari has been guilty of reading into the text words which do not occur therein, so as to give the status of Atma Bandhus to persons who would otherwise be classed as Pitri Bandhus.

Similarly it is to be noticed that their Lordships of the Calcutta High Court in *Omrit Koomaree's case* (1) have classed a sister's son as a Pitri Bandhu, though the learned Vakil for the plaintiff before us relying on Professor Sarbadhikari's view strenuously contends that he is an Atma Bandhu.

In this state of doubt and uncertainty it would, in my opinion, be unsafe to insist on the classification within the group of Atma, Pitri and Matri Bandhu of heirs other than the nine specifically enumerated in the text. In my opinion the son of one of these nine is not entitled to claim membership in the class to which his father belongs and I think the doubt thrown out by Chamier, C. J., in *Adit Narayan Singh v. Mahabir Prasad Tewari* (8), which is binding on this Court till overruled, was well grounded. In that case the learned Judges gave effect to their doubt by preferring one who would be a Matri Bandhu according to Professor Sarbadhikari's classification to one who would be a Pitri Bandhu, because

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he was nearer in degree counting from the common ancestors in their respective lines, and also on the ground of religious merit.

It follows from the above view that when there is a contest between Bandhus other than the nine Bandhavas or between one of the former and one of the latter, the principle of numerical propinquity alone will determine the heritable right, supplemented in case of doubt by the rule of religious benefit and such other rules derived from the succession of agnates as may be appropriate.

Let us next consider what is the position of the claimants in the case now before us.

Both parties seem to be agreed that the plaintiff and Raghunandan are Atma Bandhus. If Atma Bandhu is the same thing as Atma Bandhava and if Bandhava has not the special meaning of cousin, brother or first cousin, then if a maternal grandfather's son's son is an Atma Bandhu in the sense of one specially near to the propositus, it would be reasonable to class the grandfather's son also as an Atma Bandhu. But is the sister's daughter's son also an Atma Bandhu? I think not, although he has been classed as such by Professor Sarbadhikari. Their Lordships of the Calcutta High Court observed in *Omrit Koomaree's case* (1) that the sister's son was both an Atma and Pitri Bandhu, but they seem to have classed him as a Pitri Bandhu on the ground that he was nearer in degree to the father of the propositus than to the propositus.

But as I have already observed, the Mitakshara does not warrant the inference that all Bandhus must be classified into the three classes assigned to the nine enumerated Bandhavas and I respectfully venture to differ from those decisions of the Madras Court which hold that every descendant of an Atma Bandhu within the requisite limits is entitled to claim the status of his ancestor.

The difficulty in following out this classification logically in the case of the descendants of the daughters of the family compelled Professor Sarbadhikari to alter the text to an extent which has been pronounced unwarrantable by other text-book writers. I think, therefore, that Bandhus other than the nine Bandhavas

named in the text cannot appropriately be placed in the three groups reserved for the latter.

Assuming, however, that the three classes are exhaustive on the point of classification and that there can be no heritable right without membership within one of these three classes, then I think Raghunandan being an Atma Bandhu and the plaintiff Pitri Bandhu, the former is entitled to preference.

Let us assume next that both are Atma Bandhus as has been held by Professor Sarbadhikari.

If the principle of nearness by particles of the body is applied, how is the calculation to be made? We have no means of ascertaining how much the plaintiff has in common physiologically with the deceased as compared with the maternal uncle. We can only estimate through the common ancestor through whom they respectively claim and if that test is applied, then obviously the maternal uncle and the deceased have greater community of blood than the plaintiff and the deceased.

Let us take next the mode of counting sanctioned by the Hindu Law. The Indian Succession Act, following the principle of the civil law, prescribes that counting is to be made from the propositus upwards to a common ancestor, each ancestor representing one degree, and then downwards till the claimant is reached. The Mitakshara prescribes that counting is to be made from the common ancestor, from whom the branch divides beginning with such common ancestor as the first degree. Adopting this mode of counting Raghunandan is two degrees removed while the plaintiff is four degrees removed. In the absence of any detailed order of succession for cognate, Sapindas, I think Raghunandan is entitled to priority.

But then it is said that the rule of the Mitakshara is that the nearer line excludes the more remote and, therefore, the line of the father of which the plaintiff is a member must be exhausted before the line of the maternal grandfather can come in. Now this rule is not based upon any text. It is derived from the order of succession as given in the Mitakshara relating to certain named agnates, but even in that connection the rule is not of general

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and universal application. In the earlier decisions in Upper India the limit was placed on the authority of Colebrooke at the seventh lineal descendant, according to later decisions, in Madras [it was fixed at the second degree, while their Lordships of the Privy Council have now definitely held that the limit of collateral descent is three degrees in each line. Thus the grandson's grandson, though a lineal and nearer descendant, is excluded by descendants within three degrees in the lines of the father and the grandfather. The Mitakshara in this respect is not singular, for we find that in other systems too the law has recognised the propriety of preferring some collaterals to lineal descendants of the fourth and the fifth degree. If, therefore, the rule is limited in application with regard to agnates, I see no reason why it should be applied without restraint and restriction in the case of cognates. Upon the admitted mode of counting, a maternal uncle is nearer in degree than a father's daughter's daughter's son and I cannot find any equity in defeating his rights by a resort to analogy and by the arbitrary extension of a rule applicable to another class.

I am unable, therefore, to exclude Raghu-nandan on the ground that he claims descent through a more distant line than the plaintiff. If the principle is to apply at all, it must apply to cases where the respective candidates are numerically of the same degree. In such an event this test as well as other tests may be taken into account for the purpose of determining the preferential right.

Next it is said that the Mitakshara favours the male against the female heir, and, therefore, the plaintiff, who is connected through the father, is preferable to Raghu-nandan who is connected through the mother. Here again the rule is derived not from an express text in the Mitakshara but from the order of succession given by the sages as regards agnates. But even among the latter the preference for males is not rigorously enforced and female relatives, such as a mother, daughter, and sister and a male relative descended through a female, namely, the daughter's son, have been accorded high places within the circle of agnatic heirs, the last named being even

preferred to one nearer in degree on the male side, namely, the father's son. Here again the question arises whether the preference for males shown by the Hindu Law in the case of agnates generally, and in particular in Satatappa's text as regards Bandhavas, is to be applied regardless of numerical nearness in degree. It may be noticed that Satatappa and Vijnaneswara seem to limit the preference to cases where the degree of relationship is equal, as for instance when they give precedence to Pitri Bandhavas over Matri Bandhavas. Even in Madras where their Lordships of the High Court have applied the rules of agnatic succession to the case of Bandhus more freely than other Courts in favour of claimants who would be otherwise excluded, the decisions have not been uniform and we find that in spite of the superiority ascribed by analogy to males a mother's sister's son has been preferred to a mother's brother's son.

I think, therefore, that the correct rule in regard to these analogies has been laid down by Professor Golap Chandra Sarkar as follows:—

(1) The nearer in degree on either side must be preferred to one more remote.

(2) Of those equal in degree the one related on the father's side is to be preferred to the one related on the mother's side.

(3) When the side is the same, the circumstance of one being related through a male and another through a female makes no difference.

Applying these rules I do not consider that the fact of plaintiff's being connected through a nearer branch or through a male can operate in his favour.

On the other hand if the latter fact operates in this case at all, then the circumstance that he claims through two females must also be taken into account as a counterpoise. At the same time it must in fairness be remembered in this connection that although their Lordships of the Madras High Court in *Appandai Vathiyar v. Ragubali Mudaliar* (16) preferred the mother's sister's son to the mother's brother's son, their Lordships of the Allahabad High Court in *Ram Charan Lal v.*

(16) 5 Ind. Cas. 280; 33 M. 439; 20 M. L. J. 275; (1910) M. W. N. 44; 7 M. L. T. 203.

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Rahim Bakhsh (17) were of a contrary opinion, holding that the mother's sister's son being removed by two females the principle of preference in favour of males rendered the mother's brother's son nearer in affinity.

Being, however, clearly of opinion that Raghunandan is nearer in affinity than the plaintiff from every point of view, I do not think the interposition of two females affects the present case.

For the same reason the question of spiritual benefit also does not arise. In this respect the position, as I have already said, appears to be this, that while the Dayabhaga recognizes the principle of affinity as well as the principle of spiritual benefit for the purpose of creating the heritable right and admits into the circle of heirs persons by reason of their capacity to confer spiritual benefit alone, the Mitakshara makes affinity the sole test of the heritable right, leaving the preferential right to be regulated by the doctrine of spiritual benefit. This position has been repeatedly affirmed by their Lordships of the Privy Council in a long line of decisions beginning from *Gridhari Lall Roy v. Bengal Government* (2) and ending with *Buddha Singh v. Lattu Singh* (6), and it could not have been more emphatically recognised by their Lordships of the Calcutta High Court than it was in *Gunesh Chunder Roy v. Nil Kamul Roy* (18), where a father's daughter's son was preferred to a mother's sister's son on the ground of spiritual benefit. Applying this principle to the case under consideration, it is immaterial whether the plaintiff and Raghunandan are both ordinary Bandhus or both Atma Bandhus; in either event Raghunandan is clearly entitled to preference because he can offer spiritual benefit upon the maternal grandfather of the propositus, while the plaintiff can confer no spiritual benefit upon the propositus of any kind whatsoever.

In the various Courts in India the strongest resistance to the application of the doctrine of spiritual benefit has perhaps come from their Lordships of the Madras High Court and particular

reliance has been placed by the plaintiff on *Balusami Pandithar v. Narayana Rau* (11), where a maternal uncle was defeated by a sister's son's son on the ground that the nearer line must exclude the more remote, and also on the ground that an Atma Bandhu *ex parte paterna* excludes an Atma Bandhu *ex parte materna*. Their Lordships declined to consider the principle of religious efficacy at all but with great respect, I venture to say that this view is not in accordance with that of other Judges of the same Court and is certainly in direct conflict with the latest pronouncement of the Privy Council.

As an illustration of this divergence of opinion I need only cite the case of *Muttusami v. Muthukumarasami* (19), where their Lordships of the Madras High Court decided in favour of the maternal uncle of the half blood against the son of the father's paternal aunt and laid down the rule that as between Bandhus of the same class the spiritual benefit conferred upon the propositus is, as stated in the *Viramitrodaya*, a ground of preference. That decision was affirmed by their Lordships of the Privy Council in *Muthusami Mudaliyar v. Simambedu Muthukumaraswami Mudaliyar* (20) and no exception was taken to the above statement of the law. The unsatisfactory condition produced by subsequent conflicting decisions has been somewhat sharply commented upon in a recent judgment by Sadasiva Aiyar, J., in *Subramania Mudaliyar v. Ranganathan Chettyar* (13). His Lordship there, although approving of the claim of the father's sister's son as against a maternal uncle on the ground that the former is an Atma Bandhu *ex parte paterna*, characterizes Satatappa's text as illogical, incomplete and inconsistent, but feels himself bound to accept the law as settled by the Courts even though based on less authoritative treatises than the ancient authoritative Shastras. He points out that a mother's sister's son need not necessarily be always a Bhinna Gotra Sapinda, as sometimes the mother of the propositus and her sister might marry husbands of

(17) 34 Ind. Cas. 108; 38 A. 416 at pp. 421 to 424; 14 A. L. J. 538.

(18) 22 W. R. 264.

(19) 16 M. 23; 2 M. L. J. 296; 5 Ind. Dec. (N. S.) 724.

(20) 23 I. A. 83; 19 M. 405; 6 M. L. J. 113; 7 Sar. P. C. J. 45; 6 Ind. Dec. (N. S.) 987.

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the same Gotra. He is nevertheless of opinion that the rule as to religious benefit laid down in *Muttusami v. Muttukumarasami* (19) is not supported by the law and custom within the Presidency of Madras, where the question of spiritual benefit or of death pollution or of the right of performance of obsequial ceremonies does not operate in determining the preferential right. He considers that Mr. Mayne's classification is inaccurate and misleading as he gives the maternal uncle the 9th place and the maternal grandfather the 17th place, and does not carry the class of Bandhus to the fifth degree. He agrees with the decision of Aikman, J., sitting as a single Judge in *Ram Bharos v. Ram Parshad* (21), where preference is given to a father's brother's daughter's daughter's son as against a mother's brother's son on the ground that the former is an Atma Bandhu *ex parte paterna*, but he feels that this position is really contrary to the Hindu Shastras and that legislation should intervene to alter the current of judicial decisions. The learned Judge's findings are admittedly limited to the Madras Presidency where the Smriti Chandrika and other later commentaries have acquired special predominance, but his observations are of general application in so far as they indicate the possibility of a different mode of interpretation of the texts.

So far as concerns the Province to which the parties before us belong and the territories which are now subject to the authority of the High Court at Patna, I am quite satisfied that the test of religious and spiritual benefit can and should be applied to determine the preferential right, that is to say, where the principle of affinity by blood relationship does not clearly indicate with which claimant the preference lies.

The result is that I would answer the reference in favour of the defendant.

This result is in conflict with the lists prepared by Professors Sarbadhikari and Bhattacharya, while Mr. Mayne, who gives precedence to the sister's son as against the maternal uncle, does not consider at all the claim of a sister's daughter's son.

On the other hand Professors Golap Chandra Sarkar and Jogendra Nath Ghose

would seem to support the claim of the maternal uncle on the rule of nearness laid down by them.

In my opinion as the texts do not expressly declare the order of priority between the rival claimants we are entitled to apply the principles, of affinity and spiritual benefit, both of which have been pronounced by sages and commentators to be of universal application and here operate to establish Raghunandan's claim. Other principles, inferred from the order of succession for agnates who have been specially mentioned by name in the texts, cannot be invoked in this case as the claimants are not numerically of the same degree of nearness.

JWALA PRASAD, J.—The question for determination is whether Uma Shanker or Raghunandan is the preferential heir of one Chaman Lal Upadhaya. Uma Shanker is the sister's daughter's son of Chaman Lal. Raghunandan is the mother's brother, or maternal uncle of Chaman Lal. The competition, therefore, is between a maternal uncle and a sister's daughter's son. The former bases his claim for preference over the latter on the following grounds :—

(1). That he is nearer in degree to the propositus than the sister's daughter's son inasmuch as he is 4 degrees removed from the propositus and 2 degrees from the common ancestor of the propositus (the maternal grandfather) and himself, whereas the sister's daughter's son is 5 degrees removed from the propositus and 4 degrees from the common ancestor of the propositus (the father) and himself.

(2). That the maternal uncle offers Pindas or funeral oblations to two ancestors of the propositus, namely, the maternal grandfather and the great-grandfather, to whom also the propositus offers Pindas, whereas the sister's daughter's son offers no Pinda to any of the ancestors of the propositus, and thus the maternal uncle confers spiritual benefit to the propositus, whereas the sister's daughter's son confers none.

(3). That the maternal uncle is related to the propositus through one female only, namely, the propositus's mother, whereas the sister's daughter's son is related to him through two females, namely, the sister and the daughter.

(4). That the texts of the Mitakshara and Viramitrodaya give to the maternal

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uncle a high position among heirs. Reference has been made to the Mitakshara, Chapter II, section 6, clause 1, where the maternal uncle's son is enumerated as an Atma Bandhu, to another part of the Mitakshara (page 322, 3rd Edition, 1829) where he has been expressly mentioned as a principal heir of a trader dying abroad, to Asharkanda, Chapter I, verse 52, where the maternal uncle has been mentioned as a prominent Sapinda, and to Viramitrodaya, Chapter III, part VII, section V, where the maternal uncle has been mentioned as an heir superior to the three classes of Bandhus. Sister's daughter's son or any of his ancestors, sister or sister's daughter, is not mentioned anywhere.

The above facts are not disputed, but it is contended that the sister's daughter's son should be preferred to the maternal uncle on the following grounds:—

(1). That he is related to the propositus through his father, whereas the maternal uncle is related to the propositus through his mother; and

(2). That he traces his descent through a nearer ancestor of the propositus, namely, his father, whereas the maternal uncle traces his descent through a remoter ancestor, namely, the maternal grandfather of the propositus.

The parties are governed by the Benares school of the Hindu Law. The remoter sources of the Hindu Law are the Institutes of Manu and of Yajnavalkya and other Rishis, who gave different Smritis. These ancient texts are common to all the schools. The authority of a commentator was received in one and rejected in another part of India. Hence schools with conflicting doctrines arose. The Mitakshara, which is a commentary on the Institutes of Yajnavalkya by Vijnaneswara Bhutta, is universally accepted by all the schools except that of Bengal where also it is received as of high authority, yielding only to Dayabhaga in those parts where they differ. In like manner there are glosses and commentaries upon the Mitakshara, which are received by some of the schools that acknowledge the supreme authority of that treatise but are not received by all [*Collector of Madura v. Mootoo Rama-*

linga Sathupathy (22)].

Smriti Chandrika by Deonand Bhutta and Subodhani by Visheshwar Bhutta are generally followed in Southern India (Madras Presidency) and Vivahar Mayukha by Nil Kantha Bhutta in Western India (Bombay Presidency). They differ in essential rules of law from those followed in the Benares school [*Buddha Singh v. Laltu Singh* (6)].

In the Benares school, which is said by their Lordships in *Bhyah Ram Singh v. Bhyah Ugur Singh* (7) to be the most orthodox of the different schools, Viramitrodaya by Mitter Misser is followed concurrently with the Mitakshara [*Omrit Koomaree Dabee v. Luckhee Narain Chuckerbutty* (1.)]. Their Lordships of the Judicial Committee as well as all the Courts in India from the earliest times up to the present moment have recognized Viramitrodaya as an authoritative commentary on the Mitakshara and as governing the Benares school [*vide Collector of Madura v. Mootoo Ramalinga Sathupathy* (22), *Gridhari Lal Roy v. Bengal Government* (2), *Bhyah Ram Singh v. Bhyah Ugur Singh* (7), *Lallubhai Bapubhai v. Oasibai* (3), *Buddha Singh v. Laltu Singh* (6), *Narasimma v. Mangammal* (23), *Muttusami v. Muttukumarasami* (19), *Appandai Vathiyar v. Ragubali Mudaliar* (16), *Janki v. Nand Ram* (24), *Suba Singh v. Sarafraz Kunwar* (25), *Buddha Singh v. Laltu Singh* (26), *Lallubhai v. Manukvarbai* (27) and *Mohandas v. Krishnabai* (28)].

In *Collector of Madura v. Mootoo Ramalinga Sathupathy* (22) their Lordships point out that in administering Hindu Law, the duty is, not so much to inquire whether a disputed doctrine is fairly deducible from the earliest authorities, as to ascertain whether it has been received by the particular school which governs

(22) 1 B. L. R. P. O. 1; 12 M. I. A. 397 at pp. 435—438; 10 W. R. P. C. 17; 2 Suth. P. C. J. 135; 2 Sar. P. C. J. 361; 20 E. R. 389, 3 Mad. Jur. 298; 1 Ind. Dec. (N. S.) 1.

(23) 13 M. 10; 4 Ind. Dec. (N. S.) 717.

(24) 11 A. 194; A. W. N. (1889) 30; 13 Ind. Jur. 347; 6 Ind. Dec. (N. S.) 552 (F. B.).

(25) 19 A. 215; A. W. N. (1897) 53; 9 Ind. Dec. (N. S.) 142.

(26) 16 Ind. Cas. 529; 34 A. 663; 10 A. L. J. 303.

(27) 2 B. 385 at p. 421; 1 Ind. Dec. (N. S.) 632.

(28) 5 B. 597; 3 Ind. Dec. (N. S.) 393.

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the district with which he has to deal, and has there been sanctioned by usage. This has been emphasised in *Bhyak Ram Singh v. Bhyak Ugur Singh* (7) and recently in *Ramchandra Martand Waikar v. Vinayak Venkatesh Kothekar* (5) in the following words:—"Questions arising under the Hindu Law cannot be determined by abstract reasoning or analogies borrowed from other systems of law, but must depend for their decision on the rules and doctrines enunciated by its own lawgivers, and recognised expounders."

The question whether a maternal uncle or a sister's daughter's son will have a preferential right to succeed to the properties of the propositus will, therefore, be determined by the rules laid down in the *Mitakshara* by *Vijnaneswara* and in *Vira-mitrodaya* by *Mitter Missir*.

The text of *Manu* upon which all the rules of inheritance in the Hindu Law are founded consists of two Slokas 186 and 187, Chapter IX—* * * * *

Translation:—186. "Let a man do the water rite and offer oblations to his three ancestors (*i. e.*, father, grandfather and great-grandfather); no Sapinda relationship exists between the offerer of such oblations and his fifth ancestor (*i. e.*, great-great-grandfather)."

187. "Of the Sapinda relations one nearest to the deceased shall inherit the property (in exclusion of one more remote); in the absence of one's Sapindas one's Sakulyas shall inherit his property, and in the absence of a Sakulya his preceptor, and in the absence of a preceptor his disciple (shall inherit his property)."

It is clear from the above that *Manu*, whose antiquity is not unknown, prescribed oblations to the three ancestors and held that no Sapinda relationship exists between the offerer and the fifth ancestor—great-great-grandfather, the offerer being the 4th. *Manu* does not mention of any oblation to the maternal ancestors and does not expressly mention *Bandhus* among the heirs. As held by their Lordships in *Ramchandra Martand Waikar v. Vinayak Venkatesh Kothekar* (5), *Yajnyavalkya*, who lived in the 2nd century of the Christian era, was the first to introduce *Bandhus* or distant kinsmen related to the deceased through females, as heirs

and he was also the first to mention the offering of a cake to maternal ancestors—* * * [Translation:—Thus (he should give rice balls) even to the manes on the maternal side (Chapter I, section 10, Sloka 242, *Yajnyavalkya*, *Acharkanda*), (Mandalik, page 190)]. Consequently it became necessary to allow those who could offer *Pindas* to inherit and this let the *Bandhus* in. The cake offered to maternal ancestors was offered to 3 ascendants of the mother and no *lapa* was offered to higher ascendants and no water offerings. So the right of inheritance was confined to 5 degrees, counting the offerer, which is the exact limit allowed to persons claiming relations through mother.

By the time that *Vijnaneswara* flourished in the 11th or the 12th century, the right of inheritance came to depend upon blood connections and not upon the right to offer funeral oblations. But there can be no doubt that the latter had still great influence upon the right of inheritance and the two were still regarded as going together.

In verse 135, *Yajnyavalkya* has enumerated the heirs of a sonless man and in verse 136 has said that on failure of the first among those enumerated, the next in order is the heir of the deceased and that this rule extends to all persons and classes. *Bandhus* have been mentioned to succeed after the *Gotrajas* or gentiles.

The *Mitakshara*, commenting upon the aforesaid verses, has defined *Gotrajas* to mean *Sapindas* and *Samanodakas* and has given the rules and the order of their succession in Chapter II, section 5. In clause 3, section 5, it says that by the word '*Bandhu*' must be understood a *Sapinda* relation belonging to a different *Gotra* or family—(connected with the propositus through females) * * * * *

In *Mitakshara*, section 6, Chapter II, the following rules have been laid down regarding the succession of *Bandhus*:—

Clause 1.—"On failure of *Gotrajas* or gentiles the *Bandhus* are heirs. The *Bandhus* are of three kinds—the *Bandhus* of the man himself, the *Bandhus* of the father and the *Bandhus* of the mother, as is declared by the following text:—The sons of his own father's sister, the sons of his own mother's sister, and the sons of his

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own maternal uncle must be considered as his own Bandhus.

"The sons of his father's paternal aunt, the sons of his father's maternal aunt and the sons of his father's maternal uncle must be deemed to be his father's Bandhus. The sons of his mother's paternal aunt, the sons of his mother's maternal aunt and the sons of his mother's maternal uncle must be regarded as his mother's cognates kindred."

Clause 2.—"Here by reason of nearness the cognate kindred of the deceased himself are his successors in the first instance; on failure of them his father's cognate kindred, or if there be none, his mother's cognate kindred. This must be understood to be the order of succession here indicated."

Viramitrodaya, Chapter III, part VII, section 5, quoting the above passages from the Mitakshara, adds the following:—

"In the text of Manu, namely,—'In their default, a Sakulya, or the preceptor, or a pupil (becomes heir)',— the term Sakulya includes the Sagotras (Sapindas) and Samanodakas, the maternal uncle and the like, and the three classes of cognates. Also in the text of Yogiswara the term 'cognate' or Bandhu comprises also the maternal uncle. Otherwise the exclusion of the maternal uncle and the like would be the result. And it would be extremely improper that their sons are heirs, but they themselves though nearer are not heirs" [quoted in *Gridhari Lal Roy v. Bengal Government* (2), *Cmrit Koomaree Dabee v. Luckhee Narain Chuckerbutty* (1)].

Viramitrodaya, therefore, recognised that the above quoted text of the Mitakshara is not an exhaustive enumeration of all the Bandhus who are capable of inheriting, but is only an illustration of the proposition that there are three kinds of Bandhus, as is held by their Lordships of the Privy Council in *Gridhari Lal Roy v. Bengal Government* (2). This is now a settled proposition of Hindu Law.

In addition to the 9 persons mentioned in the Mitakshara, many other persons have been let in as heritable Bandhus and their place in the order of succession has to be determined.

According to the definition of Bandhu as Bhinna Gotra Sapinda given in the Mitakshara, it is obvious that a heritable Bandhu must be a Sapinda of the propositus, and

according to the text of Manu (Chapter IX, section 187)—"The property of a near Sapinda shall be that of a near Sapinda," the Sapinda relationship must be mutual. Among agnates the Sapinda relationship is always mutual but amongst cognates it is not in a few cases. In order, therefore, to determine whether any persons are heritable Bandhus, it is necessary to see whether they are Sapindas to each other—*Ramchandra Martand Waikar v. Venayak Venkatesh Kothekar* (5).

Chapter II, section 6, clause 2, no doubt clearly lays down the order of priority among Bandhus of each of the three classes. But no special rule has been laid down by the Mitakshara, or Sanskrit text writers and commentators as to the order in which the heritable Bandhus of each class should take preference amongst themselves, as pointed out in *Ram Charan Lal v. Rakim Bakhsh* (17) and *Gridhari Lal Roy v. Bengal Government* (2).

According to the Mitakshara the rule given for the preference of Atma Bandhus to those of Pitri Bandhus and so on is said to be "by reason of nearness;" (Chapter II, verse 6, clause 2). The Sanskrit words used are * * * * * literally meaning "by reason of nearness or proximity" (*vide* Monier William's Sanskrit English Dictionary). The reason "of nearness" assigned by the Mitakshara for the preference of one class of Bandhus to the other class is in accordance with the text of Manu itself "to the nearest Sapinda the inheritance belongs." This, therefore, is the only rule prescribed by Manu and the Mitakshara for determining the claims of rival Bandhus—the nearest of the Bhinna Gotra Sapindas or Bandhus will exclude the others.

The question then is now to determine the nearness or proximity among the Bhinna Gotra Sapindas of a propositus.

Manu in Chapter III, verse 5, recommends for marriage a girl not related to one's mother by the tie of Sapinda relationship nor to one's father as Sagotra and has limited the Sapinda relationship to seven degrees on the paternal side, Chapter V, Sloka 60. Yajnavalkya in Chapter I, verse 52 (Acharkunda), says, "a Sapinda should not be married." Commenting upon this verse Vijnaneswara in Mitakshara defined a Sapinda

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relationship and declared that definition to apply to the word 'Sapinda' used elsewhere in the Mitakshara, namely, in Chapters on Sradha and Inheritance.

Verse 53, Chapter I, runs as follows:—

"He should marry a girl who is a non-Sapinda (with himself). She is called his Sapinda who has particles of the body (of some ancestor, etc.) in common (with him). Non Sapinda means not his Sapinda. Such a one he should marry. Sapinda relationship arises between two people through their being connected by particles of one body. * * * *

Thus the son stands in Sapinda relationship to his father because of particles of his father's body having entered (his). In like (manner stands the grandson in Sapinda relationship) to his paternal grandfather and the rest, because through his father, particles of his grandfather's body have entered into (his own). Just so is (the son) a Sapinda relation of his mother, because particles of the mother's body have entered into (his). Likewise (the grandson stands in Sapinda relationship) to his maternal grandfather and the rest through his mother. So also is (the nephew) a Sapinda relation of his maternal aunts and uncles and the rest, because particles of the same body, the paternal grandfather, have entered into (his) and (theirs). Likewise does he stand in Sapinda relationship with paternal uncles and aunts and the rest, so also the wife and the husband are Sapinda relations to each other, because they beget one body. Likewise brothers' wives are in Sapinda relationship to each other. They produce one body, the son, with those (severally) who have sprung from one body (that is, because they bring forth sons by their union with the offspring of one person and thus their husbands' father is the common bond which connects them). Therefore, one ought to know that whenever the word Sapinda is used there exists (between the persons to whom it is applied) a connection with one body either immediately or by descent." The Sapinda relationship is limited in verse 53 as follows:—

"After the fifth ancestor on the mother's side," and "after the seventh on the father's side"—"on the mother's side in the mother's line after the fifth, on the father's side in the father's line after the 7th (ancestor) the Sapinda relationship ceases; these latter

two words must be understood, and, therefore, the word Sapinda, which on account of its etymological import (connected by having in common) particles (of the body) would apply to all men, is restricted in its signification, just as the word Pankaja (which etymologically means growing in the mud, and, therefore, would apply to all plants growing in the mud) designates the lotus only, and the like: and thus the 6th descendant beginning with the son and one's self counted as the 7th in each case are Sapinda relations. In the case of a division of a line also the enumeration should be until the 7th degree commencing from whence the direction of the line changes. This rule should be applied in every case."

The above translation is to be found in the Digest of Hindu Law of West and Buhler, page 120, and also in the judgment of the Bombay High Court in *Lallubhai v. Mankuwarbai* (27) and in *Lallubhai Bapubhai v. Cassibai* (3) and recently in the case of *Ramchandra Martand Waikar v. Vinayak Venkatesh Kotheekar* (5). The rest of the verse 53 runs as follows:—

* * * * *

It has thus been translated by Pandit Rajkumar Sarvadhikari, pages 604 and 605 (Tagore Law Lectures, 1880):—"A girl is said to be related to a given person through his mother if in reckoning upwards from the mother to the common stock (e.g., the maternal grandfather, the great-grandfather and the rest), she is found to stand in the 5th degree of the kindred in the mother's line. Similarly, a girl is said to be related to a given person in the 7th degree through his father if in reckoning upwards from the father to the common stock (e.g., the paternal grandfather and the rest) she is found to stand in the 7th degree of kindred to the common ancestor in the father's line."

In *Ramchandra Martand Waikar v. Vinayak Venkatesh Kotheekar* (5) their Lordships held that the limitation prescribed in verse 53 regarding Sapindas connected through females, applies only to Bhinna Gotra Sapindas and that the right of a Bhinna Gotra Sapinda or a Bandhu ceases with the 5th degree from the propositus not merely for the purpose of marriage but generally, and, therefore, for the purposes of inheritance also.

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The limits of Sapinda relationship prescribed by Manu in Chapter V, Sloka 60, and those prescribed by Yajnavalkya and Mitakshara on marriage apply to Sradha, impurity and inheritance (*vide* Mitakshara, Chapter I, verse 253, Chapter II, verses 135 to 137, and Chapter III, verse 18).

In *Soorendronath Roy v. Musammat Heerz-monee* (29) their Lordships observe: "Still there is in the Hindu Law so close a connection between their religion and their succession to property that the preferable right to perform the Sradha is commonly viewed as governing also the question of the preferable right to succession of property and as a general rule they would be expected to be found in union." According to Manu the near Sapinda is enjoined to perform the funeral rights and he is also entitled to inherit the property of the deceased.

For the purpose of inheritance and Sradha, the Mitakshara, therefore, in the aforesaid verses 52 and 53, Chapter I, lays down the rule for ascertaining in what degree of kindred a Bandhu or Sapinda belonging to a different Gotra stands to the deceased both in the direct line as well as when the line or lineage diverges. This rule of counting the number of degrees that a person is removed from the propositus is for the purpose of determining his nearness or propinquity with the propositus, and is, therefore, also the rule for the order of preference among several Bandhus for the purposes of inheritance and Sradha. Referring to the aforesaid verses 52 and 53 the learned Judges of the Sadr Dewani Adaulat, Agra, in their judgment quoted in *Bhyah Ram Singh v. Bhyah Ugur Singh* (7), hold: "We have thus furnished to us a rule for computing the order of succession in regard not only to Sapindas but to Samanodakas." That was a case of Gotrajas, but the above remarks would apply to the case of Bandhus as well.

It must, therefore, be held the Mitakshara in the said verse has laid down the rule that the nearest in the degree ascertained by the mode of calculation indicated there exclude those more remote. The mode of calculating in what degree a person stands to the pro-

(29) 1 B. L. R. P. C. 26; 3 Mad. Jur. 434; 2 Suth. P. C. J. 147; 2 Sar. P. C. J. 372; 20 E. R. 271; 12 M. L. A. 81 at p. 96; 10 W. R. P. C. 35; 1 Ind. Dec. (N. S.) 17.

positus has been clearly laid down in the said verse both when the line is direct as well as when the lineage diverges. For the latter it is said:—"Should the line diverge the enumeration should be made until the 5th degree commencing from whence the line varies. This should be applied in every case," that is, among collateral Bandhus the degrees of propinquity are counted from the ancestor from whence the line diverges (*vide* Mayne's Hindu Law, 8th Edition, page 712 and illustration, and *Ramchandra Martand Waikar v. Vinayak Venkatesh Kothekar* (5), where the collateral Bandhus, per genealogy given therein, beyond 5 degrees from the propositus were held not to be heritable). According to Sarvadhikari's Tagore Law Lectures, 1880, pages 633, 635, the degree in which a Bandhu stands to the deceased is ascertained by counting from the deceased himself to the Bandhu in question allowing a degree for each person, and among collaterals the counting commences from the common ancestor from whence the line diverges. At page 728, the same author says: "Within a well-defined range the degrees of Sapinda relationship are allowed to be heritable and the distance from the common ancestor is the test of propinquity."

This is also the method of determining nearness or propinquity adopted in the Indian Succession Act, Part III, section 22, where it is laid down that—"for the purpose of ascertaining in what degree any collateral relative stands to a person deceased, it is proper to reckon upwards from the person deceased to the common stock and then downwards to the collateral relative allowing a degree for each person both ascending and descending."

The table annexed to that section illustrates the method of determining the nearness of degree. The nearest in degree of kindred to the propositus thus ascertained excludes remoter degrees: (*vide* section 44).

Adopting the method of computation laid down in the Mitakshara, the sister's daughter's son is 5 degrees removed from the propositus, whereas the maternal uncle is only 4 degrees removed from the propositus. Again the former is 4th in descent from the common ancestor of himself and the propositus, whereas the latter is

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only 2nd in descent from the common ancestor of himself and the propositus. According to the English method of counting (*vide* Table to the Succession Act, section 22, *mutatis mutandis*) the former is 4 degrees removed and the latter 3 degrees removed from the propositus. Thus if the nearness or propinquity of Sapinda relationship depended upon the number of degrees removed either from the propositus or the common ancestor, there can hardly be any doubt that the maternal uncle is nearer than the sister's daughter's son, whatever mode of counting be adopted. In *Sradha* also where preference is given to the Sapindas on the ground of nearness, the method of determining the nearness is by counting the number of degrees removed from the common ancestor of the propositus. There is no reason, therefore, why this should not be the mode for determining the nearness or propinquity for the purpose of succession, particularly where there is no other rule mentioned expressly in the text or in the commentaries.

Brabhaspati—"Where there are many jnati, Sākulyas and Bandhavas, among them whoever is the nearest he shall take the property of the childless" [quoted in *Lallubhai v. Mankuvarbai* (27) and also in *Ram Charan Lal v. Rahim Bakhsh* (17)]. This is strictly in accordance with the text of Mann "to the nearest Sapinda the inheritance shall belong," and the Mitakshara, verses 52 and 53, Chapter I, as well as the Chapter on Bandhu where the only test is that of nearness. This again is the test applied in the Indian Succession Act.

Sarvadhikari has clearly laid down at page 728 that among the heritable Bandhus "the distance from the common ancestor is the test of propinquity;" and at page 711 that the "nearer excludes the more remote."

So does Golap Chandra Sastri in his Hindu Law, 4th Edition, at page 294 lay down—"the nearer in degree on whichever side is to be preferred to one more remote", as the foremost principle for determining the rival claims of Bandhus. Both of them have laid down other rules for selection among those equal in degree.

It is thus clear that the first and the

foremost rule of preference among several claimants is that the nearest in degree, ascertained by the simple method of counting given in the Mitakshara, exclude those more remote and when the degree is equal only then other considerations might be resorted to for the purpose of preference among the other rival claimants.

In the present case the maternal uncle and the sister's daughter's son are not equal in degree. The former is nearer in degree than the latter and must on this ground alone be preferred. There is, therefore, no occasion for applying any other test to the present case and it would have been unnecessary to discuss the other tests for determining the preferential claims of Bandhus but for the great stress laid on them at the Bar during the hearing of this case.

It is said that although a sister's daughter's son is remoter in degree than the maternal uncle, yet the common particles of the body of the propositus in the former are greater than those in the latter. It is difficult to weigh with exactitude the common particles of body or blood, and an attempt to do that would perhaps be futile. The following illustration, suggested, during the hearing of this case, by one of my learned colleagues in this Full Bench (which I quote here with his kind permission) will, however, show that the maternal uncle and the propositus have more particles of body and blood of their common ancestor (the maternal grandfather and the maternal grandmother of the propositus) than the sister's daughter's son and the propositus have of their common ancestor (the father and the mother of the propositus). The propositus's mother and the maternal uncle had each 16 annas of the common particles of body and blood of the maternal grandfather and the maternal grandmother. The propositus had 8 annas of his mother in common with the maternal uncle. Now the propositus and his sister had 16 annas of the common blood of the father and the mother. The sister's daughter inherited 8 annas and the sister's daughter's son only 4 annas of that common blood. The sister's son or the sister's daughter may be said to have equal quantity of common blood or particles of body of the father

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and the mother as the maternal uncle and the propositus had of the maternal grandfather and the maternal grandmother, but in a descendant further removed, namely, the sister's daughter's son, the common particles of body and blood became less. Thus the descendant of a remoter ancestor as the maternal uncle will have more common particles of body and blood than one descended from a nearer ancestor but several generations down. The uncertainty of this test is obvious and cannot be the basis of a general rule.

It is then contended that the sister's daughter's son, being descended from the father or mother, should be preferred to the maternal uncle who traces his descent from a more remote ancestor, namely, the maternal grandfather: in other words, the line of the father must be exhausted before that of the grandfather is resorted to. This contention is supported by the view expressed in *Balusami Pandithar v. Narayana Rau* (11), where a sister's son's son was preferred to a maternal uncle's son [followed in *Krishna Ayyangar v. Venkatarama Ayyangar* (10)]. No text or authority was cited in support of the view taken by their Lordships. As an illustration the case of a nephew excluding his uncle was quoted. The analogy does not afford any principle, for the priority of the nephew (brother's son) over the uncle (paternal grandfather's son) is by virtue of a special text in the Mitakshara.

In Chapter II, placita 135 and 136, Yajnavalkya, the order of succession of (an Aputra) a sonless propositus is as follows:—"The wife, the daughter, both parents, brother likewise, and their sons (* *), gentiles: (* *), cognates (* *), a pupil and a fellow-student. On failure of the first among these the next in order is indeed heir to the estate of one who departed for heaven leaving no male issue."

In accordance with this text of Yajnavalkya, in Chapter II, section 5, the Mitakshara gives the rules and the order of succession of Gotrajas (Sapindas and Samanodakas) and in clause 1 declares that brother's sons (or * * * *) succeed before the paternal grandfather and his sons. In placitum 4, it is expressly laid down "on failure of the father's descendants (Santan) the heirs are successively the paternal

grandmother, the paternal grandfather, the uncles and their sons."

Placitum 5. "On failure of the paternal grandfather's descendants (Santan) the paternal great grandmother, the great-grandfather, his sons and their sons inherit. In this manner must be understood the succession of kindred belonging to the same Gotra or family till the 7th degree among the Sapindas."

* * 'Suta' in verse 136 of Yajnavalkya, 'Santan' and 'Putra' in placita 4 and 5 of the Mitakshara cited above, do not mean only son or descendant in the restricted sense, for in Yajnavalkya the word 'Putra' in the verse stands for son, son's son and son's son's son, as defined by Manu, Vishnu, Harita, Yajnavalkya, Sankha and Lakshita (Mitakshara, Chapter I, section 11, Sloka 3, Viramitrodaya, Chapter III, Part I, section 11, page 198).

Upon the aforesaid special meaning of the word 'Putra and Santan,' the texts enjoin that the three immediate descendants of an ancestor would succeed before the next ancestor and his 3 descendants can come in. This rule applies only in the case of 3 immediate ancestors of the deceased upon the text of Manu, Chapter IX, verse 187, and is also based upon the theory of religious benefit: "To three ancestors water must be offered, to three funeral cakes must be given, the fourth descendant is the giver of oblations, the fifth has no connection."

The Smriti Chandrika, an authority in Madras, has restricted the meaning of son to include only son's son and has further laid down that the son and grandson of an ancestor succeed even before the ancestor (*vide* Smriti Chandrika, Chapter IX, section 5). This view has been adopted by the Madras Court in *Suraya Bhukta v. Lakshminarasamma* (30) and *Ohinnaswami Pillai v. Kunju Pillai* (31). This would show that in Madras, either on the text or on the authority there is no general rule even in the case of Gotraja Sapindas of exhausting all the heirs in the nearer line before going up to a higher one. Far less this can be a rule in the case of

(30) 5 M. 291; 2 Ind. Dec. (N. S.) 203.

(31) 11 Ind. Cas. 885; 35 M. 152; 21 M. L. J. 856; 10 M. L. T. 226.

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Bandhus. There is no such rule in the Benares school either.

Their Lordships of the Judicial Committee in the case of *Buddha Singh v. Lattu Singh* (6), affirming the decision of the Allahabad Court, laid down the order of succession among Gotrajas by working it up from the express texts, and not upon the general principle that 'the nearer line excludes the more remote.' Indeed if this were the rule, then the descendants up to the 7th degree of each immediate ancestor would have been exhausted before going up to a higher ancestor and the nephew's great-grandson would have excluded the grandfather and the great-grandfather and their three respective immediate descendants.

It is noticeable that among Gotrajas the heirs succeed in the order in which they have been named in verses 135 and 136, Yajnavalkya, but the Bandhus do not succeed in the order in which they have been enumerated in Chapter II, verse 6, as held in *Ram Oharan Lal v. Rahim Bakhsh* (17), dissenting from *Appandai Vathiyar v. Ragubali Mudaliar* (15). Thus the analogy of the principal rule of succession among the Gotrajas is not extended in the Benares school to Bandhus. Why then should the analogy of an uncle succeeding before the nephew apply to the case of Bandhus?

As to the contention that, as in the case of Gotrajas so in the case of Bandhus three descendants of nearer line should be exhausted before going to a higher line, or his descendants, it is enough to say that the words "and their sons" have not been used against the Bandhus named in Chapter II, section 6, Sloka 2, as in the case of Gotraja Sapindas. Besides, it would hardly help the sister's daughter's son, for Putra means son's son's son, and a daughter does not come in.

In the recent case of *Adit Narayan Singh v. Mahabir Prosai Tewari* (8) this Court declined to adopt the rule that a descendant of a nearer ancestor must be preferred to that of a remoter one, and held that a mother's paternal aunt's son, who although traced his descent through the mother's father's father, was preferable to mother's sister's son's son who traced his descent through the mother's father, on the ground that the former was

nearer in degree than the latter. Another ground for preference mentioned in that case was that the former offered religious oblations to two ancestors of the deceased, whereas the latter offered to none. This principle will be referred to later, but at present the decision of this Court is referred to for the purpose of showing that among Bandhus there is no such rule that the descendant of a nearer ancestor excludes that of a remoter one. Sir Edward Chamier, C. J., observed that if effect be given to this rule, "it may easily happen that an obviously more remote heir will exclude a nearer Sapinda" and will, therefore, override the cardinal principle of Hindu Law that "the inheritance belongs to the next Sapinda." Sir Edward Chamier was a party to the decision in *Kalian Rai v. Ram Chander* (32), where it was held that the grandson of a brother is preferable to a son of a paternal uncle, and that among the Gotrajas "the father's line as far as the grandson must be exhausted before the grandfather or his line can 'come in' and 'was, therefore, fully alive to the texts regulating the rule of succession among the Gotrajas; still he would not lay down a general rule that a nearer line excludes the one more remote and would not extend the rule by analogy to apply to the case of Bandhus. His long experience at the Bar and on the Bench in the United Provinces and lately on the Bench of this Court, where the Mitakshara Law of the Benares school prevails, is entitled to great weight, as showing that the Hindu Law, as administered in the United Provinces and here, does not admit of the rule that 'the nearer line excludes the one more remote'.

In the Madras cases *Balusami Pandithar v. Narayana Rau* (11) and *Krishna Ayyangar v. Venkatarama Ayyangar* (10), relied upon, no text or authority has been quoted. Besides, the rival claimants were equal in degree, and that also makes the ruling inapplicable to the present case, where the one claimant is nearer than the other. Sarvadhikari, at page 712 says, "all other things being equal, the nearer line excludes the one more remote."

It is then contended that the sister's daughter's son is a descendant from the father of

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the propositus, whereas the maternal uncle is connected on the mother's side of the propositus, and hence the former would exclude the latter on the principle that the heirs *ex parte paterna* exclude those *ex parte materna*. In the earlier decisions of the Madras Court the principle does not appear to have been recognised.

In *Narasimma v. Mangammal* (23) a maternal uncle was preferred to a father's sister and thus the above principle relied upon was not followed although in Madras females were heritable Bandhus, *vide Nallanna v. Ponnal* (33), *Ramappa Udayan v. Arumugath Udayan* (34).

In *Muttusami v. Muttukumarasami* (19) maternal uncle was preferred to father's father's sister's son, although the former was connected through the mother and the latter through the father and grandfather. This decision was affirmed by the Privy Council in *Muthusami Mudaliyar v. Simambedu Muthukumaraswami* (20), which is an indication that their Lordships did not give effect to or recognise the principle of preferring *ex parte paterna* to *ex parte materna*.

For the first time in *Sundrammal v. Rangasami Mudaliyar* (12) it was simply stated, without deciding, that as between the plaintiffs, the daughter's son of the paternal uncle, and the defendant No. 3 who was mother's sister's son, the latter is *ex parte materna* while the former is *ex parte paterna*. The point could not be decided as there was no dispute in that case between the defendant No. 3 and the plaintiffs; they compromised the case in the Court below. The appeal was by defendants Nos. 4 and 5, who were the sister's daughters of the propositus, against the plaintiffs. That ruling, therefore, cannot be any authority for the proposition that a Bandhu *ex parte paterna* is to be preferred to one *ex parte materna*. Yet this was relied on in the case of *Balusami Pandithar v. Narayana Rau* (11) for the proposition that the *ex parte paterna* excludes the *ex parte materna* and on that ground a sister's son's son was preferred to a maternal uncle's son. Here also no text of the Hindu Law was quoted in support of the general proposition.

The later decision in the Madras Court (33) 14 M. 149; 1 M. L. J. 46; 5 Ind. Dec. (N. S.) 105.

(34) 17 M. 182; 4 M. L. J. 30; 6 Ind. Dec. (N. S.) 125.

in *Subramania Mudaliar v. Ranganathan Chettyar* (13) shows that the Judges felt themselves bound to follow the decisions of that Court in *Sundrammal v. Rangasami Mudaliyar* (12) and *Balusami Pandithar v. Narayana Rau* (11). Miller, J., in answer to the argument that the rule is not based on any Smriti or accepted commentary, said that: "It is not a sufficient reason why we should refuse to follow the course of decisions in this Court." Sadasiva Aiyar, J., went further and said that "It is not the Shastra according to my views." The learned Judge, however, recognised that the Benares branch of the Hindu Law was different from that administered in that Presidency, as is expressly said by him within brackets "(and ignoring the Benares Branch of the school)." His Lordship further said that the father's sister's son would include father's sister's son's son, as son means son's son. I have already shown that the Mitakshara in enumerating the Bandhus does not add the words "and sons" as in the case of Gotrajas, and there is, therefore, no justification for including sons and grandsons of the persons named. Even if it be so, it would not apply to the present case. In the first place, sister or sister's daughter is not mentioned. In the second place, we are concerned here not with the sister's son's son, but with the sister's daughter's son, and the word 'son,' although it includes son and grandson, does not mean daughter and daughter's son. These Madras cases seem to accept the notion, as expressly held in *Appandai Vathiyar v. Ragubali Mudaliyar* (16), that amongst the persons *inter se* named in the text of Mitakshara they succeed in the order in which they have been named. This view was dissented from recently in an elaborate judgment of Banerji and Piggott, J.J., in *Ram Oharan Lal v. Rahim Bakhsh* (17), where the mother's brother's son was preferred to mother's sister's son and it was conclusively shown that the Madras authorities were wrong in holding that the order of priority among cognate Bandhus of each of the three classes is not the order in which those persons have been named in the text. In *Madho v. Janki* (35) relied upon, it is expressly mentioned that the decision

(35) 36 Ind. Cas. 514; 12 N. L. R. 148.

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is based upon the law and usage prevalent in the Bombay Presidency, where Mayukha and Smriti Chandrika are the authorities and have been given precedence over the Mitakshara. Mitter, J., said that "unless there were clear and cogent reasons for dissenting from the earlier decisions in Nagpur and in Bombay, where by custom the females are heirs, it would be my duty to follow them." The case of *Ram Bhargos v. Ram Parshad* (21), where father's brother's daughter's son was preferred to mother's brother's son, was decided by Aikman, J., sitting singly. The learned Judge did not discuss the point or cite any text. The decision, therefore, is not of any assistance in the case.

The rule that the heirs *ex parte paterna* should be preferred to those *ex parte materna* is not to be found in the text relating to Bandhus in the Mitakshara and there is no authority for supplying any omission in that text. It was well observed by Holloway, J., in *Chelikani Tirupati Rayanagaru v. Rajah Suraneni Vencata Gopala Narasimha Rau Bahadur* (36): "It is satisfactory to find it at least recognised that the rule of law is not to be derived...from the positive words of a commentator and still less from his omissions."

According to Mayne, those on the father's side take precedence over those on the mother's side "as regards two sets of persons equally near," and hence the nearer in degree on whichever side will exclude the one more remote (Mayne's Hindu Law, 8th Edition, page 812, paragraph 579).

Similarly Golap Chandra Sastri lays down among the governing principles of competition among Bandhus first rule—"the nearer in degree on whichever side is to be preferred to one more remote" and the second rule "of those equal in degree one related on the father's side—is to be preferred to one related on the mother's side." In the Madras cases the claimants were equal in degree. Thus the rule that *ex parte paterna* is to be preferred to *ex parte materna* becomes inapplicable to the present case where the claimants are not equal in degree, but the maternal uncle is nearer in degree than the sister's daughter's

son. I do not see how the father's line should be preferred to the mother's on the text of the Mitakshara, for the Mitakshara as distinguished from Dayabhaga prefers mother and grandmother to father and grandfather respectively, on the ground that their propinquity is greater than the father and grandfather (vide Mayne, paragraph 512, page 714; also Mitakshara, Chapter II, placita 3, 4 and 5). According to Smriti Chandrika which governs the Madras Presidency, the father succeeds before the mother and this might be the reason for the decisions in that Province that persons connected through the father are to be preferred to those connected through the mother. There is an absence of direct authority of the Privy Council on the point but as already shown, the principle was not given effect to in *Muthusami Mudaliyar v. Simambedu Muthukumarswami Mudaliyar* (20).

The reason urged for preferring persons related through males to those related through mothers or other females is possibly that in the case of the latter the Gotra becomes different by marriage, and where two females intervene the family becomes much more remote and is disconnected by two different Gotras or families. On this ground also the maternal uncle should be preferred because only one female intervenes between him and the propositus, whereas in the case of the sister's daughter's son two females intervene. There is apparently a conflict of decisions in the Madras Court on this point. In *Krishna Ayyangar v. Venkatarama Ayyangar* (10) father's sister's daughter's son was preferred to paternal grandfather's sister's daughter. As regards the intervention of two females in the case of the former, it was said as follows:—

"Whether having regard to the preponderating influence in the Hindu system of law of relationship through males with reference to the devolution of the heritage of a man, such a circumstance (intervention of females) as that relied on may or may not avail when the competition is between Bandhus of the same category and of the same degree, it is unnecessary to consider."

The question, therefore, was left undecided. The question was, however, expressly decided in the case of *Tirumalachariar v.*

(36) 6 M. H. C. R. 278 at pp. 285, 291.

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Andal Ammal (14), where a daughter's son's son was preferred to a daughter's daughter's son on the grounds stated that "it is legitimate to prefer that claimant between whom and the stem there intervenes one female link to that claimant who is separated from the stem by two such links." It may be noted that in Madras a daughter's daughter is an heir and Bandhu [*Ramappa Udayan v. Arumugath Udayan* (34), *Nallanna v. Ponnal* (33)]. With regard to the decision in *Tirumalachariar v. Andal Ammal* (14), it was said in the case of *Appandai Vathiyar v. Ragubali Mudaliar* (16) that the principle of two females intervening would not apply to the case, because of the important qualification "of all other considerations being equal," and the mother's sister's son was preferred to the maternal uncle's son on the ground that he was mentioned before the latter in the list of Bandhus given by the Mitakshara in the text, section 6, Chapter II. This view has been dissented from recently in the case of *Ram Oharan Lal v. Rahim Bakhsh* (17), where it is held that the mother's sister's son, though named before the maternal uncle's son in the enumeration of Bandhus in the Mitakshara, cannot still be preferred to the latter inasmuch as he is separated from the propositus by two females, whereas in the case of the maternal uncle's son only one female intervenes. So far as the present case is concerned, the Allahabad decision must be preferred to those of the Madras and the Bombay Courts. Apart from the aforesaid decision of the Allahabad Court, I think that the intervention of two females would more diverge the Gotra and family of the person so related from that of the propositus than where only one female intervenes and that there would be less or no possibility of the former classes of relations conferring any spiritual benefit to the propositus or his ancestors. This might possibly be the reason for the rule, if any, of postponing females or relations through females to males, and those connected through males. The reason will apply with greater force to exclude persons connected through two females in preference to those connected through one female. This was the reason adopted in *Tirumalachariar v. Andal Ammal* (14) and *Ram Oharan Lal v. Rahim Bakhsh* (17).

I have discussed all the tests for determining the rival claims of Bandhus and I would conclude by saying that none of those tests are mentioned in the text either of the Rishis or by Vijnaneswara in the Mitakshara, or in the authoritative commentary of Mitakshara, namely, Viramirodaya, received as a treatise of high authority and as exposition of what may have been left doubtful by the Mitakshara. I have also shown that there is no authority for resorting to any of those tests where the claimants are not equal in degree.

The claim of the maternal uncle rests upon a firmer ground, namely, that he offers oblations to the two common ancestors of the propositus and thereby confers spiritual benefit to him, whereas the sister's daughter's son offers oblations to none of the ancestors of the propositus and confers, therefore no spiritual benefit at all. It is said that some of the persons named in the Mitakshara as heritable Bandhus do not confer spiritual benefit and in particular one of the Matri Bandhus, who confers spiritual benefit, is postponed till some of the Pitri Bandhus who confer none, and hence the Mitakshara abandoned the doctrine of spiritual benefit to be applied to the case of Bandhus.

We are dealing here with the case of claimants who are not expressly mentioned in the Mitakshara as Bandhus, and there is no reason why their nearness or propinquity to the propositus should not be determined by the religious benefit they confer upon the deceased in order to give preference among rival claimants.

In the case of *Bhyah Ram Singh v. Bhyah Ugur Singh* (7) the Board affirmed this ruling in the following words:—

"When a question of preference arises, as preference is founded on superior efficacy of oblations, the principle must be applied to the solution of the difficulty. It obtains properly when a succession opens to the deceased, when the question mooted is a real one (at least in the contemplation of pious Hindus), viz., who best can confer on the deceased and his ancestors not fully benefited the benefits which the grades of oblations offer in differing degrees."

In the recent case of *Buddha Singh v. Lattu Singh* (6), their Lordships, relying

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upon the text of Viramitrodaya, Chapter II, Part I, section 23 (A), observed—"Now it is absolutely clear that under the Mitakshara whilst the right of inheritance arises from Sapinda relationship or community of blood, in judging of the nearness of blood relationship or propinquity among the Gotraja the test to be applied to discover the preferential heir is the capacity to offer oblations."

Similar was their Lordships' observation in the case of *Soorendronath Roy v. Musamat Heeramonee* (29), already referred to in the earlier part of this judgment.

It is contended that the rule laid down by their Lordships of the Privy Council applies only to the case of Gotraja Sapindas and not to the Bhinna Gotra Sapindas or Bandhus. There does not appear to be any substance in this contention. Their Lordships do not restrict the application, and the authorities that will be presently quoted will show that the rule applies also to the case of Bandhus. Besides, if the rule applies to the Sagotra Sapindas, there is no reason why it should not apply to the Bhinna Gotra Sapindas. The passage in Viramitrodaya relied on by their Lordships occurs in Chapter II, Part I, section 23 (A), relating to the Partition of Heritage: "But when there are many claimants to the heritage amongst the gentiles and the other class, then the fact of conferring benefits on the proprietor of the wealth by means of the offering of oblations and the like, only excludes those that do not confer such benefits though this is not the criterion here." The Sanskrit words are:—

(vide page 39, Sanskrit Text, and page 91, Translation by Golap Chandra Sastri). The expression means "Gotrajas and other (class)" as rendered by Dr. Sarvadhikari. It clearly lays down the general rule applicable not only to Gotrajas but to all classes of heirs including Bandhus. This is by using the word 'Gotraja,' and the other classes.

Devala says, "Sages declare partition of heritable property to be co-ordinate with gifts of funeral cakes." Vishnu and Gautama support the theory of religious ob-

lations as a determining factor in inheritance.

Mitter Missir has conclusively shown that according to Manu, Yajnavalkya and other Rishis as well as the Mitakshara, inheritance is intervoven with capacity to offer funeral oblations. It is needless to quote these passages. They have been referred to in Viramitrodaya, Chapter III, Part I, section 11, pages 134, 155, 157, 186 and 200. Relying upon those texts, Viramitrodaya says: "the three descendants beginning with the son confer the greatest amount of spiritual benefit on the three ancestors beginning with the father, consequently the estate, conducing as it does to the benefit of the owner himself when taken by the sons, etc., continues as it were the owner's own by reason of the proximity of benefit. And the nearness on account of the spiritual benefit is consistent with reason: thus it is ordained..... Since, in the Chapter on Partition of Heritage, the conferring of spiritual benefit is by the term 'therefore' set out as the reason; hence it is indicated that he alone is entitled to get the estate, on whom the estate being devolved conduces to the greatest amount of spiritual benefit of the deceased owner, and that proximity in this way is to be accepted as a general rule and reasonable." Indeed Mitter Missir has considered the religious efficacy in discussing the claim of every heir separately and has throughout his work maintained that the degrees of propinquity are determined by religious merit. West and Buhler accept the principle of religious efficacy as propounded in Viramitrodaya. Aparakba, another commentator of great repute, who flourished a century before Mitter Missir, has also upheld the same principle of preference among several claimants. There are passages in the Smriti Chandrika supporting the same view in Chapters on Inheritance of Gotrajas and the last paragraph (15) in Chapter XI regarding the succession of Bandhus.

I next deal with the principle of religious efficacy as accepted in the judicial decisions. The Calcutta High Court in the Full Bench case of *Omrit Koomaree Dabee v. Luckhee Narain Chuckerbutty* (1), per Mitter, J., applied the doctrine of spiritual benefit for holding

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that sister's son and maternal uncle, though not specifically mentioned in the list given by Mitakshara, are heritable Bandhus, and affirmed the views of Sir William Jones that "the doctrine of funeral cakes is the key to the whole Hindu Law of Inheritance. All the schools of Hindu Law that are current in the country are agreed in accepting this principle as their guide, however much they might differ from one another with reference to particular points connected with its application."

In *Gunesh Chunder Roy v. Nil Kamul Roy* (18) the principle of spiritual benefit was accepted to be the general principle of Hindu Law and as a general guide in determining the preferential claims of the parties where their respective position is not settled in the Mitakshara itself or by any decided case, the principle was applied and a sister's son was preferred to a mother's sister's son of the deceased on the ground that the former "confers greater spiritual benefit upon the soul of the deceased than the latter."

Similarly the Allahabad High Court in the Full Bench case of *Janki v. Nand Ram* (24), upon the authority of Viramitrodaya and the Mitakshara, held that although propinquity is the rule of inheritance and the spiritual benefit cannot create the heritable right, yet it determines with precision the preferable right of Gotrajas and other heirs, where there is more than one claimant to the heritage.

Mahmood, J., agreed with the above and went the length of saying: "The Hindu system went further and laid it down as an imperative rule, that the right to inherit a dead man's property is exactly co-extensive with the duty of performing his obsequies. The devolution of property depends upon the competence to perform the obsequial rites of the deceased."

In the Full Bench case of *Suba Singh v. Sarafraz Kunwar* (25) with regard to the passage in Viramitrodaya already referred to, Banerji, J., observed that "It may be that, where two Sapindas stand, with reference to propinquity, in the same degree of nearness to the propositus, the capacity to confer the highest amount of spiritual benefit should be applied as a test to determine the order of priority. But, where the degrees of propinquity are

different, the rule of religious efficacy has, according to the Mitakshara, no application."

According to Banerji, J., therefore, even if the maternal uncle and the sister's daughter's son were equal in degree, the former would have been preferred and being nearer in degree, his claim is much more preferable.

The Bombay Court in *Lallubhai v. Mankuvarbai* (27) held that the Mitakshara adopted, in lieu of religious efficacy, the theory that Sapindaship is based upon community of corporal particles, or in other words, upon consanguinity. This was affirmed by their Lordships of the Privy Council in *Lallubhai Bapubhai v. Cassibai* (3). Neither the Bombay Court nor their Lordships of the Judicial Committee held that spiritual benefit could not be taken into consideration in determining the preferential right of rival claimants. Their Lordships say that by the law of Mitakshara as interpreted in Western India, the preferential right to inherit in the classes of Sapindas is to be determined by family relationship or community of corporal particles and not alone by the capacity to perform the funeral rights. Moreover, in that case the right of the widow of a first cousin was upheld upon the local law and usage and upon the Mayukha which has precedence over the Mitakshara in Gujerat and Bombay Presidency. Except for the principle referred to above the authority is not applicable to the Benares school as females, unless specially mentioned, do not succeed in Northern India to the exclusion of male heirs [*Gauri Sahai v. Rukko* (37)].

Later on in *Mohandas v. Krishnabai* (28) the Bombay Court applied the principle of religious efficacy and preferred the maternal uncle to mother's sister's son. It was observed—"When it is once admitted that the list of Bandhus given in the text is not exhaustive and that other relatives take before some of those specified in the list, there is no other logical conclusion except that the relative who as the nearest of kin is capable of conferring the greatest spiritual benefit on the soul of the

(37) 3 A. 45; 5 Ind. Jur. 433; 2 Ind. Dec. (N. S.) 21.

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deceased, must in all cases be preferred to a more remote Bandhus."

This Bombay case [*Mohandas v. Krishnabai* (28)] has been referred to in the later decisions of the same Court in *Gojabai v. Shrimant Shahajirao Maloji Raje Bhosle* (38) and the Privy Council case of *Bai Kesserbai v. Hunsraj Morarji* (39). But the principle laid down there has not been at all dissented from or adversely commented upon. The case of *Parot Bapalal Sevakram v. Mehta Harilal Surajram* (40) has also been referred to, but in that case there were no rival claimants and no question arose as to preference by religious efficacy.

The views of the Madras Court have been conflicting. In *Chelikani Tirupati Rayanagaru v. Rajah Suraneni Venkata Gopala Narasimha* (36), Innes, J. observed as follows:—

"Putting the Mitakshara aside for the present, all the treatises on Hindu Law just referred to seem to disclose the intention of including as heirs in the order of propinquity all kindred, however remote, except when propinquity requires to be postponed to the superior benefits which another relationship is capable of conferring in funeral oblations."

In *Lakshmanammal v. Tiruvenguda Muzali* (41) Turner, C. J., referring to *Chelikani Tirupati Rayanagaru v. Rajah Suraneni Venkata Gopala Narasimha* (33), said that "that ruling has the support of at least one text, although the right to perform funeral rites is a sequence and not a cause of inheritance and the recognition of the right in a person may fairly be regarded as recognition of the claim of inheritance in the same person."

In *Muttusami v. Muttukumarsami* (19) a maternal uncle of the half blood was preferred to father's paternal aunt's son; the Court, relying on and quoting a passage from the *Viramitrodaya*, Chapter III, Part I, section 2, page 158, observed:—"This passage indicates that as between Bandhus of the same class, a rule of preference may be found in the quantity of spiritual benefit

which they confer..... As between Bandhus of the same class the spiritual benefit they confer upon the propositus is, as stated in *Viramitrodaya*, a ground of preference."

On appeal to the Privy Council *Muthusami Mudaliyar v. Simambedu Muthukumaraswami Mudaliyar* (20) their Lordships affirmed this decision but did not take exception to the observation of the Madras High Court. On the other hand, their Lordships expressly recognized the authority of *Viramitrodaya*.

In *Sundrammal v. Rangasami Mudaliar* (12) relied upon by the appellant, the decision in *Muttusami v. Muttukumarsami* (19) was referred to, but the doctrine laid down there regarding the preference to be given by reason of spiritual benefit was not dissented from. On the other hand, the analogy of the sister's son excluding the sister was quoted with the remark that the sister is a mere relative and being a female, "can offer no funeral oblations."

In *Balusami Pandithar v. Narayana Rau* (11) and *Appandai Vathiyar v. Ragubali Mudaliar* (16) the doctrine of religious efficacy was not acted upon. In the latter case their Lordships felt themselves more at liberty not to follow the doctrine "by the fact that the parties were Jains and that though the Hindu Law is *prima facie* held applicable to them, its religious developments should not have unrestricted operations." The actual decision in the case, that the mother's sister's son is preferable to the maternal uncle's son, has been dissented from recently by the Allahabad Court in *Ram Charan Lal v. Rahim Bakhsh* (17). In the former Madras case [*Balusami Pandithar v. Narayana Rau* (11)] it was held that the doctrine ought not to be resorted to in derogation of the principles (1) the nearer line excluding the more remote, and (2) that persons *ex parte materna* should be preferred to those *ex parte paterna* on the ground that these principles are the cardinal principles of the Hindu Law and pervade the law of inheritance under the Mitakshara system. But no text or authority was quoted in support of the aforesaid view, or that these principles should override the rule of religious efficacy for the purpose of giving preference in the case of rival claimants as laid down in the earlier deci-

(38) 17 B. 114; 9 Ind. Dec. (N. S.) 75.

(39) 30 B. 431 at p. 449; 33 I. A. 176; 10 C. W. N. 802; 4 C. L. J. 9; 8 Bom. L. R. 416; 3 A. L. J. 434; 1 M. L. T. 211; 16 M. L. J. 446 (P. C.).

(40) 19 B. 631; 10 Ind. Dec. (N. S.) 421.

(41) 5 M. L. J. 241 at p. 250; 2 Ind. Dec. (N. S.) 169.

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sions of the same Court. But both the aforesaid Madras decisions in *Balusami Pandithar v. Narayana Rau* (11) and *Appandai Vathiyar v. Ragubali Mudaliar* (16) have admitted that "the Privy Council and the Madras Court have adverted to considerations of religious efficacy of oblations as a factor in determining the relative priority of competing claimants," particularly "as between Bandhus of the same class." The doctrine, therefore, has not been wholly abandoned by the Madras Court. Indeed a reference to the *Smriti Chandrika* itself will show that the doctrine has been referred to in more places than one in Chapters relating to succession of Gotrajas. In Chapter XI, section 5, paragraph 14, *Smriti Chandrika* has quoted from the *Mitakshara* the enumeration of Bandhus. In paragraph 15, it says "of the kinsmen, distant kinsmen, and cognate kindred, in default of one that stands nearest in the order expressly given, he that may be somehow viewed to stand on a par with him, may be selected, it being generally declared by Gautama 'let those take the inheritance who give the funeral cake' (Pinda), who are the descendants from the same Gotra, or who are sprung from the same Rishi." I do not know how in face of the above, it can be said that the *Smriti Chandrika* did not lay down that (1) the nearest in degree should be preferred to those more remote, and (2) that religious efficacy may be resorted to for the purpose of preference of the rival claimants. This exactly agrees with the view in *Viramitrodaya* and as stated in the rules given in Dr. Sarvadhikari's *Tagore Law Lectures* and *Golap Chandra Sastri's Hindu Law* already referred to. Whatever may have been the view in the other Presidencies, the proposition has been stoutly affirmed and followed in Northern India, where the *Mitakshara* as interpreted by *Viramitrodaya* governs the rule of succession.

The Privy Council as early as 1868, in *Gridhari Lal Roy v. Bengal Government* (2), observed, after quoting the text of the *Mitakshara* re the enumeration of Bandhus: "This sub-division of Bandhus into 3 classes is possibly a consequence of that part of the definition already referred to, which treats them as kinsmen connected by funeral oblations." As observed by their Lord-

ships of the Privy Council in *Bhyah Ram Singh v. Bhyah Ugur Singh* (7), "The compiler of the *Mitakshara* is said to have been an ascetic or a devotee and from that source nothing at variance with the religion of the Hindus is likely to have flowed." Yajnavalkya was the first to mention the offering of a cake to the maternal ancestors in Chapter I, Sloka 242, and to introduce Bandhus as heritable heirs and could not ignore the religious considerations from inheritance, much less his commentator, *Vijaneswara*, the author of the *Mitakshara*, could do.

Mayne on Hindu Law, 8th Edition, section 516, page 723, dealing with the succession of Bandhus, says: "The *Mitakshara* recognized the difference between the offerings which A and B were bound to make to X, but it used the difference in order to ascertain which of the two was nearer to X in a direct line."

Coming to this Court, in the recent case of *Adit Narayan Singh v. Mahabir Prosad Tewari* (8) Sir Edward Chamier, C. J., referred to *Viramitrodaya* and to the Privy Council authorities and gave effect to the religious benefit in determining the claims of the mother's paternal aunt's son to that of a mother's sister's son's son, although the latter was the son of an Atma Bandhu expressly named in the *Mitakshara*. Sir Edward Chamier in *Kalian Bai v. Ram Chandar* (32) had also referred to *Viramitrodaya* for the proposition that religious consideration should be resorted to in order to prefer the claims of competitors.

In another case, *Harihar Oharan v. Jang Bahadur* (42), a Division Bench of this Court per Roe, J., held that although the succession of a Bandhu is based on consanguinity, it must still be supported by the right to offer oblations to a common ancestor. There is no reason why the two decisions of this very Court should not be followed in this case. It appears to me clear that the maternal uncle must exclude the sister's daughter's son on the ground that he confers spiritual benefit on the propositus, whereas the latter confers none.

There is a difference of opinion among the recent commentators as to the rights of the present claimants. Those who have placed (42) 34 Ind. Cas. 183.

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the sister's daughter's son above the maternal uncle have apparently done so on the authority of the Madras cases which, as has already been shown, do not apply to the Benares school. They have not supported their views by any text of the Mitakshara or the Hindu Law. The claims of the parties must be determined in accordance with the texts. According to Sarvadhikari's Tagore Law Lectures, page 728, father's paternal aunt's son should take precedence over mother's brother or mother's sister's son, but this is obviously contrary to what has been held in *Muthusami Mudaliyar v. Simambedu Muthukumaraswami Mudaliyar* (20). We cannot, therefore, depend upon a commentator's views but upon the text.

The claim of the maternal uncle to succeed ranks high after the Gotrajas under the Mitakshara. In verses 52 and 53, the Mitakshara itself, while enumerating the Sapindas, mentions maternal uncle as occupying a high position.

Viramitrodaya, Chapter III, Part VII, section 5, at page 200 of Golap Chandra Sastri's Translation, after quoting from the Mitakshara the list of Bandhus, adds—"In the text of Manu, namely—"In their default, a Sakulya or the preceptor or a pupil (becomes heir)"—the term Sakulya includes the Sagotras (Sapindas) and Samanodakas, the maternal uncle and the like, and the three classes of cognates. Also in the text of Yogisvara the term 'cognate' or Bandhu comprises also the maternal uncle. Otherwise, the exclusion of the maternal uncle and the like would be the result. And it would be extremely improper that their sons are heirs but they themselves though nearer are not heirs."

Dr. Jolly in the Tagore Law Lectures for 1883 at page 215 is of the same view.

According to Viramitrodaya, the maternal uncle would even have precedence over the 3 classes of Bandhus. There is no reason why the authority of Viramitrodaya, right or wrong, which has been accepted for centuries in the Benares school, should be discarded on any strained analogies or on account of its being either unreasonable or even repugnant to the text of Mitakshara, for the Benares school is governed not by the Mitakshara alone, but by the Mitakshara as interpreted by Mitter

Missir in Viramitrodaya. There is another passage in the Mitakshara itself, page 322 3rd Edition, 1829, quoted in *Gridhari Lal Roy v. Bengal Government* (2), *Omrut Koomaree Dabee v. Luckhee Narain Chuckerbutty* (1): "When one having gone to a foreign country dies, let the descendants, cognates (Bandhus), gentiles, or his companions take the goods. In their default, the King. When of those who are associated in trade, any one having gone to a foreign country dies, then his share shall be taken by his heirs, i.e., the son and other descendants, cognates, Bandhavas." This passage was relied on by their Lordships of the Privy Council in the aforesaid case at page 466,* in the following words:—"Here then is a passage written by the author of the Mitakshara himself, which treats the maternal uncle as capable of inheriting. The learned Judges of the Court below meet this authority by suggesting that the heirship of the maternal uncle, as well as that of the co-trader, may be exceptional and confined to the case of the trader dying abroad. Their Lordships however, cannot admit the reasonableness of this hypothesis." Therefore, the maternal uncle occupies the foremost position among the Bandhus and according to Viramitrodaya is superior to the Bandhus. Sister's daughter's son is nowhere mentioned. Besides, it is doubtful whether the sister's daughter's son is an Atma Bandhu or a Pitri Bandhu. If he is a Pitri Bandhu, he will clearly be excluded by the maternal uncle. The doubt was also expressed in the case of *Umaid Bahadur v. Udoi Chand* (4), and in fact I am not satisfied that the persons not named in the Mitakshara should necessarily be classed in one of the three classes mentioned there. In the already cited Patna case, *Adit Narayan Singh v. Mahabir Prasad Tewari* (8), it was not accepted that the descendant of an Atma Bandhu is necessarily an Atma Bandhu, for the reason that then "it may easily happen that an obviously more remote Sapinda will exclude a nearer Sapinda."

I have refrained from quoting any translation from Colebrooke for the reason that the accuracy of his translation has been doubted. On a consideration of the original texts and of such translations as have been

*Page of 12 M. I. A.—Ed.

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accepted by the authorities, particularly of the Privy Council, I have come to the conclusion that the theory of religious efficacy is based upon the original text of the Smritis, the Mitakshara and the Viramirodaya, the authoritative commentary thereof. The rule has been accepted by all the authorities on the Hindu Law and has been affirmed by judicial decisions, both in this country and of the Judicial Committee of the Privy Council prior to and after Colebrooke's translation of the word Sapinda was doubted. The rule has nothing to do with the meaning of the word 'Sapinda,' whether it means a connection through the particles of one body or a connection by balls of rice, but is founded upon the fact that the rules of succession and religion are indissolubly blended in the Hindu Law and cannot, by any process of reasoning or analogies, be separated. This has been affirmed recently by the Privy Council, as already adverted to, in *Buddha Singh v. Lattu Singh* (6) (a case of the Benares school and applicable to the parties in the present case).

To conclude, the maternal uncle must be preferred to the sister's daughter's son for the reason that (1) he is nearer in degree than the latter, (2) he confers spiritual benefit on the propositus, whereas the latter confers none (3) he is mentioned in certain texts of the Mitakshara as occupying a high position among heirs, whereas the sister's daughter's son is not mentioned anywhere, and (4) he is connected with the deceased through one female, whereas the latter is connected with the deceased through two females and is thus much more remote.

I do not think that the fact that the sister's daughter's son is related to the deceased through his father, whereas the maternal uncle is related through his mother, or that he is descended from a nearer ancestor, namely, the father, whereas the maternal uncle is descended from a more remote ancestor, namely, the maternal grandfather, does in any way give him any preferential right, for the simple reason that these are not the tests mentioned in the Smritis, the Mitakshara, or any authoritative commentary.

I, therefore, hold that the maternal uncle

should be preferred to the sister's daughter's son and would answer the reference accordingly.

IMAM, J.—The question, referred to us for determination by this Full Bench is whether in a family governed by the Mitakshara School of Law a sister's daughter's son is to be preferred to the maternal uncle of the last male owner as his heir. The answer to this question depends upon the order of succession among the Bhinna Gotra Sapinda under the Mitakshara as expounded in the Benares school. The Mitakshara has placed Bhinna Gotra Sapindas, that is Bandhus, into three classes in the order in which they stand to the deceased for the purposes of inheritance. These are Atma Bandhus, who are cognate kindreds of the deceased; Pitri Bandhus, who are cognate kindreds of the father of the deceased, and Matri Bandhus, who are cognate kindreds of the mother of the deceased. This is evident from the following passage in Chapter II, section 6, paragraph 1, of the Mitakshara:—

"On failure of gentiles cognates are heirs. Cognates are of three kinds, related to the person himself, to his father or to his mother as is declared by the following text,—'the sons of his own father's sister, the sons of his own mother's sister and the sons of his own maternal uncle must be considered as his own cognate kindred'. The sons of his father's paternal aunt, the sons of his father's maternal uncle must be deemed his father's cognate kindred. The sons of his mother's paternal aunt, the sons of his mother's maternal aunt and the sons of his mother's maternal uncle must be reckoned his mother's cognate kindred."

The passage was relied upon in *Omrit Koomaree Dabee v. Luckhee Narain Chuckerbutty* (1). It will be observed that the text of the Mitakshara does not mention sister's daughter's son or maternal uncle as heirs, but it has been repeatedly held that the enumeration in the text is only illustrative and not exhaustive [vide *Gridhari Lall Roy v. Bengal Government* (2), *Mathuswami Mudaliyar v. Simambedu Muthukumaraswami Mudaliyar* (3), *Umair Bahadur v. Udoi Chand* (4), *Babu Lal*

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v. *Nanku Ram* (43). Taking the text as only illustrative it is clear that sister's daughter's son and maternal uncle are Atma Bandhus of the deceased. This is admitted in the argument addressed to us by both sides at the Bar. The question then is, which of these two Atma Bandhus has preference for the purposes of inheritance. They both have a place in the first group of heritable Bandhus.

Paragraph 2, section 6, Chapter II, of the Mitakshara runs as follows:—

"Here by reason of more affinity the cognate kindreds of the deceased himself are his successors in the first instance; on failure of them his father's cognate kindred; or if there be none, his mother's cognate kindred. This must be understood to be the order of succession here intended."

The text lays down the order of precedence among the three main classes of Bandhus known as Atma Bandhus, Pitri Bandhus and Matri Bandhus. This is not questioned by the parties before us and is supported by judicial pronouncements [*vide Muthuswami Mudaliyar v. Simambedu Muthukumaraswami Mudaliyar* (20), *Appandai Vathiyar v. Ragubali Mudaliyar* (16)]. There is no text of the Mitakshara which definitely lays down any rule of precedence when the competition is between Bandhus of the first class *inter se*. That a sister's daughter's son is a heritable Bandhu received the sanction of judicial authority in the decision of the Calcutta High Court in *Umaid Bahadur's case* (4).

The learned Vakīl appearing on behalf of the appellant does not dispute that the mother's brother is also a heritable Bandhu, nor could this be doubted once the illustrations given in the Mitakshara are accepted to be not exhaustive. We have, therefore, to decide between the rival claims of two cognates who are both admittedly heritable Bandhus. If the test as a determining factor were the efficacy of religious benefit, there is little doubt that the mother's brother would have preference over a sister's daughter's son, for the former admittedly would offer Pindas to the maternal grandfather of the propositus; whereas the latter suffers from complete incapacity to render any religious service whatever to the propositus or his

(43) 22 C. 339; 11 Ind. Dec. (N. S.) 228

antestors. One of the cardinal differences between the Dayabhaga of the Bengal school and the Mitakshara of the Benares school is that inheritance under the latter law is regulated by propinquity of relationship as the guiding principle for determining the order of succession [*vide Suba Singh v. Sarafraz Kunwar* (25), *Parot Bapalal Sevakram v. Mehta Harilal Surajram* (40), *Balusami Pandithar v. Narayana Rau* (11)].

Indeed the mistake by Colebrooke in translating the word "Sapinda" in the Mitakshara by the phrase "connected by funeral oblations" has become a matter of history in the case-law of India and was discovered so long ago as 1876, when their Lordships of the Bombay High Court gave their decision in the well-known case of *Lallubhai v. Mankuwarbai* (27). That religious efficacy is not the determining guide for the purpose of inheritance in the Mitakshara is also evident from the fact that no less than 4 heritable Bandhus out of the 9 specifically mentioned in the text (Chapter II, section 6, paragraph 1) can confer no religious benefit whatsoever. The proposition that Vijnaneswara, the author of the Mitakshara, construes Sapinda relationship to arise from community of blood is supported by judicial decisions [*vide Ramchandra Martand Waikar v. Vinayak Venkatesh Kothekar* (5), *Appandai Vathiyar v. Ragubali Mudaliyar* (16), *Parot Bapalal Sevakram v. Mehta Harilal Surajram* (40)].

I do not, therefore, think that the mother's brother's capacity to render religious service can be relied upon in a case governed by the Mitakshara as a ground of preference over a sister's daughter's son. It was contended by the learned Vakīl for the respondent that though propinquity of blood determines the preferable right to succeed, the test to determine propinquity is closeness in religious benefits and not blood parties. No text has been placed before us that the principle enunciated by the learned Vakīl is one that has application to succession by Bandhus under the Mitakshara. It has, however, been argued that where the Mitakshara is silent, the authority of Viramitrodaya must be received as an exposition of what has been left in doubt by Vijnaneswara. That Mittra Missir, the author of Viramitrodaya, has a high place in the Benares school

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is not denied [*vide Gridhari Lall Roy v. Government of Bengal* (2)]. But no text from *Viramitrodaya* has been placed before us to establish the proposition that among *Bandhus* preference must be given to one that renders religious service over another who does not, or that among *Bandhus* the capacity to offer such service is the test of propinquity of blood. Reliance has been placed upon a passage of *Viramitrodaya* quoted by their Lordships of the Judicial Committee in *Buddha Singh v. Lattu Singh* (6). The passage in question is as follows:—

"When there are many claimants to the heritage among *Gotrajas* and the like, then the fact of conferring benefits on the proprietor of the wealth by means of the offering of oblations and the like only excludes those that do not confer such benefits."

The rival claimants before their Lordships of the Judicial Committee were agnates of the *propositus* and in dealing with the case their Lordships were pleased to observe as follows:—

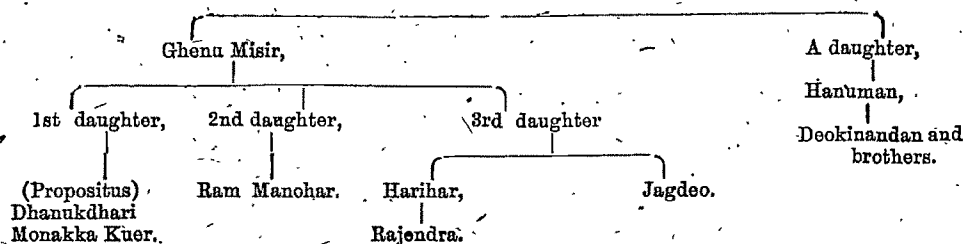
"Now it is absolutely clear that under the *Mitakshara* whilst the right of inheritance arises from *Sapinda* relationship, the community of blood, in judging of the nearness of blood relationship or propinquity among the *Gotraja* the test to be applied to discover the preferential heir is the capacity to offer oblations."

So also in the case of *Bhyah Ram Singh v. Bhyah Ugur Singh* (7), where the claimant was a *Gotraja*, the Board

made the following observation:—

"When a question of preference arises, as preference is founded on superior efficacy of oblations that principle must be applied to the solution of the difficulty."

The learned Vakil for the respondent has failed to produce any authority except a decision of a Divisional Bench of this Court in support of his contention that the passage of the *Viramitrodaya* is applicable to a case in which the claimants are not *Gotrajas* of the *propositus* but *Bhinna Gotrajas*. To my mind there is a material difference between the two classes of cases. The *Gotrajas* are agnates and descendants in the male line from a common ancestor or ancestors of the *propositus*. In their case the male line of descent is not broken or disturbed by a *Gotra* springing from a different family as in the case of *Bandhus*. It is quite evident that in cases where the rival claimants are *Gotrajas*, greater propinquity of blood is identifiable by greater capacity to render religious rights. But this is not necessarily the case when the rival claimants are *Bhinna Gotrajas*. The point may be illustrated by a reference to the case of *Adit Narayan Singh v. Mahabir Prasad Tewari* (8) decided by a Divisional Bench of this Court and relied upon by the learned Vakil for the respondent. In that case the rival *Bandhus* were an *Atma Bandhu* and a *Matri Bandhu* as will appear from the genealogical table given below:—



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The question of preference in this case was between Hanuman and Rajendra. Their Lordships who decided the case applied to the issue before them the test of finding out the nearest Sapinda by the capacity to offer oblation. As I have said before, that principle will apply to the case of preference among Gotrajas without doing any violence to the Mitakshara rule, which bases succession on community of blood. The same rule, when applied to the case of rival Bandhus, will produce a result which does not seem to me to be in agreement with the text of the Mitakshara itself. In deciding the case reported as *Adit Narayan Singh v. Mahabir Prasad Tewari* (8) their Lordships recognized the fact that the test of religious efficacy to determine nearness of blood was a test that had been applied in reported cases with reference to disputes between agnates. With profound respect to their Lordships who decided that case, I have not been able to discover the ground upon which the test was applied for deciding the issue between Bhinna Gotrajas. There can be no question that Hanuman, a Matri Bandhu, could offer oblation to the great-grandfather of the propositus. On the other hand Rajender was incapable of offering such religious service. The application of the principle held to be the test among the Gotrajas to a case among Bhinna Gotrajas resulted in the exclusion of an Atma Bandhu by a Matri Bandhu. It appears to me that this is inconsistent with the clear and explicit text of the Mitakshara already quoted (Chapter II, section 6, paragraph 2). Fully recognizing the high authority of the Viramitrodaya in the Benares school in matters left doubtful by the Mitakshara, I am unable to accept a view which subordinates the Mitakshara to a merely possible interpretation of the text of the Viramitrodaya.

I am not unmindful of the dictum laid down by the Calcutta High Court in the case of *Gunesh Chunder Roy v. Nil Kamal Roy* (18). In that case the contest was between a sister's son and the mother's sister's son. Preference was given to the sister's son as he conferred greater spiritual benefits upon the soul of the deceased than a mother's sister's son. In that case the test of spiritual benefits was applied,

as it was held that in the Mitakshara itself the respective positions of the parties were not definitely settled and the general principle of the Hindu Law was, therefore, applied to determine the issue. The decision in that case is nonetheless consistent with the general principle of the Mitakshara based upon affinity of blood. It is also quite evident that the Mitakshara gives preference to the male line over the female line. The Mitakshara kinsmen *ex parte paterna* have preference over kinsmen *ex parte materna*. The text of the Mitakshara already quoted clearly indicates that Bandhus *ex parte paterna* should be preferred to Bandhus *ex parte materna*. This is a view that is supported by the order of succession of Atma Bandhus laid down by Dr. Jogendra Nath Bhat-tacharya and Pandit Raj Kumar Sarva-dhikari. According to these learned authors the first group in order of merit is made up of Bandhus who are sons of the daughters of the family of the propositus. The second group is made up of sons of daughter's son of the family. The third group is composed of sons of daughter's daughters of the family, and it is in this group that father's daughter's daughter's son has been placed and is the seventeenth in the list given in Trevelyan's Hindu Law. On the other hand, mother's brother's son is outside these three groups and has the 23rd place in order of merit as an Atma Bandhu. This is evidently due to the Mitakshara preference of the Bandhus of the deceased connected with him through his father over those connected through his mother. The principle of the Mitakshara has been the guide in the decisions given in *Saguna v. Sadashiv* (15) and *Ram Bharos v. Ram Parshad* (21). This is also the view taken in *Sundrammal v. Rangasami Mudaliar* (12) and was followed in *Balusami Pandithar v. Narayana Rau*, (11). In the last case the doctrine of religious efficacy based upon the authority of the Viramitrodaya was dealt with. Their Lordships who decided this case, while unwilling to hold that the doctrine in question could never be resorted to in dealing with difficult questions arising under the Mitakshara and for which no rule was expressly or impliedly stated in the treatise of the Benares school, did nevertheless

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emphatically lay down the rule that the doctrine of the Viramitrodaya was not to be resorted to in derogation of the great principles governing the law of inheritance under the Mitakshara. The competition in that case was between a sister's son's son of the deceased and his maternal uncle's son. Their Lordships held that the latter had no preference, inasmuch as one of the pervading principles of the Mitakshara Law of Inheritance was that the nearer line excluded the more remote. The sister's son's son, tracing his descent from the father of the propositus, was given preference over the maternal uncle's son who traced his descent from a more remote ancestor, namely, the maternal grandfather. It is quite evident that the decision in the case turned on the nearness or propinquity of blood, and not religious service. The principle has been applied by the Allahabad and Calcutta Courts to a reversioner of the full blood excluding one of half blood [vide *Suba Singh v. Sarofraz Kunwar* (25) and *Sham Singh v. Kishun Sahai* (44)]. It seems to me that these principles governing inheritance under the Mitakshara are clearly deducible from the well-known text of Manu "to the nearest Sapinda the inheritance next belongs."

In the case before us the sister's daughter's son seems to have two distinct advantages over the maternal uncle. Firstly, he descends from the father of the propositus, while the other from the maternal grandfather. Descendants of the nearer ancestor exclude those of the more remote. Secondly, though both are Atma Bandhus, the sister's daughter's son is *ex parte paterna* unlike the mother's brother who is *ex parte materna*. These advantages are based upon the broad principles of the law of inheritance laid down in the Mitakshara. Can it, therefore, be said that the authority of the Viramitrodaya is sufficient to outweigh the principles of the Mitakshara? I think, not. There is no authority for such a proposition. I am unable to accept the view that on any point on which the principles of the Mitakshara are clear the authority of the Viramitrodaya can have any place. [vide *Appandai Vathiyar v. Ragubali Mudaliar* (16), and *Ram Charan Lal v. Rahim Bakhsh* (17)].

I do not, therefore, think that the capacity to offer oblation can be permitted in the present reference to influence the decision. This view is also supported by a decision of the Madras High Court [*Subramania Mudaliar v. Ranganathan Chettyar* (13)]. In this case the rival claimants were sister's son's son of the propositus and his maternal uncle. The decision was against the latter and in favour of the former.

One of the disqualifications of the sister's daughter's son in competition with the maternal uncle was pointed out by the learned Vakil for the respondent to be the intervention of two females in the case of the former. I do not think there is any substance in this contention. The rival claimants are no doubt both Atma Bandhus, but as has already been pointed out, the sister's daughter's son is of a nearer line and is also *ex parte paterna*. The rule based on the intervention of two females is, therefore, inapplicable to the present case, where the claimants do not stand on the same place [vide *Krishna Ayyangar v. Venkatarama Ayyangar* (10)]. It is only when all considerations are equal that the rule applies [vide *Tirumalachariar v. Andal Ammal* (14)].

It was suggested in the course of his address by the learned Vakil for the respondent that the decisions of the Madras Court on points arising in the present case were in the light of the Mitakshara Law as understood in the Madras Presidency and probably influenced by the text of the Smriti Chandrika and the Saraswati Vilas, which are of high authorities in that province but not here. It is worthy of note that neither of these authorities contains any text laying down any order of precedence among Bandhus of each of the three classes *inter se*. All that they contain is reproduction of what is laid down in the Mitakshara. This feature of these two books was noticed in *Ram Charan Lal v. Rahim Bakhsh* (17). Nothing has been placed before us to establish the proposition that the decisions of the Madras Court on the issues raised in this case are inconsistent with the principles of the Mitakshara as expounded by such eminent authorities as Mayne, Trevelyan, Golap Chandra Sarkar Sastri, Bhattacharji and Sarvadhikari. Nor has any case-law been relied upon to show that the cardinal principles of the Mitakshara have received

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a provincial interpretation in the Madras decisions.

Having given my most careful consideration to the reference, my opinion is that the sister's daughter's son has preference over the maternal uncle under the law of inheritance as laid down in the Mitakshara.

THORNHILL, J.—The appellant, Uma Sankar Prasad, claims to succeed to the estate of Chuman Lall, deceased, on the ground that he, as sister's daughter's son of the said deceased, must, under the Mitakshara Law of Inheritance, be preferred to the maternal uncle of the said deceased. Both are Bhinna Gotra Sapindas or Bandhus. It is admitted the sister's daughter's son confers no spiritual benefits on the deceased whereas the maternal uncle does.

It was on this account the learned Vakil for the appellant devoted a considerable time to the meaning of "Sapinda" relationship. He has authoritatively shown that the word "Pinda" as used in the Mitakshara is used in the sense of "body" and not in the sense of "funeral cakes" and that Sapindaship is based upon community of corporeal particles, or, in other words, upon consanguinity. The Mitakshara, after enumerating the three classes of Bandhus, that is to say, those related to the person himself, those related to his father and those related to his mother, declares that "by reason of mere affinity, the cognate kindred of the deceased himself are his successors in the first instance, on failure of them his father's cognate kindred or if there be none, his mother's cognate kindred. This must be understood to be the order of succession here intended."

Thus it would appear that the order of priority of the three classes of Bandhus is established, but the Mitakshara lays down no rules for our guidance as to the order of succession *inter se* of the Bandhus comprised in each class, but case-law has made it clear that in the system of inheritance under the Mitakshara school propinquity or nearness of relationship is the guiding principle for determining the inheritance.

The Viramitrodaya by Mitra Missir, which is an authority to be looked to of what may have been left doubtful by the Mitakshara [*Gridhari Lall Roy v. Government of Bengal*

(2)] says at page 194: "Greatness of propinquity is alone the criterion of succession."

The method of counting Sapinda relationship according to the Mitakshara is referred to in Mayne, 8th Edition, page 707, but no matter what method of counting is adopted, the maternal uncle in the present case would be nearer in degree of relationship.

It is, however, argued that the appellant's claim must be postponed in conformity with the two rules which are to be found in Trevelyan's Hindu Law, Second Edition, page 401:—

(1) In each of these classes as between cognates related through the father of the deceased and those connected through his mother, preference is given to those related through his father.

(2) Subject to the above, the nearer line excludes the more remote.

The former of these rules appears to be founded on *Sundrammal v. Rangasami Mudaliar* (12). There the plaintiffs compromised with a number of the defendants and the competition for the decision by the Court rested between the males and females. The case does not appear to me to satisfactorily lay down any cardinal rule. In *Tirumalachariar v. Andal Ammal* (14) the competition was between Bandhus of equal degree in nearness to the propositus. The learned Judges in their judgment stated: "We base our decision on the general preference exhibited by the Mitakshara for the male over the female line. We think that that preference, of which it is unnecessary to give instances, may legitimately be extended so as to prefer, all other considerations being equal, that claimant between whom and the stem there intervenes only one female link, to that claimant who is separated from the stem by two such links."

This seems to indicate that preference of a male line over female was resorted to because the competition was between Bandhus of the same class and in the same degree of propinquity.

There has been one case, however, which has been referred to, *Madho v. Janki* (35), decided in the Nagpur Judicial Commissioner's Court, where a competitor connected through the father, though further removed

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from the propositus by one degree, was preferred to a competitor connected through the mother. There seemed to be a doubt in the mind of the Court as to whether the successful competitor was a Gotraja Sapinda or a Bandhu, and admittedly the law applied was the Mitakshara as interpreted and followed in Western India. It cannot, therefore, be taken as laying down a principle to be followed in the present case.

The second rule appears to be based upon the decision in *Balusami Pandithar v. Narayana Rau* (11), where it is said that "the doctrine of religious benefit ought not to be resorted to in derogation of the great principles pervading the law of inheritance under the Mitakshara system. The first of such principles is that the nearer line excludes the more remote." In this case also the competition was between persons who were removed from the propositus, or deceased owner, by an equal number of degrees of relationship. This was followed in *Krishna Ayyangar v. Venkatarama* (10), where the competitors were also removed from the propositus in an equal number of degrees and where the Court decided that an Atma Bandhu had preference to a Pitri Bandhu. Such rules, if applied in the present case, would seem to me to be completely inconsistent with the principle "Greatness of propinquity is alone the criterion of succession." It is pointed out in *Mohandas v. Krishnabai* (28) that the maternal uncle occupied amongst Bandhus an important status. The passages from the Mitakshara, quoted at pages 40 and 41 of the judgment in the Calcutta Full Bench case, *Omrit Koomare Dabee v. Luckhee Narain Chuckerbitty* (1), tend to show that the maternal uncle was regarded by Yajnavalkya as the principal representative Bandhu, while the passage from the Viramitrodaya cited at page 42 is still more clear upon the point.

In Upper India, however, where the Viramitrodaya is taken as the greatest authority, Chapter III, Part I, section 11, pages 157, 158, there is a distinct indication that as between Bandhus of the same class a rule of preference may be found in the quantity of spiritual benefit which they confer. In *Buddha Singh v. Lattu Singh* (6), where the dispute was between agnates, the Privy Council made it clear that while

under the Mitakshara the Sapinda relationship arises from community of blood and the right to offer oblations, still it does not exclude the right to offer oblations from consideration as a test of propinquity or nearness of blood. No case has been cited showing that the right to offer oblations may not be taken into consideration as a test of propinquity when dealing with the claims of Bandhus of the same class.

I would, therefore, hold on the ground of propinquity the maternal uncle has preference over the sister's daughter's son.

By THE COURT.—The order of the Full Court is that in a family governed by the Mitakshara school of law the maternal uncle of the last male owner is preferred to the sister's daughter's son as next heir to the estate. The case will be returned to the Division Bench for disposal.

JUDGMENT OF THE DIVISION BENCH.

MILLER, C. J., AND IMAM, J.—(August 6, 1918).—This is an appeal from a judgment of the Additional Subordinate Judge of Gaya, dated the 16th June 1915. The suit was instituted on the 3rd March 1913. The plaintiff seeks a declaration that he is the nearest Bandhu and legal heir to the property of Babu Chaman Lal Upadhyaya and entitled to succeed to his estate after the death of his widow, who died on the 30th August 1912. He further claims a declaration that neither of the defendants, whose claims to the estate are based upon a deed of sale and a deed of adoption executed by the widow a few months before her death, has any lawful title to the property and that the said deed of sale and deed of adoption may be declared void and that possession of the property may be given to the plaintiff. Chaman Lal died on the 23rd November 1910, leaving a widow Musammat Parmeshwari Koer but no issue. Under the Mitakshara Law which governs the family, his wife Parmeshwari succeeded as his next heir taking a life interest, and on her death on the 30th August 1912 the succession to Chaman Lal's estate re-opened. The plaintiff Uma Shankar Prasad Prasad

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claims to be the nearest Bandhu, there being no son or agnatic relation of Chaman Lal alive. He traces his relationship through his mother Poon Bibi, who is the daughter of Chaman Lal's sister *Musammat Chuni Bibi*. Defendant No. 1, *Musammat Nageshwari Koer*, was a sister of *Musammat Parmeshwari* and she claims an 8-annas share in the property, alleging that she acquired it by purchase from her sister during the latter's lifetime by a *Kabala*, dated the 28th April 1912, the sale being for valuable consideration and justified by legal necessity. The defendant No. 2, *Ganesh Prasad Pandey*, is a nephew of *Nageshwari*, being the son of her deceased brother *Ram Prasad Pandey*, and he claims the remaining half of the estate which was not acquired by his aunt *Nageshwari* under the *Kabala* referred to, alleging that he is the adopted son of *Chaman Lal*, the ceremony having been performed by *Chaman Lal's* widow *Parmeshwari* after her husband's death with his verbal permission and under his instructions, and in support of this he relies upon a deed of adoption executed by *Parmeshwari* on the same day as the *Kabala* just mentioned in favour of *Nageshwari*. It is clear that if the defendants' case can be made out, they would defeat the title of the plaintiff even if he proved his relationship to *Chaman Lal*. The defendants, however, by their written statements set up a second line of defence. They say that the plaintiff is not the son of *Poon Bibi* and they go further and say that *Poon Bibi* never had a child at all and, therefore, the plaintiff cannot be her son. The written statement on behalf of the defendant No. 1 states in paragraph 3 as follows:—"That the plaintiff is not the son of *Musammat Poon Bibi* and is not the grandson of *Musammat Chuni Bibi*. As a matter of fact no child has been born to *Musammat Poon Bibi*." The written statement on behalf of defendant No. 2 also says in paragraph 4: "That the plaintiff's allegation in paragraph 1 of his plaint that he is the son of *Musammat Poon Bibi* the daughter of *Musammat Chuni Bibi*, who is the sister of the late *Babu Chaman Lal Upadhyaya*, is entirely false and the genealogical table therein referred to is also untrue and false and incomplete and has been fabricated to support a false case and as a matter of

fact no child has been born to the said *Poon Bibi* and the plaintiff cannot be and is not either the son of *Poon Bibi* or grandson of *Musammat Chuni Bibi*." It would have been sufficient for the defendants simply to deny the parentage of the plaintiff, but they have by their written statements set up a case which they called evidence to support that it was entirely untrue to say that *Poon Bibi* had ever borne a child. At the trial the learned Subordinate Judge arrived at the conclusion that the plaintiff was not the son of *Poon Bibi* on the ground that she had not in fact given birth to any child. He, however, decided that assuming the plaintiff to be the son of *Poon Bibi* he was not the nearest heir to *Chaman Lal*, but that the latter's maternal uncle who was alive had a prior claim to inherit his nephew's property. Having come to this conclusion, he thought it was not necessary to decide the other issues which were raised by the defendants as to the *Kabala* and the deed of adoption upon which they relied. We should like to say here that in our opinion it is desirable when issues of fact are raised before the Court of first instance that those issues about which evidence has been adduced should be considered and determined by the trial Judge notwithstanding that the determination of one issue only may decide the case in favour of one or other of the parties. In the event of the judgment being overruled on appeal upon the issues in fact decided, it becomes necessary to send back the case on remand to the Court of first instance to have the other issues determined, and this must necessarily involve additional expense to the parties which might have been avoided had those issues been determined in the first instance.

From this judgment the plaintiff has appealed and asks this Court to overrule the findings of fact as well as the conclusions of law arrived at by the learned Subordinate Judge. There are certain general principles which ought to guide the Court of Appeal in dealing with questions of fact which have been decided by the trial Court. The Court which tries the case has a great advantage over the Appellate Court in that the Judge of first instance has an opportunity which is

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denied to the Appellate Court of observing the demeanour and behaviour of the witnesses when giving their evidence before him and has special facilities for judging of their credibility, and, therefore, as a general rule the Court of Appeal should not readily disturb the findings of fact arrived at by the trial Judge, even if it might be inclined to take a different view from reading the evidence, but if the Appellate Court is satisfied beyond all reasonable doubt on considering the evidence that the findings are erroneous, then it ought to interfere. Or again if the reasons given by the Judge of the lower Court for arriving at his conclusions are such that they cannot be supported, then the Court of Appeal is clearly entitled to disregard those findings and form its own independent judgment of the facts from the evidence and probabilities of the case. As already mentioned, the case made by the defendants both in their written statements and by their evidence is that Poon Bibi never had a child at all. Both Poon Bibi and her husband have given evidence to the effect that the plaintiff is their son. This is supported by a considerable volume of evidence of relations and neighbours who support the plaintiff's case. It is inconceivable that Poon Bibi and her husband could possibly be mistaken as to the fact of her having had a child or children, and it is highly improbable that the neighbours and relations who speak to the circumstances surrounding the birth of this child could have been deceived as to the fact that Poon Bibi had given birth to a child. The nature of the defence, therefore, involves a charge of wilful conspiracy to defraud, certainly on the part of Poon Bibi and her husband, and almost as certainly involves in that conspiracy the others who were near neighbours at the time and who speak to the events connected with the birth of a child by Poon Bibi. Moreover, the fact that a woman has borne a child is one which can be established without any reasonable doubt by proper medical examination by qualified doctors, and in the present case evidence of this nature has been adduced by the plaintiff in the form of certificates given by two lady doctors holding a distinguished position in charge of the Dufferin Hospital at

Lucknow, and one of these ladies has also given oral evidence to the effect that Poon Bibi has at some previous time borne a child.

Altogether apart from Poon Bibi and her husband Kalika Prasad, some 7 witnesses gave evidence to the effect that the plaintiff was Poon Bibi's son and in addition two medical certificates were put in, one dated the 9th September 1913 signed by Mrs. Hutton, the Lady Superintendent of the Dufferin Hospital at Lucknow who was temporarily in charge during the absence of Miss. O'Brien, the permanent doctor in charge, and another dated the 4th February 1914 signed by Miss O'Brien who had then resumed her duties and who was subsequently examined as a witness. These documents certify that Poon Bibi had been examined by the ladies in question and that she had at some period borne a child, and Miss O'Brien's evidence is to the same effect. There is, therefore, a large volume of positive evidence in support of this part of the plaintiff's case. The evidence of the defendants on this issue is of a negative character only and is to the effect that Poon Bibi never had a child. The defendants' main witnesses consisted of the defendant Nageshwari Koer herself who is a sister-in-law of Poon Bibi, Lalita Bibi a sister of Poon Bibi, and Chandrika Koer the wife of a distant relation. In addition Ram Lal and Ram Saran Ram, old servants of Chaman Lal and now in the service of one or other of the defendants, were called and stated that Poon Bibi never had a son. The other witnesses who were called spoke to the other issues in the suit but added nothing material to the question now under consideration. Poon Bibi and her husband Kalika Prasad as well as the principal witnesses called for the plaintiff resided at Badaun near Lucknow, whereas the defendants and their witnesses resided in the District of Gaya some hundreds of miles distant. The plaintiff's witnesses, therefore, would obviously be in a better position to speak to the truth of the plaintiff's parentage than those of the defendants, but at the same time one would hardly expect that the sister and sister-in-law of Poon Bibi could

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have remained in ignorance of the fact that that lady had borne a son. Although there was nothing in the nature of a quarrel between them, Poon Bibi does not appear to have had any close association with her relations at Gaya since her marriage, which took place some 20 years or more before the date of the suit. During that time so far as the evidence goes, she visited Gaya very seldom and only on ceremonial occasions, one being when Chaman Lal died and another on the death of his widow. It appears from the evidence of Lalita Bibi that she was anxious that the defendants should succeed and would be very grieved if they should fail, and the three ladies who supported the defendants' case, including Nageshwari herself, were undoubtedly on very intimate terms with each other. Both Lalita Bibi and Chandrika affirmed that they had not been informed by anybody as to the nature of the evidence that would be required of them and that until the moment they were examined they had no idea as to the facts they would be asked to depose to. Such a state of things is so improbable that it casts considerable suspicion upon the ingenuousness of their evidence.

Looking at the case broadly, the first outstanding feature is that the existence of the plaintiff as the reputed son of Poon Bibi and her husband cannot be disputed. The defendants, beyond denying his parentage, do not attempt in their written statement to set up any affirmative case alleging who his parents were. It was suggested, however, in the course of the trial that he was probably the son of Kalika Prasad by his first wife, it being admitted that Poon Bibi was the second wife. The evidence on this point, which is not contradicted, appears to make it quite clear that although Kalika Prasad had been married some years before he married Poon Bibi, his first wife died before the Gaona ceremony was performed, and, therefore, the marriage was never consummated. On reading the whole of the evidence we should have no hesitation in coming to the conclusion that the plaintiff has established satisfactorily that he was the son of Poon Bibi and Kalika Prasad, but as the learned Subordinate Judge has

arrived at a different conclusion it becomes necessary to examine his judgment with care to see how he arrives at that conclusion. The learned Judge in the earlier part of the judgment has made a calculation, based upon the evidence of Poon Bibi herself and the evidence contained in one of the medical certificates, from which he arrived at the conclusion that the plaintiff, being admittedly 18 years of age or over at the time when the judgment was delivered, could not possibly have been the son of Poon Bibi. With respect to the learned Judge we cannot help feeling that he has misinterpreted the effect of Poon Bibi's evidence, where she states that she was married 20 or 23 years ago. He has assumed that the effect of this evidence is that Poon Bibi's marriage according to her own statement took place either exactly 20 years ago or exactly 23 years ago, and that in either case the age of the plaintiff coupled with the other evidence in the case does not fit in with that statement. If, however, the marriage took place somewhere between 20 and 23 years previously to the date when her evidence was given, which was in March 1914, the difficulty which weighed on the mind of the learned Judge at once disappears. It is a well known fact that Pardanashin ladies frequently have no very definite and precise ideas of time or dates and are not accustomed to calculate the number of years that have passed since a given event with any great nicety, and it may safely be assumed that when Poon Bibi in answer to questions put to her in cross-examination stated that she was married "about 20 or 23 years ago", she was allowing a margin to cover an event about the exact date of which she was not absolutely positive. The certificate (Exhibit 1) relied upon by the learned Judge as his starting point was that granted by Miss O'Brien, in which she says that she is of opinion that Poon Bibi is about 39 years of age on the date when she examined her, which was on the 4th February 1914. This agrees with Poon Bibi's own evidence given in the following month, when she deposed that she was 39 years of age and that her son was then 18. She further says that she was married at the age of 17 and that her son was born 4 years later,

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Taking the time when her evidence was given, if she was then 39 years of age and was married at the age of 17, that would mean that she had been married 22 years and if her son was born 4 years after her marriage that would make him exactly 18, which appears to have been in fact his age at that time and unless it is to be taken that her statement that she was married about 20 or 23 years ago is inconsistent with her having been married in fact 22 years ago, the conclusion arrived at by the learned Judge does not appear to be well founded. It is only necessary to read that portion of his judgment in which he deals with this matter to see how he has been misled. After stating that the onus of proof is on the plaintiff he refers to Poon Bibi's evidence and continues: "Her deposition was begun to be recorded on the 28th March 1914. The lady doctor's certificate Exhibit 1 shows her age on 4th February 1914 to be about 39 years only. She also gives her age in the deposition to be 39 years. She says that she was married at the age of 17 and she was married 20 or 23 years ago from the time of her deposition. She could not have been married 23 years ago, as in that case her age at the time of her deposition would be 40 years, which neither she nor the doctor says. I, therefore, have no alternative but to take the other figure, namely, 20 years from 1914 March, as the probable time of her marriage from her own words. She then says that 4 years after her marriage she gave birth to a male child, meaning apparently the plaintiff. Therefore, the plaintiff was born to her 16 years ago from 1914. Now, therefore, the plaintiff would be 17 years of age or more properly speaking 17 years and a few months old, i. e., not even a major. The plaintiff, however, says that he is a major now..... From these it follows that Poon Bibi's first child, if there was one, is not the plaintiff who is now over 18 years of age, though she apparently means him as her first child." It seems to us with great respect to the learned Judge that having rejected 23 years ago as the date of Poon Bibi's marriage he was not justified in saying that he had no other alternative but to take the other figure, namely, 20 years ago, as

the probable time of her marriage from her own words. An obvious alternative was to take a period somewhere between 20 and 23 years, which would make the whole of the evidence consistent. Another reason why the Judge rejected the evidence on behalf of the plaintiff on this issue was because from the appearance of the plaintiff whom he saw in Court, it seemed to him that he was in fact over 21 years of age. There are few things more difficult than to guess the age of a person by his appearance within 2 or 3 years, and we do not think that the learned Judge was entitled to rely upon his own judgment based on the appearance of the plaintiff in coming to the conclusion that he was in fact 21 years of age and not, as he would have been in June 1915 when the judgment was delivered, something over 19 years if the evidence of his mother is accepted. The only other reason which influenced the learned Judge in rejecting the evidence as to the plaintiff's age was a statement made by the witness Raghunandan Missir, who stated that on the birth of the plaintiff he was sent by Chaman Lal with clothes, dolls, etc., to Budaun and that that was 17 or 18 years ago. That evidence was given in June 1915 when the plaintiff would be about 19 years of age, but the fact that this witness may have been a year or even two years out in his calculation appears to be such a trivial matter that it ought not to have weighed with the learned Judge as against the great bulk of positive evidence given by the witnesses who were called on behalf of the plaintiff. It is quite true that the evidence of this witness was somewhat discounted by the fact that he had on a previous occasion in an affidavit sworn that the age of Nageshwari Koer the defendant was about 25 years, whereas she was obviously older than that. But assuming, as the Judge was quite entitled to do, that this witness was unreliable, that was not sufficient reason for discarding the whole of the other evidence given by the plaintiff's witnesses.

Turning to the evidence of the lady doctors it seems to us that the learned Judge has given no sort of reasons which can be accepted for refusing to believe this evidence. The first certificate was

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granted on the 9th September 1913, when Poon Bibi was examined by Mrs. Huffton. On applying later to endeavour to get this lady to attend as a witness on behalf of the plaintiff it was discovered that she had left the Dufferin Hospital and had gone to England. The plaintiff thereupon applied for a further examination by Miss O'Brien, who had resumed the duties of doctor in charge when Mrs. Huffton went away, and a second examination was accordingly made, this time by Miss O'Brien, on the 4th February 1914, when that lady granted the certificate already referred to, and on the 21st January 1915 Miss O'Brien was examined on commission on behalf of the plaintiff. It appears that Poon Bibi gave evidence on commission on the 28th March 1914, that is, something less than two months after Miss O'Brien's certificate had been granted. Nothing was said by Poon Bibi in her evidence either about the certificate or about the fact that she had been medically examined shortly before by Miss O'Brien and previously by Mrs. Huffton and these certificates had not at that time apparently been filed in the case. This fact appears to have weighed very much with the learned Judge, and from that he argues that the certificates could not really have been obtained on the dates alleged but must have been obtained at a much later period and after Poon Bibi gave her evidence, because she did not mention them and they were not filed until the 2nd January 1915. He then goes on and says that it is doubtful whether the real Poon Bibi was produced before the lady doctors at all and arrives at the conclusion that the certificates are so suspicious that he cannot act upon them. The suspicious nature of these certificates, he says, is corroborated by the persistent refusal of Poon Bibi to be examined by any Gaya lady doctor, and then the learned Judge continues as follows: "She had experience of lady doctors of Lucknow and she suspected that the Gaya lady doctors could be purchased with money and thus I think her refusal so persistent. Had she really given birth to a child and had she any reason to think that the lady doctors would do their work honestly, then I think she would not have refused in the way she had done in this case. I

cannot from these certificates hold that Poon Bibi, the sister's daughter of Chaman Lal and the wife of Kalika Prasad, gave birth to any child..... Even if these certificates be considered reliable about which I have already said that they are not; I cannot think that they would go to shew that the plaintiff is the son of Poon Bibi." Now it will be seen from the reference which I have made to the learned Judge's judgment that he first of all doubts the genuineness of the certificate of the 4th February 1914 granted by Miss O'Brien, and, secondly, he doubts whether Poon Bibi was in fact the lady who was examined by Miss O'Brien, and, thirdly, he hints pretty clearly that the evidence of these two ladies had been deliberately bought by those acting on behalf of the plaintiff. Not only is there no evidence to justify these conclusions but it seems to us that the slightest consideration of the circumstances of the case must lead to the conclusion that these findings of the learned Judge are wholly unwarranted and cast an unmerited slur upon the character of two ladies who have been devoting their lives to a most laudable object.

First of all turning to the evidence of Poon Bibi, it is obvious that at the time when she gave her evidence, which was rather less than two months after the date of Miss O'Brien's certificate, she at all events was acquainted with Miss O'Brien, because when asked in cross-examination whether she was willing to be examined by a lady doctor, she stated that she had no objection to being examined but would not be examined by any lady doctor from Gaya where the defendants live, and she then stated after her examination was completed that she would keep a lady doctor of her own, Miss O'Brien of Lucknow who treated her, by her side if she were to be examined by a lady doctor of any other place. Poon Bibi could obviously not have made a statement of this sort unless at that time she had at least been acquainted with Miss O'Brien, and from the evidence of Miss O'Brien herself it appears that the first occasion upon which she saw Poon Bibi at all was on the 4th February 1914 and that although she was not her family doctor,

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she had seen her 3 or 4 times since and had treated her. It is, therefore, quite impossible to believe that this certificate, dated the 4th February 1914, was not obtained until many months later, as found by the learned Judge. Again it seems to us that the learned Judge's suspicions that the lady produced for examination by the doctors was not Poon Bibi is totally refuted by the evidence of Poon Bibi herself, who at that time stated in the passage of her evidence already referred to that she would like Miss O'Brien to be present if any examination were made by the defendants' doctor. If in fact those conducting the case on behalf of the plaintiff, including Poon Bibi herself, which is the suggestion, had been guilty of the fraud of obtaining some other lady to impersonate Poon Bibi for the purpose of medical examination and had in this manner imposed upon Miss O'Brien, it is inconceivable that Poon Bibi should insist upon Miss O'Brien being present when a further examination was made, which would inevitably result in the fraud being discovered by Miss O'Brien. Again if these certificates were concocted and were not obtained until sometime after Poon Bibi had given evidence in March 1914, there would appear to be no possible reason for dating them at a much earlier period. Or if again the lady doctors were themselves involved in this conspiracy, which is suggested by the learned Subordinate Judge, it would seem to follow that the certificate from Mrs. Hufiton was obtained from her at a time when she had left India and gone to England and that those conducting the case on behalf of the plaintiff had gone to the trouble of writing to England to a lady doctor whom they did not know, offering her a bribe to forge a certificate on behalf of an Indian lady who was nothing to her, and that the lady doctor in question had consented to making herself a party to this conspiracy. For these reasons it seems to us that the grounds upon which the learned Judge based his decision in rejecting the plaintiff's evidence cannot be supported, and once it is admitted that *Musammatt* Poon Bibi had at some time or other borne a child, the evidence of the defendants' witnesses who pledged their word to the fact, which they positively swear to, that she never had a child

at all, is entirely unreliable and cannot be accepted. In these circumstances having from a perusal of the evidence come to the conclusion that the preponderating weight of evidence is in favour of the plaintiff, it follows that in our opinion that part of the learned Judge's judgment which finds that the plaintiff is not the son of a daughter of a sister of Chaman Lal Upadhya must be set aside and the plaintiff must be held to have established the fact that he is the son of Kalika Prasad and Poon Bibi.

This, however, is not sufficient to entitle him to the declaration No. 1 prayed for in the plaint to the effect that he is the next reversioner as nearest Bandhu and legal heir of Chaman Lal Upadhya, seeing that Raghunandan Missir, the maternal uncle of Chaman Lal, was alive at the date of the latter's death. When this appeal originally came before this Bench, the question of whether the plaintiff, assuming him to be the son of Poon Bibi, was entitled to succeed to Chaman Lal's property in priority to Raghunandan was considered and as the question appeared to be one of some doubt and difficulty, it was referred to a Full Bench of five Judges, who after considering the matter found by a majority that Chaman Lal's maternal uncle Raghunandan was under the Mitakshara Law entitled to succeed in priority to the plaintiff. The result is that the plaintiff in this case fails to establish his claim to the property in question and this appeal must be dismissed, but having regard to the fact that the greater part of the argument before us was directed to the question of fact which has been decided in favour of the appellant, each party will bear their own costs of the hearing before this Division Bench. The costs of the reference to the Full Bench have already been dealt with in the judgment on that reference.

Appeal dismissed.

PROTAP CHANDRA DHAR v. PEARY MOHUN DHAR.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 623
OF 1916.

March 7, 1918.

Present:—Mr. Justice Richardson and Mr.
Justice Walmsley.

PROTAP CHANDRA DHAR—
PLAINTIFF—APPELLANT

versus

PEARY MOHUN DHAR AND OTHERS—

DEPENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 60—Mortgage, redemption of—Partial owner of equity of redemption, whether can redeem whole mortgaged property.

A partial owner of the equity of redemption is entitled to redeem the whole of the mortgaged property in opposition to the wishes of the mortgagee. [p. 669, col. 2.]

The general rule is, that a person, who has any right at all to redeem, has a right to redeem the whole of the mortgaged properties and cannot be compelled to redeem only the part in which he is interested. [p. 669, col. 2.]

Baikantha Nath Dey v. Mohesh Chandra Dey, 44 Ind. Cas. 77; 22 C. W. N. 128, followed.

Appeal against the decree of the District Judge, Chittagong, dated the 6th October 1915, affirming that of the Munsif, Additional Court, North Raozan, dated the 4th of May 1914.

Babu Chandra Sekhar Sen, for the Appellant.

Babus Jogesh Chandra Roy and Khitish Chandra Sen, for the Respondent.

JUDGMENT.

RICHARDSON, J.—The appellant before us is the plaintiff in a suit for the redemption of a mortgage. The property in question originally belonged to 5 brothers—Ram Dayal, Uma Charan, Pran Krishna, Akhil Chandra and Nishi. In the year 1896, the first four of these brothers executed a mortgage by way of conditional sale in favour of defendant No. 4. Thereafter Pran Krishna purchased the share of his three brothers Ram Dayal, Akhil and Nishi. Having done so, he mortgaged certain properties, including some of the properties which were the subject of the prior mortgage, to defendants Nos. 2 and 3. That was in 1899 or 1900. On the 31st October 1900 the defendant No. 4 brought a suit on his mortgage, and on the 18th June 1901 obtained a final decree for foreclosure. The puisne mortgagees, the defendants Nos. 2 and 3, were not made parties to the suit. In 1902 the defendant No. 4 sold his decree to the defendant No. 1. In the same year the

defendants Nos. 2 and 3 instituted a suit upon their mortgage against the mortgagor Pran Krishna, making the defendant No. 1 also a party defendant. In execution of the decree which they obtained the mortgagees (defendants Nos. 2 and 3) purchased the equity of redemption in the property mortgaged to them. On the 28th March 1910 the plaintiff purchased the rights of the defendants Nos. 2 and 3. He then brought this suit to redeem the defendant No. 1, the successor-in-interest of the original mortgagee (defendant No. 4). The sole question which arises is whether the plaintiff is entitled to redeem the whole of the property originally mortgaged to defendant No. 4 or whether he is only entitled to redeem the four-fifths share which came to be in the possession of Pran Krishna. The Courts below have held that the plaintiff is not entitled to redeem the whole of the property in opposition to the wishes of the mortgagee.

In this appeal it is contended for the plaintiff that that is a mistaken view of the law and that according to the cases a partial owner of the equity of redemption is entitled to redeem the whole of the mortgaged property. The learned Pleader has cited the cases of *Pearce v. Morris* (1) and *Huthasanam Nambudri v. Parameswaran Nambudri* (2). He has also referred to the statement of the rule in Sir Rash Behari Ghose's work on the Law of Mortgage in India (4th Edition, Volume I, page 249). The learned author says that the general rule is that a person who has any right at all to redeem, has a right to redeem the whole of the mortgaged properties and cannot be compelled to redeem only the part in which he may be interested; and in support of the proposition authorities, English and Indian, are cited. The learned Pleader for the defendants respondent urges on the other hand that the rule enacted in section 60 of the Transfer of Property Act is a rule intended for the benefit of the mortgagee and that a mortgagor interested, in a part only of the equity of redemption has no corresponding right. The authorities, however, as they stand, are against him and the question

(1) (1870) 5 Ch. 227; 39 L. J. Ch. 342; 22 L. T. 190; 19 W. R. 196.

(2) 22 M. 209; 8 Ind. Dec. (n. s.) 149.

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appears to be concluded by the decision of a Division Bench of this Court in the case of *Baikantha Nath Dey v. Mohesh Chandra Dey* (3).

The result is that this appeal should be allowed. The decree of the trial Court should be varied by stating that the plaintiff is entitled to redeem the whole of the property originally mortgaged to defendant No. 4, on payment of the amount due on the mortgage to be ascertained in the manner indicated in the judgment of the Munsif. Something was said as to the rate of interest allowed by the learned District Judge. But this point as to interest was not pressed. The plaintiff is entitled to his costs throughout as against defendant No. 1.

WALMSLEY, J.—I agree.

Appeal allowed.

(8) 44 Ind. Cas. 77; 22 C. W. N. 128.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 694
OF 1917.

October 29, 1918.

Present:—Mr. Justice Jwala Prasad.

DAROGA LAL AND OTHERS—DEFENDANTS—
APPELLANTS
versus

DEVI LAL—PLAINTIFF—RESPONDENT.

Easement of necessity, requisites of.

An easement of necessity can only arise when the property cannot be used at all without the easement, and not where the easement is merely necessary to the reasonable enjoyment of the property. [p. 671, col. 2.]

An easement of necessity points to the fact that there must be absolute necessity before the law will compel a land-owner to submit to so detrimental a right as an easement in his land, a right in reality, though not in theory, imposed on his land against his will. [p. 672, col. 1.]

Appeal from a decision of the Subordinate Judge, Patna.

Mr. P. K. Sen, for the Appellants.

Messrs. Syed Mahmud and D. N. Sircar, for the Respondent.

JUDGMENT.—This appeal relates to a question of easement claimed by the plaintiff. The plaintiff and the defendant are cousins and there was a partition be-

tween them in the year 1904, when all their properties immovable and moveable were divided between them. There were two contiguous houses owned by them jointly. On partition the eastern one fell to the share of the defendant and the western to that of the plaintiff. Prior to the partition there was a doorway between the two houses and other necessary requirements which were suitable for the enjoyment of the occupants of both the houses. In the building allotted to the plaintiff there is a 3rd storey or second floor, the access to which was through the terrace or *mundera* appertaining to the building allotted to the defendant. The defendant interfered with this passage and closed up the way to it. The plaintiff, therefore, instituted the suit out of which this appeal has arisen, for a declaration that the defendant had no right to interfere with the plaintiff in the use of the terrace B C in the map attached to the plaint and for a perpetual injunction against him. This claim in the plaint was based upon the fact that the way to the 3rd story was in existence prior to the date of the partition and had since been continuously and without any interruption used and enjoyed by the plaintiff up to the time of the interference on the part of the defendant. The right of the plaintiff to use the terrace in dispute was disputed by the defendant. The principal issue raised in the case was issue No. 3—"Has the plaintiff acquired any right of easement in the property in dispute and has he any right to restrain the defendant from closing the door and passage?" The Munsif who tried the case held that the plaintiff did not prove his right to use the disputed land which is a part of the defendant's building as an easement for 20 years, and, therefore, had no right accrued to him. In dealing with this issue the Munsif observed that in the plaint the right of easement claimed is said to have been acquired by user. On appeal the learned Subordinate Judge reversed the decision of the Munsif and decreed the plaintiff's suit. The finding of the Munsif that the plaintiff failed to prove that he had acquired under the law the right of easement upon the ground of user has not been disturbed by the learned Subordinate Judge. In this appeal it is not disputed by the learned Counsel on behalf of the

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respondent that the plaintiff's right of easement on the ground of user must fail. The learned Subordinate Judge, however, has granted the plaintiff's right to the use of the defendant's land as an easement of necessity. It is objected on behalf of the defendant that the lower Court was wrong in giving decree to the plaintiff upon the aforesaid ground as it was not urged in the plaint. The objection was, however, overruled on the ground that there was nothing to show in the plaint that the plaintiff claimed a right of easement of user and not a right of easement of necessity. Reading the plaint and the issues, it is difficult to support the Subordinate Judge in this view; but it is not necessary to pursue this point further, for admitting that the plaintiff was entitled in appeal before the Court below to raise the point, it is obvious that the finding of the Court below that the plaintiff is entitled to the right of way claimed as an easement of necessity cannot be supported.

The plaintiff has not produced any partition deed. On the other hand, the deed of the agreement of partition executed by him in favour of the defendant has been produced by the latter and is marked Exhibit J. The Munsif clearly says in his judgment that there is no trace in this deed of agreement, Exhibit J, of the right set up on behalf of the plaintiff. The Subordinate Judge also has accepted this in the following words: "On referring to the partition-deed it appears that there is provision for closing a common passage and a drain and it was silent as to the way leading to the 3rd storey which has now fallen into the plaintiff's share." I have also gone through this deed, and it appears to me that the Courts below are correct in the view that in it there is absolutely no mention of the path claimed by the plaintiff. The right of the plaintiff to the use of the defendant's terrace as a way for the plaintiff to his 3rd storey has not been expressly granted or reserved in the deed. There is no reservation by implication even of any such right in the deed, not even expressions of a general right to the use of the building allotted to him, such as "appurtenances", "appertaining" or "rights and accompaniments" or "existing rights", or "rights used, occupied and enjoyed", and

a place in the document. It is needless, therefore, to consider the authorities quoted at the Bar, which have construed the aforesaid expressions as being sufficient or insufficient as conveying the right to the use of certain easements. It is true that the terrace in the defendant's building was used as a passage to the 3rd storey when both the houses were jointly owned by the plaintiff and the defendant and that the plaintiff has not constructed any other way, to the 3rd storey. The finding of the Court below is that "even after partition the plaintiff has been using this way which is the only way to go up to the 3rd storey and without which the *chhat* is unapproachable, for a very long time without any objection." But there is no finding, and my attention has not been invited to any evidence on the record, that the plaintiff could not in any way construct a passage from his own land leading to the third storey in question. No doubt the passage in question might be the most convenient way for the plaintiff and that it was used so long by him. The plaintiff ought to have exhausted all possible ways of communication to the third storey. On the record as it stands, it is impossible to hold that it was the only way by which the plaintiff could enjoy the use of the house after the partition. Indeed looking again at the plan of the house annexed to the plaint, which might be treated as a part of the judgment, it is obvious that from his own house on different points the plaintiff could construct a staircase leading to the third storey in question. Whatever may have been the views before, the question has been set at rest by the decision in the well-known case of *Wheeldon v. Burrows* (1). That case was followed in the case of *Union Lighterage Co. v. London Graving Dock Co.* (2) and recently in the case of *Ray v. Hazeldine* (3). It has been conclusively settled that an easement of necessity can only arise "when the property cannot be used at all and not where it is merely necessary to the reasonable enjoyment of the property," and as observed by Goddard,

(1) (1879) 12 Ch. D. 31; 48 L. J. Ch. 858; 41 L. T. 327; 28 W. R. 196.

(2) (1902) 2 Ch. 557; 71 L. J. Ch. 791; 87 L. T. 381; 18 T. L. R. 754.

(3) (1904) 2 Ch. 17; 73 L. J. Ch. 537; 90 L. T. 703.

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pages 38, 39, 6th Edition, "An easement of necessity points to the fact that there must be absolute necessity before the law will compel a land-owner to submit to so detrimental a right as an easement in his land, a right—in reality though not in theory—imposed on his land against his will. It must be borne in mind how detrimental generally it is to an estate to be burdened with an easement, what a nuisance it is to an owner of land to have another person walking at his pleasure over a field.....and how such rights may prevent building on land or using it in many of the ways the owner may desire." That principle has been embodied in section 13 of the Indian Easements Act which is not applicable to this part of the country. The principle upon which that section was enacted is based upon the English cases and is consonant to reason and common sense. Clause E of that section says: "Where a partition is made of the joint property of several persons—if an easement over the share of one of them is necessary for enjoying the share of another of them, the latter shall be entitled to such easement." The easements mentioned in clauses A, E and F of section 13 are easements of necessity. A right of way or passage is not a continuous easement, and, therefore, it can only be allowed when without the easement in question it is impossible to use the dominant tenements to which the easement is claimed. It has been urged on behalf of the respondent that at the time when the partition took place between the members of the family there was only one way to the third storey, that is, by the disputed terrace, and as no other way existed the possibility of the plaintiff being able to construct another passage cannot take away his right of easement of necessity. This point appears to have been disposed of by the Allahabad High Court in the case of *Sukhdei Bibi v. Kidarnath* (4), the facts of which case appear similar to this case. The right of way as an easement of necessity after partition of the joint house claimed in that case was disallowed. The observation at page 472 is that "he (the plaintiff) certainly can open a door towards the north for

access to his share." It is clear from this that the plaintiff cannot claim the easement of necessity unless he can show that it is not possible for him to construct a new passage for his use: in other words, the plaintiff must make out that the use of the way claimed is one of absolute necessity and not merely necessary or convenient or that it was used so long by him. This view is supported by a string of authorities of all the Courts and it is unnecessary, therefore, to mention all of them that have been quoted at the Bar. Suffice it to say that the cases of *Krishnamarazu v. Marraju* (5), *Esubai v. Damodar Ishivardas* (6), *C. H. Crowdy v. L. O'Reilly* (7) and *Ram Narain Shaha v. Kamala Kanta Shaha* (8) are dead against the plaintiff-respondent. The authority quoted by the Subordinate Judge, namely, *Charu Surnokar v. Dokouri Chunder Thakoor* (9), is based on *Pyer v. Carter* (10) which has since been overruled. The case of *Kadambini Debi v. Kali Kumar Haldar* (11) refers to a right of light and air, and not to a way which is neither continuous nor always an apparent easement. Perhaps the attention of the Court was not drawn to the later decisions of the same Court.

For these reasons the appeal is allowed and the judgment of the Court below is set aside. The appeal is decreed with costs; the plaintiff's suit stands dismissed.

Appeal allowed.

(5) 28 M. 495; 15 M. L. J. 255.

(6) 16 B. 552; 8 Ind. Dec. (N. S.) 547.

(7) 17 Ind. Cas. 966; 16 C. L. J. 417.

(8) 26 C. 311; 13 Ind. Dec. (N. S.) 803.

(9) 8 C. 956; 10 C. L. R. 577; 7 Ind. Jur. 86; 4 Ind. Dec. (N. S.) 616.

(10) (1857) 1 H. & N. 916 at p. 922; 26 L. J. Ex. 258; 21 L. T. (O. S.) 371; 5 W. R. 371; 103 R. R. 896; 156 E. R. 1472.

(11) 26 C. 516; 3 C. W. N. 473; 13 Ind. Dec. (N. S.) 932.

(4) 9 Ind. Cas. 628; 33 A. 467; 8 A. L. J. 230.

HADIYAR KHAN v. EMPEROR.

ALLAHABAD HIGH COURT.

CRIMINAL APPEAL NO. 588 of 1918.

September 4, 1918.

Present:—Mr. Justice Tudball.

HADIYAR KHAN—APPELLANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 477, scope of—Sessions Judge, power of, to try witness for perjury, exercise of—Summary trial, legality of—Court, duty of—Procedure.

Section 477 of the Criminal Procedure Code gives the power to a Court of Session to charge a person for any offence referred to in section 195 of the Code and committed before it. It further gives the Court of Session the power to commit for trial or to admit to bail and to try the person for the charge it has framed, but the section nowhere lays it down that the trial is to be a summary one, nor does it anywhere demand a decision which should be more prompt and speedy than that of any ordinary trial. The very powers granted in that section to a Court of Session are so unusual that it is the bounden duty of any Court exercising them to be at pains to give the accused a fair and impartial trial, in view of the fact that the Court has already had before it certain evidence upon which it may have already formed an opinion. [p. 674, col. 1.]

At the conclusion of a trial in a Sessions Court, the Sessions Judge charged one of the defence witnesses with the offence of perjury and proceeded there and then to try him under the powers conferred upon the Court by section 477 of the Criminal Procedure Code. The accused repeatedly asked for time to enable him to obtain legal advice and to put in his defence but the Court refused his prayer and convicted and sentenced him:

Held, that the Sessions Judge had, in the exercise of his jurisdiction, acted hastily and irregularly and had not given the accused a fair trial and that, therefore, the case must be re-tried. [p. 674, col. 1.]

Criminal appeal from an order of the Sessions Judge, Kumaun.

Mr. G. W. Dillon, for the Appellant.

Mr. Lalit Mohan Banerji (Government Pleader), for the Crown.

JUDGMENT.—The appellant Hadiyar Khan has been convicted of the offence of perjury and has been sentenced to four years' rigorous imprisonment, including three months' solitary confinement, by the learned Sessions Judge of the Naini Tal District. The circumstances under which the appellant was tried and convicted are somewhat unusual. Two men Aziz-ul-lah and Kifayat-ul-lah were upon their trial in the Court of Session at Pilibhit on a charge of attempted murder under section 307 of the Indian Penal Code. Hadiyar Khan

was called as a witness for the defence to prove that Aziz-ul-lah was actually dining with him at the time the offence is said to have been committed. The trial of Aziz-ul-lah and Kifayat-ul-lah concluded on the 2nd of August 1918 at about 5 P. M. and the Judge convicted them to ten years' rigorous imprisonment under section 307. On that very same date, namely, the 2nd of August 1918, the Judge passed an order issuing notice to the defence witnesses to show cause why they should not be prosecuted for the offence of perjury. Then the learned Sessions Judge changed his mind at once in respect to the present appellant Hadiyar Khan. As a perusal of his judgment will show, his attention was called to the provisions of section 477 of the Code of Criminal Procedure and he there and then proceeded to try Hadiyar Khan, under the powers granted by that section, for the offence of perjury which he charged against him. I have examined the record of the trial. Hadiyar Khan asked the Sessions Judge for time to enable him to appoint a lawyer and to consult him so as to enable him to put in his defence. The Sessions Judge declined to adjourn the case or to give him any further time, whereupon Hadiyar Khan refused to plead or to take any steps in his defence. As the Judge's judgment shows, he began the case against Hadiyar Khan at 5 o'clock and Hadiyar Khan from the very beginning asked for a postponement. Postponement was refused. He, therefore, refused to cross-examine. He refused to make any attempt to defend himself. He asked repeatedly to be allowed to obtain legal advice. The Judge declined to give him any further time and on the evidence taken in the presence of the accused he convicted him and sentenced him as mentioned above. He remarks in his judgment:—"Section 477 demands a prompt and speedy decision, which will bring home to the public generally the dangers a man runs in giving false evidence. I am not going to spoil the effect of section 477 by weakly granting a postponement, which would only mean that the accused would then be able to produce another lot of false witnesses leading to nothing." Section 477 grants a power which is very seldom exercised. It gives the power to a

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Court of Session to charge a person for any offence referred to in section 195 and committed before it. It further gives the Court of Session the power to commit for trial or to admit to bail and to try the person for the charge it has framed, but the section nowhere lays it down that the trial is to be a summary trial nor does the section anywhere demand a decision which should be more prompt and speedy than that of any ordinary trial. The very powers granted in that section to a Court of Session are so unusual that it seems to me it is the bounden duty of any Court exercising them to be at pains to give the accused a fair and impartial trial, in view of the fact that the Court has already had before it certain evidence upon which it may have already formed an opinion. I should have thought that a simple sense of justice would have shown to the Court below that Hadiyar Khan was entitled to appoint a Pleader, to consult with him and to defend himself just as any ordinary person in an ordinary criminal trial. The learned Sessions Judge has in his haste made it impossible for Hadiyar Khan to defend himself. He refused to grant postponement, which he certainly ought to have granted whatever the result, and in my opinion in view of the expressions which he had already used in his judgment in the case against Aziz-ullah and Kifayat-ullah, it would have been fairer perhaps to have dealt with Hadiyar Khan in the same manner as that in which he had dealt with the remaining defence witnesses, that is, of taking action against them under section 476. It is impossible to say that the learned Sessions Judge had not power to try the case. He certainly had the power to do so, but in the exercise of his jurisdiction he has, in my opinion, acted hastily and very irregularly and has not given the appellant a fair trial. In these circumstances without expressing any opinion as to the appellant's guilt, I set aside the conviction and sentence. The case must be re-tried but it is obvious that it cannot be re-tried in the same Court. It must be transferred to a calmer atmosphere so as to enable an impartial trial to be held. I, therefore, direct that the case be re-tried in the Court of Sessions Judge of Bareilly

instead of in the Court of the Sessions Judge of Kumann.

Re-trial ordered.

BOMBAY HIGH COURT.

CRIMINAL REFERENCE No. 95 OF 1917.

July 10, 1918.

Present:—Mr. Justice Heaton and Mr. Justice Hayward.

In re MURLIDHAR BHAGWANDAS -
—ACCUSED.

Extradition Act (XV of 1903), ss. 7, 8, 8A, 18—Cheating, extradition for, whether permissible—Offence not mentioned in treaty—Bail, power of Magistrate to grant—Criminal Procedure Code (Act V of 1898), s. 496.

A person accused of cheating in the Hyderabad State can be made the subject of a warrant under section 7 of the Extradition Act, notwithstanding that the offence of cheating is not mentioned in Article IV of the Treaty, dated the 8th May 1867, between the British Government and the Hyderabad State. [p. 675, col. 2.]

The provisions of section 7 (2) of the Extradition Act override the provisions of section 496 of the Criminal Procedure Code, so that a Magistrate has no power, apart from sections 8 and 8A of the Extradition Act, to admit to bail a person arrested under section 7 of the Act. [p. 676, cols. 1 & 2.]

Criminal reference made by the Chief Presidency Magistrate, Bombay.

Mr. *Strangman*, Advocate-General (with him Mr. *Nicholson*, Public Prosecutor), for the Crown.

Mr. *G. N. Thakor*, for the Accused.

JUDGMENT.

HEATON, J.—The Chief Presidency Magistrate, finding himself in difficulties in a case which he had to deal with under the Indian Extradition Act, XV of 1903, has referred certain questions to us which he is empowered to do by section 432 of the Criminal Procedure Code.

The questions are four in number, but the one of chief importance arises out of the controversy, to put it briefly, whether a person accused of cheating in the Hyderabad State can be made the subject of a warrant under section 7 of the Indian Extradition Act. If we read the Act by itself, no doubt on the point arises, because cheating is an extradition offence as appears

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from the Schedule to the Act. But the attention of the Chief Presidency Magistrate was called to the Extradition Treaties between the Governor-General of British India and the Hyderabad State, and having read the Treaties and referred to section 12 of the Act, a doubt did arise in his mind. It was this: Cheating is an extradition offence under the Act, but it is not one of those offences for which extradition is provided by the Treaty. Section 18 says that nothing in the Act is to derogate from the provisions of the Treaty. The argument then proceeds: if we extradite under the Act for an offence not mentioned in the Treaty, we are derogating from the provisions of the Treaty. That, to my mind, quite clearly is an argument based on the assumption that because the Treaty provides that there may be or shall be extradition in certain cases, it implies that there shall not be extradition in other cases. I can say this after listening to the arguments and after much discussion: that there is no other logical basis for the contention. For the Treaty itself does not say that there shall not be extradition in other cases, and, therefore, if it means that, it means it not by what it says but by what it implies. I do not wish for a moment to be understood as meaning that there may not be great force in that way of putting the case. But we have to determine whether or not the Treaty does imply that there should be no extradition except in the matter of offences named in the Treaty. And though there may be force in the argument urged by Mr. Thakor, it seems to me there is a great deal more force in the argument urged on the other side. When analysed and reduced to the smallest possible compass, it really comes to this, whether extraditing under the Act for an offence not mentioned in the Treaty derogates from the provisions of the Treaty, and we have to consider what the word "derogate" means. Now it certainly does not derogate from the express provisions. Therefore, again we are reduced to a consideration, whether it derogates from the implied provisions, or rather whether there are implied provisions of the kind asserted. So that we are practically reduced to the first argument over again. I cannot think that it is implied in the

Treaty that there cannot be extradition for offences not mentioned in the Treaty. Principally for this reason, if we imply it, we imply that the British Government by making a Treaty with a Native State deprived itself of the power to legislate regarding a matter which fell within its own legislative power, i.e., a matter of arresting persons who are supposed to have committed certain offences in Native States. The power of making such arrests is essential where there is an Extradition Treaty and it may be very desirable where extradition is or can be arranged for otherwise than by Treaty. I cannot think that the Government intended by this Treaty to deprive itself of the power to legislate for the purpose of facilitating extradition which could be arranged for otherwise than by Treaty. To imply this seems to me to imply what I cannot think the Government wished to do: what there was no necessity for doing, and what on the whole it seems to me would be unreasonable to do. In arriving at this conclusion I am influenced by the nature of the relations between the Government of India and Native States. I do not assert that the same conclusion would be reached if the parties to the Treaty were on both sides Independent Sovereign States. I have, therefore, no difficulty in my own mind in answering the first question put by the learned Chief Presidency Magistrate, which is:—

Whether in view of section 18 of the Indian Extradition Act, XV of 1903, the offence of cheating is an extradition offence so far as British India and Hyderabad State are concerned, notwithstanding its omission from Article IV of the Treaty, dated the 8th May 1867, between the British Government and Hyderabad State?

My answer is that the offence of cheating is an extradition offence so far as British India is concerned notwithstanding its omission from Article V of the Treaty. Whether it is an extradition offence so far as the Hyderabad State is concerned I really do not know, and for the purposes of this case it is quite immaterial to consider.

Questions 2 and 3 do not seem to me to need an answer for the purposes of this reference.

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Question 4, to put it briefly, is whether the Magistrate has power to admit an arrested person to bail apart from the provisions of sections 8 and 8A of the Act. I think he has no such power. The Act directs that the person, when arrested, shall, "unless released in accordance with the provisions of this Act," be forwarded to the place and delivered to the person or authority indicated in the warrant. Then by clause 2 of section 7 and by clause 1 of the same section it is provided that the Magistrate shall act in pursuance of the warrant. If he does these things, it is not open to him to act under section 496 of the Criminal Procedure Code and to admit to bail otherwise than is provided in the Indian Extradition Act, and as the provisions in the Indian Extradition Act are so specific and so clear, there is in my mind no doubt that they override the provisions of section 496 of the Criminal Procedure Code and I would answer question 4 accordingly.

MR. HAYWARD, J.—I concur. The main question to be answered is whether cheating is an extradition offence notwithstanding its omission from Articles III and IV of the Treaty with the Hyderabad State and in view of the provisions of section 18 of the Indian Extradition Act, XV of 1903.

The question must, in my opinion, be answered in the affirmative. The effect of Articles III and IV of the Treaty referred to in this reference amounts to this, that the surrender of a person charged with cheating shall not be a bounden duty of the British Government, and it seems to me important to note that the Articles do not provide that such an offender shall not in any case be surrendered by the British Government. On the other hand, the Chief Presidency Magistrate is bound to surrender such an offender in accordance with the Schedule of the Indian Extradition Act, if the case is not covered by the provisions of section 18 of the Act. The provision there is that nothing shall be held to derogate from the provisions of the Extradition Treaty, and it has been argued that it would derogate from the Treaty, to add to it the offence of cheating. That argument, however, does not commend itself to me as a reason-

able interpretation of the words used. If it had been the intention to exclude the addition of any offence, then the word "derogate" or "takeaway from" could hardly have been used. In its place would have been substituted some such word as "modify". So that, in my opinion, there cannot be said, upon a plain interpretation of the words used, to be any derogation from the provisions of the Treaty by the insertion of the offence of cheating in the Schedule of the Indian Extradition Act. It could only, in my opinion, be argued in a strained sense that there would be derogation by regarding the provisions of the Treaty as conferring some kind of freedom from liability to surrender a person accused of cheating upon the British Government. But even that argument could not be supported, because entire freedom of action is reserved to the British Government by the provisions of section 15 of the Act, which could not, in any sense, be held to be a derogation from the provisions of the Treaty under section 18 of the Act.

The subsidiary question referred to us is, whether bail could be allowed under the ordinary provisions of the Criminal Procedure Code notwithstanding the special provisions of sections 8 and 8A of the Act. It seems to me that that question must clearly be answered in the negative. The Criminal Procedure Code is a general Act and it is specially provided in the Indian Extradition Act that the accused person, when arrested, shall be forwarded to the authority indicated in the warrant unless released in accordance with the provisions of this Act. That seems to me clearly a provision that the accused person must not be released in accordance with the provisions of any other Act, and the only provisions for his release on bail are those provided in sections 8 and 8A of the Act. The general provisions of the Criminal Procedure Code must, in this matter, yield, according to the well-known rule, to the special provisions of the Indian Extradition Act.

Answers accordingly.

PALTU SINGH v. EMPEROR.

PATNA HIGH COURT.

CRIMINAL REVISION No. 228 of 1918.

July 2, 1918.

Present :—Mr. Justice Mullick and
Mr. Justice Thornhill.PALTU SINGH AND OTHERS—ACCUSED—
PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), ss. 71, 147, 149, 325—Rioting and causing grievous hurt—Separate convictions and sentences, legality of—Practice of Patna High Court—Calcutta High Court, uniform course of decisions of, whether to be followed.

In addition to a conviction under section 147 of the Penal Code an accused who has himself caused grievous hurt to the opposite party cannot be separately convicted under section 325 of the Code. [p. 678, col. 1.]

Separate convictions and sentences, therefore, under section 325 read with section 149 of the Penal Code and section 147 of the Code are illegal. [p. 678, col. 2.]

Where there is a long course of decisions by the High Court of Calcutta upon a particular point, the Patna High Court will not depart from that settled course. [p. 678, col. 2.]

Criminal revision against an order of the Sessions Judge, Bhagalpur, dated the 3rd May 1918, modifying that of the Sub-Divisional Magistrate, Banka, dated the 22nd April 1918.

Mr. P. B. Das, (with him Mr. Abani Bhusan Mukherjee), for the Petitioners.

Mr. Manohar Lall, (Assistant Government-Advocate), for the Crown.

JUDGMENT.

MULLICK, J.—The petitioners Paltu, Sarju, Jinpal and Jahar Singh have been sentenced for rioting with the common object of committing theft in respect of the crops of the complainant Juglal. Juglal and his brother Hitlal were injured on Juglal's side, while Paltu was injured on the side of the petitioners. The trial Court found all the petitioners guilty of rioting under section 147, and of grievous hurt under section 325 read with 149 of the Indian Penal Code, and sentenced them to six months' rigorous imprisonment for each offence; the punishments taking effect consecutively.

On appeal the learned Sessions Judge has affirmed the convictions and two of the sentences, observing that Sarju and Jinpal had been shown by the evidence to have taken part in the assault and that in their case the application of

section 149, Indian Penal Code, was not necessary. In regard to the other two appellants before him the learned Sessions Judge observed that although they were not shown to have themselves struck any one, separate sentences were not illegal. The learned Judge has relied on *Queen-Empress v. Bana Punja* (1), but reduced the sentences on Paltu and Jahar to one month's rigorous imprisonment for the offence under sections 325 and 149 of the Indian Penal Code. Now the only question that has been argued before us is whether separate sentences are legal. The learned Sessions Judge has not altered the convictions recorded by the trying Magistrate, and we take it that Sarju and Jinpal still remain convicted, not of the substantive offence of grievous hurt under section 325 of the Indian Penal Code, but of a constructive offence under that section by reason of the application of section 149 of the Indian Penal Code. Obviously the learned Sessions Judge could not have set aside the convictions under sections 325 and 149 of the Indian Penal Code and substituted a conviction under section 325 of the Indian Penal Code, because these two petitioners were not charged with the substantive offence in the trial Court, nor would it be proper for us in revision to convict them of this offence in the absence of any opportunity to plead to a charge in respect of it. We will, therefore, only consider whether the separate convictions and sentences under section 325 read with section 149 of the Indian Penal Code against all the petitioners are legal.

Here upon the facts it is not clear whether the offence of rioting was complete before grievous hurt was caused to Juglal and Hitlal. It may be that the blows which caused these injuries were themselves the acts which turned the unlawful assembly into a riot. As has been observed in *Queen-Empress v. Bisheshwar* (2), it is not generally possible in a riot of this kind to say that the offence of rioting was complete before the grievous hurt was caused. It is contended, however, that assuming that the grievous hurt was itself the act which

(1) 17 B. 262; 9 Ind. Dec. (N. S.) 170.

(2) 9 A. 645; A. W. N. (1887) 149; 5 Ind. Dec. (N. S.) 867.

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turned the unlawful assembly into a riot, the law justifies separate sentences.

I think it is clear that the weight of authority in the High Courts of Allahabad and Bombay is in favour of the view that not only can separate convictions be recorded under section 146 of the Indian Penal Code and section 325 read with section 149 of the Indian Penal Code but separate punishments may also be imposed. On the point whether the punishments are controlled by section 71 of the Indian Penal Code, the opinion in the Allahabad Court is in the negative while no clear decision exists in the Bombay Court [see *Queen-Empress v. Ram Sarup* (3) and *Queen-Empress v. Bana Punja* (1)]. In the High Court of Calcutta the view now accepted is that separate convictions and, therefore, also separate sentences are illegal and that in any event section 71 of the Indian Penal Code applies [*Nilmony Poddar v. Queen-Empress* (4)]. This view seems to be based upon the consideration that although the acts may constitute offences falling under two separate definitions, it is unfair to convict a man for two offences for the same acts.

In regard to the point whether in addition to a conviction under section 147 of the Indian Penal Code, an accused who has caused grievous hurt himself can be convicted under section 325 of the Indian Penal Code, the recent cases in the High Court of Calcutta are against a separate conviction [see *Ramdiha v. Empress* (5), *Hridoy Mondal v. Jagananda Das* (6)]. On the other hand the Allahabad and the Bombay Courts seem to be of opinion that separate convictions are legal and that the punishment is not controlled by section 71 of the Indian Penal Code [*Queen-Empress v. Dungar Singh* (7), *Queen-Empress v. Bana Punja* (1)]. It is to be noted that the opinion of the Bombay High Court upon this point was an *obiter dictum* and that in the present case, upon my view of the learned Sessions Judge's order, the question of a separate sentence under section 325 of the Indian Penal Code does not arise.

(3) 7 A. 757; A. W. N. (1885) 195; 4 Ind. Dec. (N. s.) 885.

(4) 16 C. 442; 8 Ind. Dec. (N. s.) 292.

(5) 3 C. W. N. 174.

(6) 4 C. W. N. 245.

(7) 7 A. 29; A. W. N. (1884) 220; 4 Ind. Dec. (N. s.) 258.

Following the view accepted by the High Court of Calcutta, I think that in the present case the convictions under sections 325 and 149 of the Indian Penal Code cannot be sustained. In this Court we have adopted the principle that where there is a long course of decisions by the High Court of Calcutta upon a particular point, this Court will not depart from that settled course.

Separate convictions and sentences, therefore, under section 325 read with section 149 of the Indian Penal Code and section 147 of the Indian Penal Code cannot be sustained. We will, however, follow the course which was adopted in *Hridoy Mondal v. Jagananda Das* (6) by Prinsep and Stanley, JJ., and treat the sentence in regard to each prisoner as a consolidated sentence and while setting aside the conviction under section 147 of the Indian Penal Code, we sentence the petitioners before us under section 325 of the Indian Penal Code, read with section 149 of the Indian Penal Code, to rigorous imprisonment for one year each in the case of Sarju and Jinpal and 7 months in the case of Paltu and Jahar.

THORNHILL, J.—I agree.

Order modified.

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 341 of 1918.

June 4, 1918.

Present:—Sir Lancelot Sanderson, Kt.,
Chief Justice, and Mr. Justice Beachcroft.
ABINASH CHANDRA SARKAR AND

ANOTHER—PETITIONERS

versus

ATUL KRISHNA BOSE—OPPOSITE
PARTY.

Penal Code (Act XLV of 1860), s. 379—Theft—Crops grown by trespasser—Trespasser ejected by owner—Crops cut and taken away by landlord of trespasser—Offence.

Complainant obtained a decree of ejectment against a trespasser and got into actual possession of the land. The trespasser had grown paddy on the land and when the crop was ready, the accused, acting on behalf of the trespasser, cut and removed the paddy:

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Held, that after the complainant had obtained actual possession of the land, the trespasser or his representatives had no right to enter upon the land and to remove the paddy, and that, therefore, the accused were guilty of theft. [p. 680, col. 2.]

Rule against the order of the District Magistrate, Khulna, dated the 3rd April 1918.

FACTS.—One Aswini was in wrongful possession of a plot of land. A decree dispossessing him from the land was passed by the Civil Court in January 1917. He had, however, grown crops upon the land. In September, after the delivery of possession, the accused No. 1, who was a Naib of the Zemindar under whom Aswini held the land, removed the paddy with the help of accused No. 2 and others. Thereupon they were prosecuted on a charge of theft.

Babu Manmathanath Mukherjee (with him Babu Probodh Kumar Das), for the Petitioners.—I object to the complainant being heard in this case. The Rule was issued on the District Magistrate only and not on the complainant. The complainant has no *locus standi* at the hearing of the Rule.

Babu Bimala Charan Deb, for the Complainant.—The name of the Emperor is used in these cases more as a matter of form and procedure than anything else. The real complainant and the person who really suffers is myself. The Emperor will not lose anything. Besides the Deputy Legal Remembrancer has not appeared in this case; under the circumstances my interests will go unprotected. Moreover your Lordships have jurisdiction to hear any person who has an interest in the case and I am vitally interested in it.

[SANDERSON, C. J.—We will hear you after we hear what Mr. Mukherjee has to say].

Babu Manmathanath Mukherjee.—The complainant was entitled to mesne profits, but not to the standing crops which were grown after the passing of the decree. In taking away the paddy under the circumstances the accused committed no offence under section 379. Refers to *Abdool Biswas v. Khater Mondal* (1).

Babu Bimala Charan Deb.—Aswini when he grew the paddy knew that he was a trespasser. The case in *Abdool Biswas v. Khater Mondal* (1) consequently does not apply. Being a trespasser he could not remove the paddy even

(1) 3 C. W. N. 332.

if it was grown by him. He would be guilty of theft if he did so.

[BEACHCROFT, J.—Would it make any difference if he were a tenant?]

It would. Refers to *Thakoor Ohunder Paramanick, In the matter of the petition of* (2), *Ismail Kani Rowthan v. Nazarali Sahib* (3), *Mofiz Sheikh v. Rasik Lal Ghosh* (4).

[SANDERSON, C. J.—Would the crop pass to the decree-holder when he took possession of the land?]

Ordinarily it would, *i. e.*, unless there was a reservation. Refers to *Ramalinga v. Sami Appa* (5).

JUDGMENT.—This was a Rule directed to the District Magistrate to show cause why the conviction of and the sentence passed on the petitioners should not be set aside on grounds Nos. 1 and 3 mentioned in the petition. Those grounds were as follows: "1. For that the conviction under section 379, Indian Penal Code, is bad in law and not sustainable on the facts and circumstances proved in the case 3. For that the petitioners having acted *bona fide* in the exercise of their civil rights, the conviction is bad in law."

Both the petitioners were convicted under section 379, the allegation being that they cut and stole some ripe paddy which had been grown on 5 or 6 *bighas* of land which were in the possession of the complainant, one Atul Krishna Bose.

The facts of the case may be shortly stated as follows:—One Aswini Kumar Palit went into possession of the land in question in 1906; the complainant Atul Krishna Bose obtained a decree for possession against Aswini Kumar Palit: and, it is found by the learned Magistrate that he obtained actual possession of the land on the 20th of September 1917.

Of the two petitioners the first was the Naib of the Zemindar of Saidpur who was the Malik of Aswini. The second, Sham Sardar, was a cultivator, and it was alleged on behalf of the petitioners that he was cultivating the land in question

(2) B. L. R. Sup. Vol. 595 at p. 597; 6 W. R. 228.

(3) 27 M. 211; 14 M. L. J. 25.

(4) 6 Ind. Cas. 796; 37 C. 815 at pp. 821, 822, 823; 14 C. W. N. 952; 12 C. L. J. 246.

(5) 13 M. 15 at p. 16; 4 Ind. Dec. (N. S.) 720.

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upon the *bhag* system, that is, the system by which the tenant and the cultivator divide equally the produce of the land between them. It was alleged by the petitioners that before the execution of the decree and before the complainant had obtained possession of the land Sham Sardar, the cultivator, grew the paddy and that he was entitled to reap the crop in spite of the decree.

There is no doubt that the two petitioners and some others did in fact reap the paddy on the 14th of December 1917; and, I think, I am right in saying that it was removed in a boat to the premises of Abinash. The learned Magistrate said that the points which in his opinion arose for determination were as follows:—

"(1) Whether the land and the paddy in question were in possession of the complainant at the time of the occurrence; (2) whether accused Abinash got the paddy cut and taken away by Sham and others, (3) whether the ingenious defence set up in writing by accused Sham was of any help to the accused in this case, (4) whether in the circumstances the accused are guilty under section 379, Indian Penal Code."

The material findings at which the learned Magistrate arrived were as follows:—He first of all found that it was clear that the accused Abinash got the paddy of the land cut by the accused Sham Sardar and others and taken to Abinash's boat, which was waiting 10 or 12 cubits from the land in question at the time of the occurrence. He has also found that the complainant actually took possession of the land on the 20th of September 1917. He then went on to find that the first petitioner, being only a Naib, dared to disregard and slight the authority of the Civil Court even when reminded that the complainant got the land, and necessarily the standing crop, under orders of the Civil Court. That was the contention put forward by the prosecution, which the learned Magistrate adopted. He said: "I accept the view advanced by the prosecution and I hold that accused Sham and others cut and took away the paddy from the complainant's possession in the immediate presence and under orders of accused

Abinash." Then he dealt with the question as to the growing of the paddy, and he held that the petitioner Sham Sardar did not grow the paddy but that Aswini had grown it. He said: "I do not believe that accused Sham grew the paddy in question in *bhag* under Aswini and I reject the inconsistent defence evidence on the point as unreliable." And, finally he found that there was no *bona fide* dispute but that it was insolent *zabberdusti* and done in disregard of the Civil Court's authority; then he found that the taking of the paddy was dishonest because it caused wrongful loss to the complainant and wrongful gain to the petitioner.

Now, my learned brother and I having taken time to consider this case have come to the conclusion that upon those findings it must be taken that the paddy was grown by Aswini and that at the time he grew it he must be taken to have been a trespasser on the land: he lost possession of the land in September 1917, and the complainant obtained actual possession of the land and was in actual possession from that time. Aswini did not remove the crops before he was put out of possession. Whether he would have had a right so to do, it is not material for us to consider, but we are of opinion that he having been a trespasser upon the land at the time the paddy was grown, he had no right to go upon the land after the complainant had obtained possession and removed the paddy. Consequently in December 1917 when this paddy was removed, Abinash had no right to remove it and there was no *bona fide* dispute.

It was found by the learned Magistrate that the first petitioner espoused the cause of Aswini, disregarded the Civil Court's decree and went upon the land: and under his orders the second petitioner and other people removed this paddy.

Under those circumstances we think that the conviction of both the petitioners must be upheld, and we see no reason for interfering with the sentence, so far as the first petitioner Abinash Chandra Sarkar is concerned.

With regard to the second petitioner Sham Sardar, we think, having regard to the findings of facts of the learned

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Magistrate that this man was acting under the orders of Abinash, the Naib, and was not the only one who was acting under the orders of the Naib, the sentence which was passed upon him of three months' rigorous imprisonment may be reduced: and, inasmuch as Mr. Mukherjee informs us that Sham has already served three weeks of his sentence we think that he may be immediately released. The other petitioner Abinash Chandra Sarkar must surrender to his bail, if he is on bail.

Conviction upheld.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISIONS NOS. 258 AND 259 OF 1918

November 29, 1918.

Present:—Mr. Pridaux, A. J. C.

AKBAR ALI—ACCUSED—APPLICANT

versus

EMPEROR—COMPLAINANT—NON-

APPLICANT.

Criminal Procedure Code (Act V of 1898), s. 350, scope of—Case transferred from one Magistrate to another—Witnesses, whether should be re-examined.

Section 350 of the Criminal Procedure Code is applicable to a case which has been transferred from the Court of one Magistrate to that of another. It is not restricted to cases in which Magistrates succeed each other in their offices. [p. 681, col. 2; p. 682, col. 1.]

Emperor v. Kasim, 15 C. P. L. R. 66; *Emperor v. Gokul*, 17 C. P. L. R. 159; 1 Cr. L. J. 1056, *Ladya v. Emperor*, 1 N. L. R. 187; 2 Cr. L. J. 820, dissented from.

Mohesh Chandra Saha v. Emperor, 35 C. 457; 12 C. W. N. 416; 7 C. L. J. 438; 7 Cr. L. J. 220; *Palaniandy Gounden v. Emperor*, 1 Ind. Cas. 54; 32 M. 218; 5 M. L. T. 218; 9 Cr. L. J. 146; *Kudrutullah v. Emperor*, 14 Ind. Cas. 314; 39 C. 781; 13 Cr. L. J. 218; *Ram Dass v. Emperor*, 44 Ind. Cas. 682; 40 A. 307; 16 A. L. J. 217; 19 Cr. L. J. 378, followed.

Criminal revision of the decision (finding and sentence) of the First Class Magistrate, Wardha, in Criminal Case No. 39 of 1918, dated the 29th June 1918.

Mr. P. S. Kotwal, for the Applicant.

ORDER—Akbar Ali and Mohammad Ali, applicants, in Criminal Revisions Nos. 258 and 259 of 1918, have been convicted

in the same trial by a 1st class Magistrate of Wardha each for an offence under section 323 of the Indian Penal Code and sentenced each to the payment of fine. The case commenced on a complaint on the 22nd April 1918 in the Court of the Tahsildar and 2nd Class Magistrate, Wardha. After the examination of three witnesses for the prosecution, the case was transferred by order of the District Magistrate to the Court of the 1st class Magistrate. He proceeded with the case on the 14th June 1918, without re-examining the witnesses already examined by the 2nd class Magistrate, and on the 29th June 1918 convicted the accused. An application purporting to be under section 350 (b) of the Criminal Procedure Code was presented to the District Magistrate and was rejected by him. The legality of the order of transfer is not questioned, but it is contended that section 350, Criminal Procedure Code, does not apply to the case, as that section is limited to cases in which Magistrates succeed each other in their offices, but does not apply to a case like the present where the transfer is by the District Magistrate from one Magistrate to another. In support of this contention, and it is the only one raised in argument, I am referred to *Emperor v. Kasim* (1), *Emperor v. Gokal* (2) and *Ladya v. Emperor* (3). These cases unquestionably support the view relied on by the applicant's learned Counsel. With all respect to the Judges who decided those cases, I find myself unable to accept their views. In recent years there are cases of other High Courts in which the opposite view has found acceptance. I may mention *Mohesh Chandra Saha v. Emperor* (4), *Palaniandy Gounden v. Emperor* (5), *Kudrutullah v. Emperor* (6) and the recent case of *Ram Dass v. Emperor* (7). I hold that section 350 is applicable to a case like the present which has been transferred from the Court of one Magis-

(1) 15 C. P. L. R. 66.

(2) 17 C. P. L. R. 159; 1 Cr. L. J. 1056.

(3) 1 N. L. R. 187; 2 Cr. L. J. 820.

(4) 35 C. 457; 12 C. W. N. 416; 7 C. L. J. 438; 7 Cr. L. J. 220.

(5) 1 Ind. Cas. 54; 32 M. 218; 5 M. L. T. 218; 9 Cr. L. J. 146.

(6) 14 Ind. Cas. 314; 39 C. 781; 13 Cr. L. J. 218.

(7) 44 Ind. Cas. 682; 40 A. 307; 16 A. L. J. 217; 19 Cr. L. J. 378.

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trate to the Court of another and it is not restricted to cases in which Magistrates succeed each other in their offices. It is not contended that applicants have in any way been prejudiced by a portion of the evidence against them having been recorded by the Magistrate who did not finish the case. I dismiss both applications.
Applications dismissed.

BOMBAY HIGH COURT.

CRIMINAL APPLICATION FOR REVISION No. 22 OF 1918.

July 5, 1918.

Present:—Mr. Justice Heaton and Mr. Justice Hayward.

In re APARAO JHAVERILAL—ACCUSED—
APPLICANT.

Criminal Procedure Code (Act V of 1898), ss. 200, 537 (a)—Complaint by District Judge to District Magistrate—Failure to examine complainant—Irregularity.

A District Judge, believing that a certain Will which had come before him in Probate proceedings was a forgery, wrote a letter to the District Magistrate suggesting that in the interests of justice there should be a prompt investigation. On receipt of the letter the District Magistrate, without sending for the District Judge and examining him on oath, ordered a Police investigation and thereafter sent the case for inquiry and trial before a competent Magistrate:

Held, (1) that the letter amounted to a "complaint" within the meaning of the definition contained in section 4 of the Criminal Procedure Code; [p. 682, col. 2; p. 683, col. 1.]

(2) that the failure to examine the District Judge on oath was an irregularity of a kind which came within those enumerated in clause (a) of section 537 of the Criminal Procedure Code, and that there having been no failure of justice the trial was not vitiated by the irregularity. [p. 682, col. 2; p. 683, cols. 1 & 2.]

Criminal application for revision from an order passed by the Resident First Class Magistrate at Nadiad.

Mr. G. N. Thakor, for the Applicant.

Mr. S. S. Patkar, Government Pleader, for the Crown.

JUDGMENT.

HEATON, J.—We have heard this matter argued at great length, but to put the case in its briefest form it is this. A complaint of forgery was made by the District Judge

of Ahmedabad to the District Magistrate. It was made because a certain Will which had come before the District Judge in Probate proceedings was believed by him to be a forgery. In his complaint which took the form of a letter to the District Magistrate, he did not mention any offenders, but he suggested that in the interests of justice there should be a prompt investigation. Now this letter fulfils in every particular the requirements of the definition of "complaint" in the Criminal Procedure Code. On receiving it the District Magistrate, who may possibly not have realized for the moment that he was dealing with a complaint, did not send for the complainant, the District Judge, and examine him on oath, a thing that no doubt he ought to have done. But the omission to do this, as one can see, in a case of this kind, makes no substantial difference whatever. Thereafter there was a Police investigation apparently ordered by the District Magistrate, an investigation which a Magistrate has power to order as provided by clause (3) of section 156 of the Code. Thereafter again there were other proceedings which I need not enumerate, but they do show that a good deal of misapprehension existed as to the precise legal character of what I have called the complaint and the proceedings thereon. For in fact the complaint was at one stage supposed to be a sanction and another complaint was presented by a Police Officer. But eventually matters were brought on to the right track, the complaint was treated as a complaint and the District Magistrate took such measures as he is empowered by law to take to have the case brought for inquiry and trial before a competent Magistrate. On an analysis of the entire proceedings we are reduced to this question: Are we to set aside these proceedings because the complainant was not examined on oath by the Magistrate who received the complaint? We must deal with the matter partly as a question of law pure and simple and partly as a question of combined law and common sense. Dealing with it purely as a question of law, I think the failure to examine the District Judge on oath was an irregularity of a kind which comes within those enumerated in clause (a) of section 537,

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We are, therefore, thrown back on the question as to whether there has been a failure of justice and that, I take it, brings into play our common sense. Very briefly stated, I understand the real purpose of section 195 and section 476 of the Criminal Procedure Code to be that it is essential to protect men who have been concerned in Court proceedings from being the victims of malicious complaints. If those sections or similar sections did not exist, the man who had produced a document in a case or who had given evidence would, to a certain extent, be at the mercy of any malicious person in the Bazar, whether connected with the case or not, who chose to present before a competent Magistrate a complaint of forgery or giving false evidence or the like. That was a state of things which the Legislature very properly recognized as one which must be prevented and so it is provided, to put it briefly, that no man concerned or supposed to be concerned in any of the offences enumerated in section 195, when this supposed offense arises in connection with a case or with judicial proceedings and so forth shall be proceeded against unless the Court or officer concerned indicates that he thinks the case ought to be inquired into. That is the real purpose of the provisions of these sections, and here we have the clearest possible indication that the Court concerned thought it most necessary that this suspected case of forgery should be inquired into. It cannot, therefore, be said that there is any failure of justice, because this inquiry is ordered to be made; even though the technicality—and in this case it is a mere technicality—of examining the complainant was not carried out.

I think, therefore, that the Rule granted in this case should be discharged.

HAYWARD, J.—I concur. I think there can be no reason for doubt that the letter of the 12th of November 1914 sent by the District Judge of Ahmedabad, in which he stated that the forgery was patent and that a prompt investigation was necessary in order to detect the offenders, was a complaint to the District Magistrate of Kaira within the meaning of the definition in section 4, clause (h), of the Criminal Procedure Code. It is true that thereafter an inquiry ensued and that the case was eventually

transferred for trial by the District Magistrate of Kaira under section 192 of the Criminal Procedure Code without formally having examined the District Judge of Ahmedabad upon oath, as strictly required by the provisions of section 202 of the Criminal Procedure Code. But it is quite clear to me that the omission formally to examine the District Judge upon oath was a mere irregularity which could have had no possible effect upon the subsequent proceedings. For it is quite clear that the District Judge had made up his mind that the patent forgery ought to be inquired into and the offenders brought to book. That is the substantial point required by the provisions of section 195 and section 476 of the Criminal Procedure Code. The omission, therefore, of the oath was a mere irregularity in no way prejudicing the subsequent proceedings or tending to the failure of justice, and is very similar to the omission in the case of *Queen-Empress v. Monu* (1), in which it was held that such irregularity was covered by the provisions of section 537, clause (a), of the Criminal Procedure Code. It is not, in my opinion, disobedience to an express provision as to a mode of trial referred to by the Privy Council in the case of *Subrahmania Ayyar v. King-Emperor* (2).

I concur for these reasons with the order that the application ought to be rejected and the Rule discharged.

Rule discharged.

- (1) 11 M. 443; 2 Weir 238; 4 Ind. Dec. (N. S.) 309.
 (2) 25 M. 61; 11 M. L. J. 233; 3 Bom. L. R. 540; 28 I. A. 257; 5 C. W. N. 836; 2 Weir 271; 8 Sar. P. O. J. 160 (P. G.).

CALCUTTA HIGH COURT.
 CRIMINAL REVISION No. 728 OF 1916.
 August 23, 1918.

Present:—Mr. Justice Teunon and
 Mr. Justice Cuming.
 BEJOY KRISHNA PAL—ACCUSED—
 PETITIONER

versus

BALAI CHAND BHANDARI—
 COMPLAINANT—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 403 (2)

BEJOY KRISHNA PAL V. BALAI CHAND BRANDARI.

—Complaint of offences under ss. 352, 504, Penal Code—Process under s. 352—Trial and acquittal of offence under s. 352—Fresh trial for offence under s. 504, legality of.

A petition of complaint alleged that the accused had committed offences punishable under sections 352 and 504, Indian Penal Code. Process was issued upon the accused directing him to appear and take his trial under section 352 only. Having heard the complainant and his witnesses, the Magistrate acquitted the petitioner of the offence under section 352, but being of opinion that on the evidence adduced a *prima facie* case of an offence punishable under section 504 had been made out, ordered process to issue directing the accused to appear and stand his trial under section 504.

Held, that section 403 (2), Criminal Procedure Code, was applicable to the case, so that the accused could be legally tried again for the offence punishable under section 504, Penal Code. [p. 684, col. 2.]

FACTS appear from the judgment.

Babu Mamatha Nath Mukherjee, for the Petitioner.—Complaint was under section 504 and section 352 of the Indian Penal Code. Process was issued only under section 352 and I was acquitted. Then the Magistrate again issued summons under section 504, Indian Penal Code, for my retrial under that section. My submission is that abuse and assault are practically one act and hence the offence is one and as there was one act only, I could be convicted under one and one section only. Hence the Magistrate after acquitting me under one section, *viz.*, section 352, Indian Penal Code, cannot again convict me under another section for one and the same offence. The charge against me as given in the charge sheet clearly constitutes one act or offence and under section 403, clause (1), Criminal Procedure Code, I cannot be tried again for an offence under section 504, Indian Penal Code.

[TRUNON, J., refers to clause (2) of section 403, Criminal Procedure Code. There was not one act, for slapping is one and use of tongue is another offence. You having been acquitted once under section 352, you cannot be tried again under section 504 *without the issue of due notice to you*, and that has been done by the Magistrate in this case.]

The Magistrate could have convicted me again under section 352, but instead of doing that I do not know why the Magistrate has convicted me under section 504, Indian Penal Code.

JUDGMENT.—In this case it appears that one Balai Chand Bhandari brought a

petition of complaint against the present petitioner, alleging that he had committed offences punishable under sections 352 and 504, Indian Penal Code. Process was issued upon the petitioner directing him to appear and take his trial only under section 352. The case was tried summarily, and the petitioner was given to understand, and the Magistrate himself believed, that he was trying a charge merely of assault. Having heard the complainant and his witnesses he came to the conclusion that the charge of assault had not been made out. He, therefore, acquitted the petitioner of the offence punishable under that section. At the same time being of opinion that on the evidence adduced a *prima facie* case of an offence punishable under section 504, Indian Penal Code, had been made out and believing also that process under that section not having been issued against the accused he could not then proceed to try him under that section, he directed that process should then issue directing the accused to appear and stand his trial under section 504.

In the present Rule it is contended that under the provisions of section 403 (1) he cannot now be tried for that offence. We are unable to accede to that contention. No doubt the Magistrate would have been better advised if, after framing a charge under section 504 and giving the accused a further opportunity of cross-examining the witnesses already examined, he had proceeded there and then to try this second charge. But the fact that he did not do this in no way alters the position of affairs. To a matter such as this section 403 (2) is applicable, and having regard to the terms of the Magistrate's judgment it cannot be said that the petitioner has been tried and acquitted of the offence punishable under that section.

It is next contended that in view of what is said to be the great influence possessed by the Chairman of this Municipality whose subordinate the complainant is, the proceedings against the petitioner should be transferred from the station of Hooghly to the Court of some competent Magistrate either at Howrah or Serampore. We can see no reason to think that the influence possessed by the Chairman in question, if he does possess such influence, will be in any way exercised to the pre-

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indice of the petitioner, or that the Magistrates at Hooghly or anyone of them are in any degree subservient to him.

We, therefore, discharge this Rule.

Rule discharged.

PATNA HIGH COURT.

CRIMINAL REVISION No. 473 OF 1917.

January 9, 1918.

Present:—Mr. Justice Roe and Mr. Justice Jwala Prasad.

MANGNI LAL MARWARI—

PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 556—Criminal trial—Judge importing his own knowledge into case, effect of—Irregularity.

Where a Judge is the sole judge of law and fact in a case tried before himself, he cannot give evidence before himself or import matters in his judgment not stated on oath before the Court in the presence of the accused. If he does so, he makes himself a witness in the case and renders himself incompetent to try it. [p. 685, col. 2.]

Criminal revision from an order of the Magistrate, 1st class, Hazaribagh.

Messrs P. K. Das and S. N. Bose, for the Petitioner.

The Assistant Government Advocate, for the Crown.

JUDGMENT.

JWALA PRASAD, J.—The petitioner in this case has been convicted by the Sub-Deputy Magistrate of Chattrā exercising 2nd Class powers under section 352 of the Indian Penal Code and sentenced to pay a fine of Rs. 50. The conviction and sentence have been upheld in appeal by the 1st Class Magistrate of Hazaribagh.

The trying Magistrate imported into the judgment his knowledge gained by making enquiries out of Court without giving notice to the parties, as a result of which he says that he was perfectly "satisfied with the truth of the complainant's story in the main". He also disbelieved the defence witness, Mahangu Mian, who swore in Court that "he did not see any assault". The Magistrate says: "I chanced to meet this witness outside the Court before his

evidence was gone into and on making enquiries relating to the occurrence he told me that owing to market day there were too many customers at his shop and he did not care to see what was going on at the complainant's shop, etc."

The Appellate Court has condemned this procedure adopted by the Magistrate, but has upheld the conviction because it considered that the evidence of the defence witness, Mahangu Mian, was not worthy of credence irrespective of the irrelevant enquiry from the witness made by the Sub-Deputy Magistrate. The Appellate Court, however, does not refer to the general enquiry made by the Magistrate as to the truth of the complainant's story outside the Court and without notice to the parties. There is no record of this general enquiry. He was also not competent to hold any enquiry into the case out of Court and to judge of the value of the evidence given in Court, except what was placed as legal evidence on the record. He became a witness out of Court and also to the facts that came to his knowledge at the extra-judicial enquiry. Under section 556 of the Code of Criminal Procedure he became personally interested in the result of the case however small that interest may be.

In the case of *Queen-Empress v. Manikam* (1) on a review of all the authorities on the point, it was held that where a Judge is the sole judge of law and fact in a case tried before himself, he cannot give evidence before himself or import matters in his judgment not stated on oath before the Court in the presence of the accused and that by so doing he made himself a witness in the case and had, therefore, rendered himself incompetent to try it. In that case, as in this, the Appellate Court upheld the conviction on the ground that there was sufficient evidence on the record irrespective of the irrelevant matter introduced by the Magistrate. The conviction was set aside by the High Court in revision.

The procedure of importing into a case his own knowledge of particular facts by a Judge was condemned in *Hurpershad*

(1) 19 M. 263; 6 M. L. J. 143; 2 Weir 725; 6 Ind. Dec. (N. S.) 888.

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v. *Sheo Dyal* (2). This was a civil case, but the principle applies with greater force to a criminal trial. The same view has since then been taken in *Girish Chunder Ghose v. Queen-Empress* (3) and in *Hari Kishore Mitra v. Abdul Baki Miah* (4). In the notable case of *Serjeant v. Dale* (5) it was observed that "a Magistrate by making himself a witness has a legal interest in the decision of the case which disqualifies him from trying it; no matter how small that interest may be".

The Magistrate could not give an impartial consideration to the evidence on the record on account of the prejudice that may have existed in his mind after having held an enquiry out of Court. He had seen the witnesses, and the petitioner is entitled to have an impartial opinion of the evidence given by the witnesses, by the trying Court. The trial is vitiated by the enquiry held by the Magistrate. The Appellate Court had not the advantage of seeing the witnesses and was in no better position than what we are in when hearing the case in revision. The petitioner is, therefore, prejudiced by the material irregularity in the trial of the case committed by the Magistrate.

I would, therefore, set aside the conviction and direct that the petitioner be re-tried by another Magistrate.

ROE, J.—I am not prepared to say that the Appellate Court in this case was bound to refer the matter for re-trial but there is much to be said for the view that it would have been wiser to have done so. It is to be noted that in the case of *Hurpershad v. Sheo Dayal* (2), in which at page 70 were contained the observations of their Lordships of the Judicial Committee on which most of the judgments in regard to Magistrates having knowledge of matters connected with the occurrence are based, their Lordships did not refer the matter for retrial by another Court but decided the case upon its merits on that part of the record actually admissible in evidence.

(2) 3 I. A. 259; 26 W. R. 55; 3 Sar. P. C. J. 611; Bald. 25; 3 South P. C. J. 304; Rafique & Jackson's P. C. No. 41 (P. C.).

(3) 20 C. 857; 10 Ind. Dec. (N. S.) 577.

(4) 21 C. 920; 10 Ind. Dec. (N. S.) 1245.

(5) (1877) 2 Q. B. D. 552; 46 L. J. Q. B. 781; 37 L. T. 153.

In my view the matter falls rather within section 167 of the Evidence Act than section 556 of the Criminal Procedure Code as now amended. However, as my learned brother is of opinion that the justice of the case requires a new trial, I concur in the order proposed.

Retrial ordered.

ALLAHABAD HIGH COURT.
CRIMINAL REVISION No. 710 OF 1918.
November 1, 1918.

Present:—Mr. Justice Tudball.

THAKUR DAS—APPLICANT

versus

ABDULLA—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 195, 476—Perjury committed in summary trial—Sanction, whether ought to be granted.

Where during the course of a summary trial the Court is of opinion that perjury has been committed, it should take action itself instead of placing in the hands of a private person the right of vindicating the law.

Criminal revision from an order of the Officiating Sessions Judge, Benares.

Mr. G. Banerji, for the Applicant.

Mr. Muhammad Yusuf, for the Opposite Party.

JUDGMENT.—The circumstances of this case are such that no private sanction, in my opinion, ought to have been granted. The trial of the original case was a summary trial. There is no record of the evidence. The matter is one involving the eternal Hindu and Musalman question. In the absence of any record of the evidence, it would be difficult indeed to secure a conviction. There are many ways of explaining the fact that the applicant made a statement which was incorrect. In such a matter as this if the Court thought that perjury had been committed, it would have been better advised if it had taken action itself instead of placing in the hands of a private person the right of vindicating the law. I allow the application and I set aside the order of the Court below. The application for sanction is refused.

Application allowed.

SUPDT. AND REMEMBRANCER OF LEGAL AFFAIRS, BENGAL *v.* MOZAM MOLLA.AZEM ALI *v.* EMPEROR.

CALCUTTA HIGH COURT.

GOVERNMENT APPEAL No. 2 OF 1918.

February 20, 1918.

Present:—Justice Sir Charles Chitty, Kt.,
and Mr. Justice Smither.SUPERINTENDENT AND REMEM-
BRANCER OF LEGAL AFFAIRS, BENGAL

—APPELLANT

versus

MOZAM MOLLA AND OTHERS—ACCUSED—

RESPONDENTS.

Criminal Procedure Code (Act V of 1898), ss. 96,
100—Warrant under s. 100.—Using form of warrant
under s. 96, legality of.If the substance of a warrant issued under section
100, Criminal Procedure Code, complies with the
requirements of that section, the warrant is per-
fectly legal, no matter what prescribed form is
used for the warrant.There being no prescribed form of warrant under
section 100, Criminal Procedure Code, a Magistrate
issuing such a warrant adapted a form under section
96, Criminal Procedure Code, to the provisions of
section 100 by altering the figures and also by
drawing up the warrant in terms required by section
100.*Held*, that the warrant was perfectly legal.Appeal against the order passed by the
Sessions Judge, Jessore, dated the 3rd
September 1917.Mr. Orr (Deputy Legal Remembrancer),
for the Appellant.Mr. Khoda Bux and Babu Saiindra Nath
Mukherjee, for the Accused.JUDGMENT.—In this case the accused
persons were convicted by a Deputy
Magistrate of offences under sections 353
and 147, Indian Penal Code, and sentenced
Israil to eight months' and the rest to
six months' rigorous imprisonment each.
The accused appealed to the Sessions Judge
who acquitted them on a question of law.
He held that the ruling in the case of
Bisu Haldar v. Emperor (1) was
conclusive in this case. The facts, he said,
were identical. Against that acquittal the
Government have appealed. It appears
clear that the facts of the two cases are
not identical. A perusal of the judgment
in the case of *Bisu Haldar v. Emperor*
(1) shows that not only was the warrant
in that case issued under section 96,
Criminal Procedure Code, but that the
terms of the warrant indicated that it
was issued under that section. In this

case there being no prescribed form of
warrant under section 100, the Magistrate
who issued it adapted a form under section
96 to the provisions of section 100 by
altering the figures and also by drawing
up the warrant in terms required by
section 100. This being so, the warrant
would be perfectly legal. For this we find
an authority in the case of *Gurameah
v. Emperor* (2), where the form of
a warrant under section 98 was used
with the necessary alterations for a
warrant under section 100. It is immaterial
what form is used, provided that the sub-
stance of the warrant complies with the
requirements of section 100. That it
certainly did in the case before us. It has
been suggested that the warrant was
altered after issue to meet the objections
raised in this case. As to that there is no
evidence whatever on the record; on the
contrary, there is the evidence of P. W.
No. 12, who states that he altered it with
his own hand before the issue. We
accordingly set aside the order of acquittal
passed by the learned Sessions Judge and
remand the case to the Sessions Court for
a hearing of the appeal on the merits. The
accused may remain on bail pending the
hearing of the appeal.

Acquittal order set aside.(2) 13 Ind. Cas. 1002; 16 C. W. N. 336; 39 C. 403;
13 Cr. L. J. 186.

CALCUTTA HIGH COURT.

MISCELLANEOUS CRIMINAL REVISION No. 77
OF 1918.

August 23, 1918.

Present:—Mr. Justice Teunon and
Mr. Justice Cuming.

AZEM ALI—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898) s. 190.
(1) (c)—Magistrate taking cognizance of offence,
whether can hold inquiry preliminary to commitment.

(1) 11 C. W. N. 836; 6 C. L. J. 127; 6 Cr. L. J. 38.

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The fact that a Magistrate took cognizance of an offence under section 190 (1) (c), Criminal Procedure Code, is no bar to his holding an inquiry preliminary to commitment.

FACTS appear from the judgment.

Moulvi A. K. Fazlul Huq (with him Mr. Muhammad Abdul Hai), for the Petitioner.—The Magistrate did not comply with the provisions of section 191, Criminal Procedure Code. The case comes under section 190 (c) and hence should be tried by another Magistrate. For this reason transfer may be granted by your Lordships.

[TEUNON, J.—But the Magistrate may have acted under section 190 (c), Criminal Procedure Code.]

That is on Police report. But here there was no Police report. The Magistrate ordered an enquiry but before the report was submitted, he proceeded to the spot and there issued summons. So he acted either under section 190 (a) or (c), Criminal Procedure Code.

[TEUNON, J.—Suppose he proceeded under section 190 (c).]

Then I am entitled to a transfer.

[TEUNON, J.—But the Magistrate can hold an enquiry preliminary to commitment, when he took cognizance under section 190 (c).]

No doubt he can hold such an enquiry but that is not trial. Unless he takes evidence and tries the case, there is a chance of his being biased. Of course by local enquiry he may know certain extraneous matters but it is impossible for him to keep himself aloof from local influence. If you think it to be a case under section 190 (c), then it ought not to be tried by the Magistrate making the local enquiry but by another Magistrate.

JUDGMENT.—This Rule is based upon an application for transfer. Even if it had to be held that the Magistrate took cognizance under the provisions of section 190 (1) (c), Criminal Procedure Code, still that is no bar to the Magistrate holding an enquiry preliminary to commitment. We have read the Magistrate's explanation and we can find no reason to think that the petitioner will not be accorded a full and fair hearing before that officer. This Rule is discharged.

Rule discharged.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 102 OF 1918.

May 14, 1918.

Present:—Mr. Kotwal, A. J. C.

TUKARAM—CONVICT—APPLICANT

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 353—Criminal Procedure Code (Act V of 1898), s. 160—Police constable acting without written order, whether acting in discharge of duty—Assault—Offence.

The accused, on being asked by a Police constable to accompany him to the Sub-Inspector without a written order from the latter under section 160 of the Criminal Procedure Code, assaulted the constable.

Held, that the constable was not acting as a public servant engaged in the discharge of his duty, and that, therefore, the accused was not guilty of an offence under section 353 of the Penal Code.

Mr. N. K. Vaidya, for the Applicant.

ORDER.—Two grounds are urged in the revision: first, that on the evidence it should have been held that the accused did not assault the constable. The learned Magistrate has considered the evidence with some care and I see no reason for departing from the practice of this Court of not interfering in revision on questions of fact. The evidence, if believed, is sufficient for a finding that the accused assaulted the constable. The 2nd point urged is that as the constable was asking the accused Tukaram to go with him to the Sub-Inspector without a written order from the latter under section 160, Criminal Procedure Code, he was not, when assaulted, acting as a public servant engaged in the discharge of his duty as a public servant and the conviction under section 353, Indian Penal Code, is wrong. I agree with this contention and alter the conviction to one under section 352 but maintain the sentence which under the circumstances is not excessive.

Criminal Revisions Nos. 103 and 104 of 1918 are argued with this application and will be governed by this order.

Conviction altered.

SURYANARAYANA U. PATANNA.

PRIVY COUNCIL.

APPEAL FROM THE MADRAS HIGH COURT.

July 1, 1918.

Present:—Lord Atkinson, Sir John Edge
and Sir Walter Rhillimore, Bart.

SURYANARAYANA AND OTHERS—

PLAINTIFFS—APPELLANTS

versus

PATANNA AND OTHERS—DEFENDANTS—

RESPONDENTS.

Madras Estates Land Act (I of 1908), s. 3 (2) (d)
—Grant of agrapharam village by Native Ruler before
British rule—Presumption—Village, whether estate—
Ejectment, suit for—Jurisdiction of Civil and Revenue
Courts.

There is no presumption that an *inam* grant made
by a Native Ruler more than 400 years prior to
British rule was a grant of land revenue alone and
did not include the *kudivaram*. [p. 690, col. 2.]

Where it was found that an *agrapharam* village
was granted to an *inamdar* by a ruler in 1373 and
had ever since been enjoyed by his successors-in-
title, and it was not proved that at the date of the
grant there were any tenants in the village holding
lands with any rights of occupancy by custom or
otherwise:

Held, (1) that the grant must be presumed to have
been of the *kudivaram* as well as of the *melvaram*
right; [p. 691, col. 2.]

(2) that the village was not an "estate" within
the meaning of section 3 (2) (d) of the Madras
Estates Land Act, and that, therefore, the *inamdar*
was entitled to eject the tenants through the Civil
Court. [p. 692, col. 1.]

Consolidated appeal from a judgment and
three decrees, dated the 9th October 1913, of
the High Court at Madras, affirming
the judgment and decrees, dated the 4th
March 1912, of the District Judge, Kistna,
which reversed the judgment and decrees,
dated the 18th April 1911, of the Additional
District Munsif, Masulipatam.

Messrs. DeGuryther, K. O., and Kenworthy
Brown, for the Appellants.

Mr. B. Dube, for the Respondents.

JUDGMENT.

SIR JOHN EDGE.—This is a consolidated
appeal from three decrees, dated the 9th
October 1913, of the High Court at Madras,
which affirmed decrees, dated the 4th
March 1912, of the District Judge of
Kistna, by which decrees, dated the 18th
April 1911, of the Additional District
Munsif of Masulipatam were set aside and
the plaintiffs' suits were dismissed.

The suits in which these appeals have
arisen were brought on the 10th July 1909
in the Court of the District Munsif of
Gudivada, and were suits of ejectment from

agricultural lands situate within the Agra-
haram village of Korraguntapalem in the
Northern Circars of the Presidency of
Madras. The plaintiffs are Inamdars of the
village, holding under an Inam grant of
1373 from a Reddi King of the district.
The defendants are agricultural tenants
who, or whose predecessors in-title, at
various times within very recent years and
before July 1908, were respectively let into
possession by the Inamdars under agreement
for terms, which expired in each case before
the suits of ejectment were brought. By
these documents of tenancy the defendants
or their predecessors in-title agreed with
the Inamdars to quit possession of their
holdings on the determination of the term
for which the lands were let to them, and
without claiming any *giriyati* right in the
lands.

In their written statements the defendants
alleged that the Agrapharam village is an
estate within the meaning of section 3 of
Act I of 1908 (the Madras Estates Land
Act, 1908), and in the alternative, and if
the Agrapharam is not an estate within the
meaning of the Act, then the defendants
alleged in their written statements that they
or their predecessors in the holdings had
been cultivating the lands long before
the formation of the Agrapharam, had
acquired permanent rights of occupancy in
the lands, and had enjoyed the lands with
such rights to the present time.

In the written statements it was denied
that the defendants held the lands for
temporary terms as alleged in the plaints,
and it was stated that if it were proved
that agreements of tenancy had been exe-
cuted by which the lands were to be held
for terms and were to be quitted on the
expiration of the terms, it was not admitted
that such documents were executed willingly
by the defendants or their predecessors or
with any knowledge of their provisions.
If that statement meant anything, it must
have meant that the Inamdars had by
fraud and the exercise of undue influence
procured the execution by the defendants
or their predecessors of the agreements of
tenancy under which the defendants held
the lands occupied by them. It may be
mentioned at once that no evidence to
suggest that there was any foundation of
truth for that statement has been brought

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to the attention of their Lordships, and it may be dismissed from consideration as unfounded.

If the lands from which the Inamdars are seeking to eject the defendants are part of an estate within the meaning of section 3, sub-section (2) (d) of "the Madras Estates Land Act, 1908" (Act I of 1908), as the defendants allege they are, the Civil Court had no jurisdiction to entertain the suits. The Munsif, who tried the suits, found on the evidence that the Agraharam village in question was not an estate within the meaning of the Act, and finding the other issues in favour of the plaintiffs, made a decree of ejectment and for mesne profits in each suit. The District Judge on appeal decided that the Agraharam village was an estate within the meaning of section 3, sub-section (2) (d) of the Act, and dismissed the suits. The High Court on appeal directed that the plaint in each case should be returned to the plaintiff in order that it might be presented to the Court of Revenue. It is from these decrees of the High Court that this consolidated appeal has been brought.

As the decision of this appeal mainly depends on the question as to whether the Agraharam village is or is not an estate within the meaning of section 3, sub-section (2) (d) of the Act, it is necessary to see how an estate for the purpose of the Act is thereby defined. Clauses (a), (b), (c), and (e) of section 3, sub-section (2), do not apply in this case, and need not be referred to. Section 3, so far as it is applicable here, is as follows:—

"3. In this Act, unless there is something repugnant in the subject or context:—

* * * * *

(2) 'Estate' means—

* * * * *

(d) Any village of which the land revenue alone has been granted in Inam to a person not owning the *kudivaram* thereof, provided that the grant has been confirmed or recognized by the British Government, or any separated part of such village;

* * * * *

The term '*kudivaram*' is not defined in the Act. It is a Tamil word and literally signifies a cultivator's share in the produce of land held by him as distinguished from the landlord's share in the produce of the

land received by him as rent. The landlord's share is sometimes designated "*melvaram*." The "*kudivaram* interest," an expression occurring in section 8 of the Act, is apparently understood by the High Court at Madras as meaning a right to occupy land permanently.

The grant of the village by the Reddi King to the predecessor-in-title of the plaintiffs has not been produced. It would be unreasonable to expect that at this long distance of time it is still in existence. But that grant has been recognized and confirmed by the British Government, and the question is, was it a grant of the revenue only of the village, or was it a grant of the proprietary right in the village, that is, of the soil of the village? If it was a grant merely of the revenue obtainable from the village, the village is an estate within the meaning of the Act. On the other hand, if the grant included the soil of the village, the village is not an estate within the meaning of the Act, and the decree of the Munsif was right and should not have been set aside.

It has been contended on behalf of the respondents that in the times when the Reddi Kings ruled in this district, the ownership of the soil of land in India was not in the sovereign or ruler, and that the right of the ruler was confined to a right to receive as revenue a share in the produce of the soil from the cultivator. Upon that assumption it was contended that the Inam grant of 1373 could have been only a grant of the King's share in the produce of the soil, that is, that the grant was a grant of land revenue alone and did not include the *kudivaram*. That is an assumption which no Court is entitled to make, and in support of which there is, so far as their Lordships are aware, no reliable evidence. The fact that rulers in India generally collected their land revenues by taking a share of the produce of the land is not by itself evidence that the soil of lands in India was not owned by them and could not be granted by them; indeed, that fact would support the contrary assumption, that the soil was vested in the rulers who drew their land revenue from the soil, generally in the shape of a share in the produce of the soil, which

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was not a fixed and invariable share but depended on the will of the rulers. The assumption contended for on behalf of the respondents was not recognized in Regulation XXXI of 1802. The opening words of that Regulation are instructive; it is there recited:—

"Whereas the ruling power of the provinces now subject to the Government of Fort St. George has, in conformity to the ancient usages of the country, reserved to itself and has exercised the actual proprietary right of lands of every description; and whereas, consistently with that principle, all alienations of lands, except by the consent and authority of the ruling power, are violations of that right; but whereas considerable portions of land have been alienated by the unauthorized encroachments of the present possessors, by the clandestine collusion of the local officers, or by other fraudulent means; and whereas the permanent settlement of the land tax has been made exclusive of alienated lands of every description; it is expedient that rules should be enacted for the better ascertainment of the titles of persons holding, or claiming to hold, lands exempted from the payment of revenue to Government under grants not being *badshahie* or royal, and for fixing an assessment on such lands of that description as may become liable to pay revenue to Government; wherefore the following rules are enacted for that purpose:"

By that Regulation all grants for holding lands exempt from the payment of revenue made previously to the 26th February 1768 in the Northern Circars shall be deemed to be valid,

"provided that such lands may not have escheated to the State, or may not have been resumed and assessed for the public revenue since the period of those dates respectively; and provided also that the present incumbents or their ancestors did obtain and hold actual possession of the said lands previously to the dates hereinbefore specified."

The date thereinbefore specified, so far as the Northern Circars were concerned, was the 26th February 1768.

By section 15 of Regulation XXXI of 1802 it was enacted that a register should be kept in each Zilla of the lands held exempt from the payment of revenue previously, in the case of the Northern Circars,

to the 26th February 1768 and that the registers should specify the denomination of each grant or Sanad, the names of the original grantors or grantees, and the names of the present possessors, with other particulars. The earliest of such registers from which an extract was put in evidence in these suits was Mr. Oakes' Inam Register. It appears from Mr. Oakes' Inam Register that the whole of the Agraharam village of Korruguntapalem was granted by Sri Madana Vema Reddi to Ivaturi Naganaradhyulu, and had been enjoyed by his successors-in-title for 429 years. That entry in Mr. Oakes' Inam Register affords, in their Lordships' opinion, conclusive evidence that the grant of the Agraharam village by the Reddi King was a grant not only of the revenue but of the soil of the village, and that conclusion is supported by the *dumbalas* which have been put in evidence in these suits, and it is also supported by the reliable evidence in these suits showing how the Inamdars dealt with the lands of the village. It is not proved, nor is there any evidence to suggest, that at the date of the grant there were any tenants in the village holding lands with any rights of occupancy by custom or otherwise.

By Act VIII of 1865 (Madras) it was enacted that Inamdars and other land-holders should enter into written agreements with their tenants, the engagements of the land-owners being termed Patta and those of the tenants being termed Muchilika. The Patta should contain, amongst other things, "all other special terms by which it is intended the parties shall be bound." The Muchilika should, at the option of the land-holders, be a counterpart of the Patta, or a simple engagement to hold according to the terms of the Patta. By the Muchilikas which were executed by the defendants respectively or their predecessors-in-title the term for which the lands were let to them was specified; it was admitted that they held no *jirayati* rights, and they agreed to quit the lands at the end of their term. All these Muchilikas were made before the coming into force of Act I of 1908, and it has not been proved that, when these tenancy agreements were entered into and the defendants or their predecessors-in-title were let into possession under them,

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any of the lands were, or had been, held by a *ryot* with a permanent right of occupancy.

The District Judge, in setting aside the decrees of the Munsif and dismissing the suits, and the learned Judges of the High Court in the decrees which they made, acted upon what they conceived to be a presumption of law, deduced by them from some decisions of the High Court at Madras and of the High Court at Bombay, to the effect that in the case of an Inamdar it should be presumed, in the absence of the Inam grant under which he held, that the grant was of the royal share of the revenue only, and they cited the decisions upon which they relied as authorities. Some of those decisions to which they referred do not, upon an examination of them, support the opinions of those Judges as to the presumption which they applied in these suits. In their Lordships' opinion there is no such presumption of law. But a grant of a village by or on behalf of the Crown under the British rule is in law to be presumed to be subject to such rights of occupancy, if any, as the cultivators at the time of the grant may have had.

Their Lordships will humbly advise His Majesty that this consolidated appeal should be allowed with costs; that the decrees of the District Judge and of the High Court should be set aside with costs; and that the decrees of the Munsif should be restored and affirmed.

Appeal allowed.

Solicitor for the Appellants: Mr. Douglas Grant.

Solicitors for the Respondents: Messrs. Barrow, Rogers and Nevill.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 2263 OF 1916.

August 1, 1918.

Present:—Mr. Justice Newbould and Mr. Justice Panton.

Sreemutty CHAND BIBI—PLAINTIFF
—APPELLANT

versus

LAL MOHAMED, AND ON HIS DEATH HIS HEIRS
AND LEGAL REPRESENTATIVES HIS WIDOW
Sreemutty CHAMPA BIBI AND
OTHERS—DEFENDANTS—RESPONDENTS.

Adverse possession between co-heirs—Co-heir

remaining in exclusive possession of estate to knowledge of others—Possession, whether adverse.

The plaintiff claimed her share of the properties left by her father, who died 37 years before the date of the institution of the suit, from her brother who had been in exclusive possession of the same to the knowledge of the plaintiff since the death of their father:

Held, that the possession of the brother was adverse to the plaintiff, even though it was not shown that there was any demand made by the plaintiff which was refused by the brother. [p. 693, col. 1.]

Appeal against the decree of the District Judge, Burdwan, dated the 5th of September 1916, reversing the decree of the Munsif, 4th Court at that place, dated the 11th of September 1915.

FACTS appear from the judgment.

Babu Jogesh Chandra Roy (with him Babus Shibo Prosonna Bhattacharjee and Poshupatinath Sastri), for the Appellant.—The plaintiff, who is the appellant before your Lordships, claims her share of the properties left by her father. The plaintiff's father died 37 years ago before the institution of this suit. The learned District Judge has erred in law in dismissing the plaintiff's suit on the ground that it is barred by limitation. The possession by the defendant, who is the brother of the plaintiff, cannot be held to be adverse possession unless it be shown that there was a demand made by the plaintiff and that demand was refused by the defendant. This is supported by the decision in *Shurfunnissa Bibee Chowdhraïn v. Kylash Chunder Gungopadhya* (1). In the present case, there is no ouster, no refusal. Mere exclusion won't do. Exclusion must be by adverse possession.

Babu Mohendra Nath Roy (with him Babus Baranasibashi Mukherjee and Biraj Mohan Mozoomdar), for the Respondents.—The learned Vakil for the appellant has misunderstood the ruling in *Shurfunnissa Bibee Chowdhraïn v. Kylash Chunder Gungopadhya* (1) and has misapplied it to the facts and circumstances of the present case. The plaintiff's father died 37 years ago before the institution of the present suit by the plaintiff. I cannot understand what is meant by adverse possession if the brother's possession is not considered adverse. The principles of law which ought to guide the decision of your Lordships in a case like this are

(1) 25 W. R. 53.

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amply set out in *Ayennessa Bibi v. Sheikh Isuf* (2) and *Faizuddin Khan v. Reju Akab* (3). The defendant for the last 37 years has been exercising exclusive right to the knowledge of the plaintiff, who obviously relinquished all rights which she possessed as regards the properties in dispute. Where is the demand and where is the refusal on which so much reliance has been placed by my learned friend?

Babu Jogesh Chandra Roy replied.

JUDGMENT.—This is a suit between a sister and a brother, in which the plaintiff claims her share of the properties left by her father who died 37 years before the date of the institution of the suit. The Munsif decreed the suit and the learned District Judge has dismissed it on the ground that it is barred by limitation. The principles to be applied in cases of this sort will be found set out in the decisions of this Court in the cases of *Ayennessa Bibi v. Sheikh Isuf* (2) and *Faizuddin Khan v. Reju Akab* (3). It appears to us, on reading the judgment of the learned District Judge, that he fully appreciated the legal point in this case and having done so, his findings as to the facts cannot be attacked in second appeal. It is contended that the possession of the brother cannot be adverse unless it is shown that there was a demand made by the sister which was refused. Though this contention finds some support in the decision in the case of *Shurfunnissa Bibee Chowdhra v. Kylash-Chunder Ganopadhya* (1), it cannot be laid down as a test applicable to all cases of this sort. It is found that the plaintiff in this case gave up her rights shortly after her father's death and that the defendant has exercised exclusive right for all those years to the knowledge of the plaintiff. If the plaintiff gave up her rights and never asserted them, obviously it could not be proved that there have been a demand and a refusal. We dismiss this appeal with costs.

Appeal dismissed.

(2) 14 Ind. Cas. 722; 16 C. W. W. 849.

(3) 23 Ind. Cas. 22; 21 C. L. J. 192.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1648 OF 1917.

August 14, 1918.

Present:—Mr. Justice Phillips and Mr. Justice Kumaraswami Sastri.

A. THIAGARAJA AIYAR—DEFENDANT
No. 1—APPELLANT

versus

G. RAMASWAMI AIYAR AND OTHERS
—PLAINTIFFS AND DEFENDANTS NOS. 2 AND 3
—RESPONDENTS.

Transfer of Property Act (IV of 1882), ss. 83, 84—Mortgage suit—Deposit after institution of suit—Interest, whether ceases—Costs, inclusion of, in mortgage amount.

A deposit under section 83 of the Transfer of Property Act is invalid if made after the institution of a suit by the mortgagee. No exception to the rule is made in favour of allowing a mortgagor to deposit the money before he receives notice of the suit but after its institution. [p. 694, cols. 1 & 2.]

Obiter.—Where a suit on a mortgage has been instituted, the mortgage amount will include the costs of the suit and even if a deposit could be made after suit, it must include the plaintiff's costs. [p. 694, col. 2.]

Second appeal against the decree of the District Court, Tanjore, in Appeal Suit No. 495 of 1916, preferred against the decree of the Court of the District Munsif, Tiruvalur, in Original Suit No. 413 of 1915.

Mr. A. Ramachandra Aiyar for Mr. S. Viswanatha Aiyar (with him Mr. P. N. Nageswara Aiyar), for the Appellant.—Under section 83 of the Transfer of Property Act the mortgagor is entitled to deposit the amount due under the mortgage at any time after it becomes payable. This right to deposit will not be taken away by the mere fact that the mortgagee has instituted a suit in respect of the mortgage, especially when the mortgagor has not received any notice of the suit. Interest stops from the date of deposit and issue of notice of the same (see section 84 of the Transfer of Property Act). After notice of the deposit was duly given, the party is entitled to draw the money from Court. At any rate the Court should not decree interest from that date. See Order XXIV, rule 3, Civil Procedure Code.

Mr. A. V. Viswanatha Sastri, for the Respondents.—Under the English Law, which is also applicable here, the deposit is invalid when made after the institution of the suit, see

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Bayya Sao v. Narasinga Mahapatro (1). It is immaterial that the mortgagor had no notice of the suit. The deposit should in any view have included the costs of the mortgagor incurred up to that date.

Refers to *Kamalamma v. Komundur Narasimha Charlu* (2), *Krishnasami Chettyar v. Thippa Ramasami Chettiar* (3), Fisher on the Law of Mortgage, page 904.

The deposit was under section 83 of the Transfer of Property Act and, therefore, Order XXIV, rule 3, Civil Procedure Code, cannot apply to the present case. Under Order XXIV, rule 1, Civil Procedure Code, the plaintiff may withdraw the deposit and still continue the suit for the balance, but a withdrawal of a deposit under section 83, Transfer of Property Act, can only be in full satisfaction of the claim and the suit cannot be proceeded with after the withdrawal.

Refers to *Griffith v. School Board of Ystradyfodwg* (4).

JUDGMENT.—In *Bayya Sao v. Narasinga Mahapatro* (1) it was held that a deposit under section 83 of the Transfer of Property Act was invalid if made in one Court after the institution of a suit by the mortgagee in another Court, and the Judges who decided that case were of opinion that the same principle would apply in the case of such a deposit in the Court where the suit had been instituted and that the deposit should be made under Order XXIV of the Code of Civil Procedure. We respectfully agree with the reasoning in that case and can see no reason for making any exception in favour of allowing a mortgagor to deposit the money before he receives notice of the suit but after its institution.

When once a suit has been instituted, the amount due on the mortgage cannot be ascertained until the decree is passed providing for interest, costs, etc., for we think that costs must also be included in the amount remaining due on the mortgage within the meaning of section 83 of the Transfer of Property Act, and we are supported in this view by the decision of this

Court in *Kamalamma v. Komundur Narasimha Charlu* (2), which interpreted similar words in the repealed section 90, to include costs. This is an additional argument in favour of holding that a deposit under section 83 of the Transfer of Property Act is invalid if made after institution of a suit by the mortgagee. Even if such a deposit could be made the amount deposited did not include costs and consequently there was no deposit of the amount due on the mortgage, which would be effectual to stop the running of interest.

The effect of the deposit on the running of interest has been the only point argued in this second appeal which must be dismissed with costs.

Appeal dismissed.

M.C.P.

PATNA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL No. 298
OF 1917.

November 7, 1918.

Present:—Sir Dawson Miller, Kt., Chief Justice, and Mr. Justice Mullick.

*Babu ADWAT PRASAD, MINOR, THROUGH
HON'BLE B. MOTI CHAND, C.I.E.—*

DEBTEE—HOLDER—APPELLANT

versus

*Kumar RADEIKA RAMAN PRASAD
SINGH AND ANOTHER—JUDGMENT.*

DEBTORS—RESPONDENTS.

Hindu Law—Joint family—Ancestral property—Presumption—Burden of proof.

In the case of a testator who was living separate from his family and had admittedly a large fortune of his own and had for many years been carrying on business on his own account, even although he had originally acquired some ancestral property, it is impossible to say that any presumption arises in favour of the proceeds of an ordinary business transaction being ancestral rather than self-acquired property. [p. 697, col. 2.]

Appeal from an order of the Subordinate Judge, 2nd Court, Arrah, dated the 11th September 1917.

Messrs. Pugh, B. O. Sinha and A. Husain, for the Appellant.

Messrs. Kulwant Sahay and Rai Gurusaran Prasad, for the Respondents.

JUDGMENT.

MILLER, C. J.—This is an appeal from an order of the Subordinate Judge of the second Court at Arrah, dated the 11th September 1917, in execution proceedings in which he allowed the objections of the

(1) 10 Ind. Cas. 393; 35 M. 209; 10 M.L.T. 37; (1911) 2 M. W. N. 126.

(2) 30 M. 464.

(3) 8 Ind. Cas. 763; 35 M. 44; 9 M.L.T. 131; (1911) 1 M. W. N. 89.

(4) (1890) 24 E. B. D. 307; 69 L. J. Q. B. 116; 62 L. T. 151; 38 W. R. 425.

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judgment-debtors and dismissed the case. The facts leading up to the present proceeding are as follows:—On the 11th February 1896, Raghunath Prasad, a wealthy Hindu Mahajan of Benares, died leaving a widow and daughter but no male issue. Many years before his death he had separated from the other members of his family. He left a Will made shortly before his death, by which after providing for the payment of certain legacies and numerous annuities the bulk of his property was left to his widow for life but provision was made that if she should have a son, the son should take an absolute interest to the exclusion of the mother. Otherwise subject to the widow's life-interest the estate was dedicated to the testator's family god. He appointed his widow executrix and in addition appointed guardians to see that the widow conducted herself in a manner becoming a Pardanashin lady. It appears also that his intention was that the guardians were to administer the property as executors together with the widow. They in fact ultimately proved the Will and were appointed executors. No provision was made for adoption of a son by the widow, but in January 1903 she in fact adopted the present plaintiff as son to her late husband. He was then a boy 4 or 5 years old and has not yet attained majority. The validity of the adoption and its effect upon the Will formed the subject of litigation which was finally decided by the Privy Council on the 28th February 1916* in favour of the validity of the adoption.

The present appeal relates to the execution of a decree, obtained by Raghunath's executors, after his death and before the adoption took place, against the present defendants under a mortgage executed by them in favour of Raghunath during his lifetime. The plaintiff-appellant is Adwat Prasad the adopted son, suing through his guardian. The defendants are the judgment-debtors under the decree just mentioned. The questions argued before us were in the main two:

- (1) Whether the appellant has any right to execute the decree, and
- (2) Whether the decree has in fact been fully discharged.

It appears that in March 1893 some three years before Raghunath's death, a mortgage was executed in his favour by the present respondents. After his death his executors brought a suit against the mortgagors to recover the sum due under the mortgage. The suit was compromised. By the terms of the compromise the amount of the claim including interest *pendente lite* was fixed at Rs. 91,880-1-9. This was to be paid by equal half-yearly instalments extending over a period of 10 years. In addition interest calculated at 10 annas per mensem per hundred rupees on each instalment as it became due was to be paid until the whole of the decretal money had been paid in full. Details of each instalment and interest as they became due each half year are set out in a schedule and a decree was to be passed for the amount so ascertained. It was further provided that if the decretal money with interest set out in the schedule should not be paid instalment after instalment and there should be default in three consecutive instalments, the decree holders should have power to realise the whole decretal amount with interest at one time without waiting for the expiry of future instalments and the mortgaged property was to remain hypothecated as security for the payment of the decretal amount with interest. On the 31st July 1902 a decree was passed in the suit embodying the terms of the compromise. At this time the adoption had not taken place and the present plaintiff was not and could not have been a party to that suit. None of the instalments were paid punctually but for the first two or three years the instalments, when paid, as they were, about a year late in each case, were sufficient to satisfy not only the instalments and interest to the due date but interest between the due date and the actual date of payment or, as it is sometimes called, *post diem* interest. In fact the first five instalments were more than sufficient for this purpose, in each case there being an excess of a small sum varying from Rs. 16 to Rs. 60. From the 6th instalment onwards although the payments were never made punctually, they ceased to include any interest beyond that payable on the due date as set out in the schedule, and towards the end several of the instalments

*See *Adwaitya Prasad v. Baldeo Das*, 33 Ind. Cas. 852—2d.

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were not paid until after there had been default in the next two succeeding ones. The 13th, 14th and 16th instalments are instances where this occurred and the last four were from three to four years late. No steps, however, were taken at any time by the decree-holders to exercise their power of realising the whole decretal amount before the remaining instalments became payable. The instalments were in each case paid into Court by the Court of Wards which was administering the estate of the judgment-debtors and in each case the amount, when paid, was taken out of Court by the decree-holders, as far as appears, without protest or objection. The payments were made in Court under Challans giving particulars of the person on whose behalf the money was tendered, the person to whose credit the amount was to be placed in the Court books, the title of the action, the amount tendered, and in most cases the number of the instalment. They were taken out by the decree-holders by petitions filed for that purpose. The last four instalments which were paid in between July 1912 and April 1915 were taken out together on a petition dated the 13th July 1915. It recites that the instalments of the decretal amount under the decree have been deposited in Court by the judgment-debtors on the dates noted below and prays for a payment order for amounts deposited, stating the petitioners have withdrawn from the Court the amounts deposited on account of several previous instalments and that the necessary particulars of their right to withdraw are noted in the record. Here the matter ended so far as the executors are concerned, and there can be little or no doubt that they were, and had been for some years, satisfied to accept the instalments together with the interest up to the due date without insisting upon the payment of additional interest during the periods when the instalments were overdue. It is also noticeable that although they might have claimed on more than one occasion the whole amount of the balance payable owing to three payments being in arrears, they refrained from doing so. On referring to the terms of the compromise it is at least open to question, although in the view I take of this case it is unnecessary to decide the

point, whether any interest beyond that set out in the schedule was payable at all and it may be that the executors took the view that they were not entitled to claim *post diem* interest or at all events that their claim to do so was very doubtful and accepted the payments as made, preferring to do so rather than run the risk of entering into further doubtful litigation.

The present plaintiff, however, whose status as adopted son of the testator was finally decided by the Privy Council in February 1916, now seeks to obtain further execution of the decree, claiming a sum of Rs. 10,144-1-3, the aggregate amount of interest on the last 15 instalments for the period between their due date and the date of actual payment, together with interest thereon at the decretal rate up to the institution of the present suit. The judgment-debtors object

(1) That the present plaintiff is not entitled to execute the decree obtained by the executors and to which he was no party.

(2) That if any interest was payable under the decree for the period during which the instalments were in default, which they do not admit, the executors waived any claim they might have had to such interest and gave a full discharge.

The Subordinate Judge decided both questions in favour of the respondents.

In answer to the first objection it is contended by the appellant that as the adopted son of Raghunath Prasad he takes by survivorship, and not under the Will and that the whole of the testator's property devolves on him notwithstanding the terms of the Will and that in the circumstances which supervened the Will has become inoperative. The determination of this question would seem to depend upon whether the property in suit was the self acquired property of the testator or family property which the plaintiff would take by survivorship. In my opinion, the interest of the adopted son in the property in question does not arise by survivorship. There is a passage in the judgment of their Lordships of the Privy Council in the adoption suit referred to, which indicates that this question had been discussed and decided in that suit in the Court of first instance and not challenged on appeal. The passage in question is in these words:—

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"The question whether, assuming authority to adopt to have been given to the widow, the adoption of Jadunath's son would make him a son of the testator capable of taking under the terms of the Will was raised before the Judge of first instance. He decided the point in favour of the adopted son and it was not argued again in the Court of Appeal and cannot be raised now."

In the judgment of the Subordinate Judge of Benares in that suit the first issue dealt with the validity of the Will and the testator's power to make it, and in dealing with this issue the learned Judge, after stating that neither party contended that the testator was not of sound mind, continues: "If it were meant that in the Will he was dealing with properties which were not his self-acquired but ancestral, this neither is the case of any party. Both admit that the deceased had absolute power and control over his properties" It is true there later are passages in the judgment to the effect that the adoption rendered the Will inoperative, which would seem to imply that in the opinion of the learned Subordinate Judge who tried that case the adopted son took by survivorship, but these passages can be reconciled with the passage quoted if they are considered as referring to the main provisions of the Will, by which the vast bulk of the estate is left to the widow and after her death to the idol. In any case it is now well settled that even in a Mitakshara family the father has full power of disposition over his self-acquired property and if and in so far as the Will purports to dispose of self-acquired property, it is clear that the appellant can have no claim thereto by right of survivorship. The onus is upon him to shew that the property in question in the present case was ancestral property and he fails in my opinion at the outset to establish such a case. It is admitted that the testator left property worth over 3 lakhs and from his Will it appears that his share of the ancestral property at the time he separated from his brothers was Rs. 34,187 in cash besides a house and some ornaments, the balance being his self-acquired property. He had for many years been dealing as a money-lender and it is not

unreasonable to suppose that the proceeds of a mortgage decree entered into by him in the ordinary course of his business formed part of his self-acquired property and, in my opinion, no presumption can arise in the circumstances of the present case that the subject-matter of this suit is ancestral rather than self-acquired property. In *Bodh Singh v. Guneschander Sen* (1), where a family held ancestral property in joint possession but some of them had acquired separate property of their own and dealt with it as such, it was held by the Privy Council that such a state of things may be fairly held to weaken if not altogether rebut the ordinary presumption of Hindu Law as to property in the name of one member of the joint family, and to throw, upon those who claimed as joint property that of which they have allowed their co-parcener, trading and incurring liabilities on his separate account, to appear to be the sole owner, the obligation of establishing their title by clear and cogent evidence. In the present case, where the testator was living separate from his family and had admittedly a large fortune of his own and had for many years been carrying on business on his own account, even although he had originally acquired some ancestral property, it is impossible to say that any presumption arises in favour of the proceeds of an ordinary business transaction - being ancestral rather than self-acquired property. I hold, therefore, that the appellant has failed to establish his case to deal with the property in question by right of survivorship.

He contends, however, that under the terms of the Will he takes as residuary legatee and that under the provisions of Order XXI, rule 16, the interest in the decree is transferred to him by operation of law and that he is entitled to apply for execution thereof to the Court which passed it. Primarily where a decree is obtained by the executors of a deceased person, they and they only are the proper persons to execute such decree, but the appellant contends that the executors or some or one of them assented to the bequest to him as residuary legatee and that under Chapter VIII of the Probate and Administration

(1) 19 W. R. 356; 12 B. L. R. 317; 3 Sar. P. O. J. 253.

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Act this assent divests the executor's interest and transfers the subject-matter of the bequest to the legatee. Chapter VIII of the Act, which consists of some 6 sections, refers primarily to specific bequests, but assuming that it applies to the interest of a residuary legatee, I think it must be taken that there could be no transfer to the residuary legatee until the residue had been ascertained. In the present case there were a large number of annuities, and there is nothing to shew that these have been paid off or that any specific sum has been set aside for the purpose of meeting these charges on the estate. In fact the estate is still being administered by the executors and having regard to the fact that the plaintiff's status as adopted son was the subject of litigation which was not finally determined until February 1916, it is improbable that the executors or any of them would, at all events up to that time, have assented to the plaintiff taking as residuary legatee under the Will. The only evidence which the appellant puts forward in support of his contention that there was any assent is, first, a passage in the judgment of the Subordinate Judge of Benares, dated the 21st September 1909, in the suit brought by Baldeo Das, one of the executors, against the present plaintiff to have the adoption declared invalid, and, secondly, the fact that in the year 1916, Moti Chand, one of the executors, was appointed guardian of the person and properties of the plaintiff by the District Judge of Benares in place of the widow who had been appointed in 1903. It appears that there was some dispute amongst the executors themselves as to the administration of the estate and as to the plaintiff's status and Baldeo Das instituted the action referred to, claiming a declaration that the adoption was invalid. *Musammât Saraswati Bibi* was one of the defendants in that suit and the following passage relied on by the appellant occurs in the judgment of the Subordinate Judge:—

"Saraswati's defence is that she adopted Adwat Prasad observing all the ceremonies of the Hindu Law and the adopted son is now become owner of the estate of Raghunath Prasad, the Will of the deceased and the plaintiff's guardianship being no

longer in operation. As motive for the suit she alleges that the trustees have got it instituted because she had demanded of them to render account and restore possession of the estate to her as guardian of the minor adopted son."

It is impossible to infer from this bald statement in the judgment that Saraswati was assenting or had at any time assented to the plaintiff's claim to the estate as residuary legatee. The inference which I draw from that passage in the judgment is that Saraswati's contention was that the Will was inoperative and that Adwat Prasad, the adopted son, was entitled to the property by survivorship and this view would appear to be confirmed by a reference to another part of the judgment, in which it is stated that Baldeo Das contended, firstly, that there was no valid adoption, and, secondly, that if there was, Adwat Prasad had no right to the properties under the Will inasmuch as the testator by his Will had made a complete dedication of them to the idol. Saraswati's answer to this was that the Will was no longer in operation. The appellant also contended that Saraswati the executrix must be taken to have assented to the legacy when she was appointed guardian of her adopted son in June 1903, and further that the same inference must be drawn in the case of Moti Chand when he was appointed guardian in 1916. There is, however, nothing whatever to shew that either Saraswati or Moti Chand took any steps to get possession of the estate of the minor in his capacity as residuary legatee, and I decline to draw any inference to this effect from the mere fact that a guardian was appointed who happened also to be a trustee. It is for the plaintiff to establish his case and he has entirely failed to adduce any evidence either positive or inferential on which an assent can be made out.

Having arrived at this conclusion, it follows that appellant is not entitled to execute this decree and his application to do so accordingly fails.

The appellant having failed to establish his right to sue, his appeal cannot succeed and it is not necessary to consider whether a waiver by the executors to claim the interest now sought to be re-

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covered acts as a full discharge to the judgment-debtors or whether such a waiver amounts to an adjustment of the decree which the Court cannot recognise unless certified or recorded in compliance with the provisions of Order XXI, rule 2. The appeal will be dismissed with costs.

MCLLICK, J.—I agree.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 2415
OF 1915.

August 2, 1918.

Present:—Mr. Justice Tennon and
Mr. Justice Cuming.RAJANI MANNA BAGDI, AND ON HIS
DEATH HIS HEIRS AND LEGAL REPRESENTATIVES
KHEPA MANNA BAGDI AND OTHERS

—APPELLANTS

versus

SATISH CHANDRA ROY AND OTHERS

—RESPONDENTS.

Landlord and tenant—Dispossession of tenant from portion of holding—Rent, suspension of—Apportionment.

Where a landlord dispossesses a tenant from a portion of the holding, the entire rent is suspended and the landlord is not entitled to any apportionment of rent on the lands still remaining in the possession of the tenant unless he has replaced the tenant in possession or has taken some effective step to that end, [p. 701, col. 1.]

Appeal against the decree of the Additional Subordinate Judge, Nadia, dated the 26th of June 1915, reversing that of the Munsif, Ranaghat, dated the 26th August 1914.

FACTS material to the report were as follows:—

This was an appeal against the decree of Babu Girindra Nath Mukerjee, Additional Subordinate Judge of Nadia, dated the 26th June 1915, reversing the decree of Babu Paroda Kinkar Mukerjee, Munsif of Ranaghat, dated the 26th August 1914.

The defendants' predecessor, Paban Manna, took *meadi* settlement for nine years of 24½ *bighas* of land at a rental of Rs. 49 a year by executing a registered *kabuliyat* in favour of the plaintiffs' predecessor, Dino Nath Roy, on 13th Chaitra 1285 B. S. After expiration of the lease Paban continued to hold possession of the land. In 1309 B. S., Dino Nath's successors dis-

possessed the defendants from 5½ *bighas* out of the said 24½ *bighas* of land by granting a *meurasi patta* to one Samiraddi. Thereupon the defendants raised objection and stopped payment of rent.

Dino Nath's successor then brought a rent suit against the defendants for the rent of 1307 to 1310 B. S., on the allegation that the defendants' predecessor had exchanged the 5½ *bighas* of land with some of the lands of Samiraddi's father and after the expiry of the former's *meadi* lease in 1294 B. S., he took a new settlement from the landlords agreeing to pay Rs. 54 as rent annually for 24 *bighas* of land. The defendants contested the suit, pleading dispossession by the landlords, want of jurisdiction and denying the new settlement. The defendants' contentions were upheld up to the Appellate Court and the suit was dismissed.

Then the plaintiffs brought another suit for rent against the defendants for the rent of 1309 to 1312 on the same allegations. Defendants again pleaded dispossession and suspension of rent, denying the new settlement at Rs. 54 per annum. This suit was also dismissed on the grounds that the defendants never agreed to pay Rs. 54 for the plaint lands, that the defendants held a *jama* of Rs. 49 under the plaintiffs and that the plaintiffs had dispossessed the defendants from plots Nos. 4 and 5 of the *kabuliyat* (5½ *bighas*), and this decision was affirmed on appeal.

Thereupon the plaintiffs brought the present suit repeating the allegations made in the previous rent suits. They further alleged that after the expiry of the term of the *kabuliyat* dated 20th Chaitra 1285 B. S., the defendants should be considered as year to year tenants even if the fresh settlement be not admitted for the sake of argument and the defendants cannot get any benefit of the said *kabuliyat*. So the plaintiffs prayed that their *lakheraj* title to the land in suit be declared, that fair and equitable rent may be settled for the lands now in occupation of the defendants and that at any rate the rent may be apportioned.

The first Court dismissed the suit, holding that the questions of dispossession and annual rental were *res judicata*, and on evidence also it found those points against the

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plaintiffs. On the authority of *Dhunput Singh v. Mahomed Kazim Ispahain* (1) the first Court held that the plaintiffs were not entitled to apportionment of rent or any other relief.

On appeal the learned Subordinate Judge held that the finding as to dispossession in the rent suit was *res judicata* between the parties, but that finding would not preclude the plaintiffs from getting apportionment of rent in a title suit. He further held that in spite of the decision in the rent case the element of consent, which was necessary to constitute a legal holding over, was wanting in the present case and in that view also the plaintiffs were entitled to an apportionment of rent.

Babu Khetra Mohan Ghose, for the Appellants.—The plaintiffs after dispossessing the defendants from the best portion of the land are not entitled to apportion the rent. They cannot get any rent unless and until they restore the tenants to possession of that portion.

[TURNON, J.—In the judgments of the Courts below only the case reported as *Dhunput Singh v. Mahomed Kazim Ispahain* (1) is referred to. Have you got any other case in support of your argument?]

Yes, my Lord. The other cases are *Chandra Kanta Dass v. Ramanath Barman* (2), *Raseswari Chowdhurani v. Sourendra Mohun* (3), *Sarip Jan Bibi v. Aftab-ud-din* (4), *Purna Chandra v. Basik Chandra* (5) and *Ashutosh Dhar v. Joy Lal Sardar* (6).

Babu Biraj Mohan Mojumdar, for the Respondents, contended that the plaintiffs' lessee Samiraddi had dispossessed the defendants, so they ought to have sued Samiraddi for recovery of possession. As they did not do that, the plaintiffs were entitled to apportionment. He relied on *Raseswari Chowdhurani v. Sourendra Mohun* (3). At any rate as the defendants held over without the landlords' assent, fair and equitable rent for the lands in defendants' occupation ought to be decreed.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiffs-landlords for apportionment of rent. It appears that under these plaintiffs the defendants took settlement of some $24\frac{1}{4}$ bighas of land as cultivating *raiya*s. The lease then executed was one for 9 years from 1286 to 1294. But though the lease expired in 1294, the tenancy of the defendants has since continued. In the year 1906 the landlords brought a suit against the defendants for arrears of rent for the period 1309 to 1312. In that suit the tenant defendants contended that inasmuch as their landlords had wrongfully dispossessed them of a substantial portion of their holding, namely, plots Nos. 4 and 5 measuring $5\frac{1}{4}$ bighas, the landlords were not entitled to any portion of the rent until such time as he replaced the tenants in possession of the two plots referred to. In that suit it was decided that the plaintiff-landlords had, in the year 1309, in collusion with a subsequent lessee of the name of Samiraddi, wrongfully dispossessed the defendants from plots Nos. 4 and 5. It was also decided that the story of exchange and of subsequent arrangement set up by the plaintiffs was false and that as a matter of fact the defendants up to the time of the suit had continued to be, and at the time of the suit were, tenants under the landlords in respect of lands measuring $24\frac{1}{4}$ bighas bearing a rental of Rs. 49. These points were directly and substantially in issue in the rent suit and the decision thereupon arrived at, therefore, operates as *res judicata* in the present suit which is, as we have said, one for apportionment of rent on the portion of the holding still remaining in the tenant defendants' possession.

In the Court of first instance the plaintiffs' suit was dismissed. In the Court of first appeal the Subordinate Judge held that though the defendants had after the expiration of their written lease in 1294 continued to hold over, yet the element of consent, which was necessary to constitute a legal holding over, was wanting. In that view he held that the plaintiffs were entitled to an apportionment of rent.

We are unable to understand how he arrived at the conclusion that the element of consent was wanting. That there was a legal holding over and that the tenancy

(1) 24 C. 296; 12 Ind. Dec. (N. S.) 864.

(2) 6 Ind. Cas. 478; 11 C. L. J. 591.

(3) 5 Ind. Cas. 105; 11 C. L. J. 601.

(4) 8 Ind. Cas. 30; 13 C. L. J. 115.

(5) 9 Ind. Cas. 568; 13 C. L. J. 119.

(6) 18 Ind. Cas. 821; 17 C. L. J. 50.

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subsisted was a question decided in the rent suit brought in 1906, and, moreover, that rent suit, and the present suit also proceeded on this basis that the rent had been paid and accepted up to, at least, the year 1307. No more cogent evidence of consent can be given than that implied in the acceptance of rent. It follows that on the principles laid down in a long series of cases of this Court of which the decisions reported as *Dhunput Singh v. Mahomed Kazim Ispahain* (1), *Rasseswari Ohowdhurani v. Sourendra Mohun* (3), *Chandra Kanta Dass v. Ramnanath Barman* (2), *Sarip Jan Bibi v. Aftab ud-din* (4), *Purna Chandra v. Rasik Chandra* (5) and *Ashutosh Dhar v. Joy Lal Sardar* (6) are instances, it must be held that the plaintiffs, not having replaced their tenants in possession of the plots in question and not having taken any effective step to that end, are not entitled to any apportionment of rent on the lands still remaining in the tenants' possession. In support of the Subordinate Judge's decision reference has been made to certain observations to be found in the decision reported as *Rasseswari Ohowdhurani v. Sourendra Mohun* (3), wherein it is suggested that it is open to argument that where the dis-possession is not by the landlord but by the lessee of the landlord, the landlord may still be entitled to apportionment. But this is not applicable in the present case, for here the finding is that the landlords themselves dispossessed the tenant defendants.

For these reasons this appeal is decreed the decree of the Subordinate Judge is set aside and that of the Court of first instance restored with costs in all Courts.

Appeal allowed.

PATNA HIGH COURT.

CIVIL REVISIONS NOS. 123 AND 126 TO 131
OF 1918.

November 1, 1918.

Present:—Mr. Justice Roe and
Mr. Justice Coutts.

AJODHYA JHA AND OTHERS—
PETITIONERS

versus

M. A. H. E. COX AND ANOTHER—

RESPONDENTS.

Contract Act (IX of 1872), s. 25—Pro-note, suit on—Consideration, release from supposed obligation, whether amounts to.

Where the Manager of an indigo factory on the one hand and the tenants of the factory on the other believed in good faith in the existence of an obligation on the part of the tenants to grow indigo on a certain proportion of their holdings and the latter, in order to obtain a release from the obligation, executed pro-notes in favour of the Manager:

Held, that the pro-notes were supported by valid consideration. [p. 702, col. 1.]

Messrs. *Rajendra Prasad* and *Sambhu Saran*,
for the Petitioners.

Messrs. *Kennedy* and *Baikuntha Nath Mitter*
for the Respondents.

JUDGMENT.—In this case the opposite party were plaintiffs on hand-notes given by tenants of an indigo concern in Champaran for what is known as Tawan, a sum paid by a *ryot* to avoid a real or imaginary obligation to grow indigo on a certain proportion of his holding. Mr. Rajendra Prasad for the petitioners contends that such hand-notes are without consideration, and he urges us to go into the legal question in each case, whether the obligation to grow indigo actually subsisted or not at the time of the taking of the hand-note. We are not prepared to accept this view of the case. It is sufficient to quote the leading text-books; Pollock on Contract under section 25 says:—"If an intending litigant *bona fide* forbears a right to litigate a question of law or fact which it is not vexatious or frivolous to litigate, he does give up something of value. It is a mistake to suppose it is not an advantage, which a suitor is capable of appreciating, to be able to litigate his claim, even if he turns out to be wrong." And on section 2, Cunningham and Shephard state the law to be that "When doubtful questions of law or of fact have arisen between two persons, and each of them has agreed to waive what he honestly

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believes to be his lawful claim in whole or in part, the transaction amounts to a compromise; the waiver or abandonment on either side furnishes the consideration. Provided that they both had equal knowledge of the facts and equally opportunities of ascertaining their rights, the compromise is valid, notwithstanding that they may both have been under a mistake as to a question of law." The only question, therefore, which we have to examine is whether Mr. Cox, the Manager of the factory, on the one hand and the tenants on the other hand believed in good faith in the existence of an obligation to grow indigo and whether Mr. Cox in the matter of this knowledge had any unfair advantage over them. The learned Munsif has found as a fact that Mr. Cox's bare statement that the tenants were liable to grow indigo is sufficient proof of their liability. He has also found that the tenants also believed in this right; for if they had not so believed they would not have insisted on getting written releases from the factory from the obligation. On reading Mr. Cox' evidence we see that it was the tenants themselves who came to him with the suggestion that they should pay cash for the abandonment of this real or supposed right, and that half of his tenants actually paid in cash, hand-notes being taken only from those who could not pay up in one lump sum the whole consideration for the abandonment of the obligation. Whatever may have been the real rights of the parties at the time when these contracts were made, there is nothing to suggest that there was any undue advantage or fraud on the side of the plaintiffs. There is nothing in the decision of the learned Small Cause Court Judge with which we can interfere as a question of law. The applications are rejected with costs, hearing fee one gold *mohur* in each case.

Applications rejected.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2576 OF 1916.

August 7, 1918.

Present:— Mr. Justice Fletcher and Mr. Justice Walmsley.

JOGESH CHANDRA ROY—PLAINTIFF—
APPELLANT

versus

THE SECRETARY OF STATE FOR
INDIA IN COUNCIL—DEFENDANT—

RESPONDENT.

*Land Acquisition Act (I of 1894), ss. 12, 18—
Acquisition proceedings—Award by Collector—Owner
dissatisfied with award—Suit for compensation, main-
tainability of—Remedy.*

The only remedy of a person whose property is being acquired under the Land Acquisition Act and who is dissatisfied with the award made by the Collector, is to call upon the Collector to refer the matter to the Civil Court under the provisions of section 18 of the Act. A separate suit for the recovery of the value of the land acquired is not maintainable. [p. 703, col. 2.]

Appeal against the decree of the Additional Subordinate Judge, Chittagong, dated the 19th of July 1915, affirming that of the Officiating Additional Munsif, Fatikchery, dated the 18th of February 1916.

FACTS appear from the judgment.

Babu *Dhirendra Lal Kastagir* (with him Babu *Tarakeswar Nath Mitter*), for the Appellant.—This appeal is on behalf of the plaintiff. It arises out of a suit for declaration of plaintiff's tenancy right and for compensation for compulsory acquisition of the land. When the Collector refused to make an award in favour of the plaintiff with reference to the land, holding that the land belonged to the Government and the plaintiff had got no interest in the land, the plaintiff sought relief by this suit. In a case like this where there is refusal to make an award, the remedy of the plaintiff is to bring a suit for declaration of plaintiff's right of ownership and possession at the time of acquisition as well as for damages. The plaintiff has got a certain interest in land which has got some market value and for which the plaintiff is entitled to some compensation. The Collector refused to make an award in plaintiff's name as tenant of the land and so the plaintiff has brought this suit for a declaration of his tenancy right in the land as well as for recovery of compensation,

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[FLETCHER, J.—Is the plaintiff competent to bring a suit of this nature without applying to the Collector to make a reference under the Land Acquisition Act?]

In this case an award was made by the Collector of the value of the trees and structures standing on the land but not of the land or of the plaintiff's interest in the land, because the Collector proceeded upon the assumption that the Government was the owner of the land. Where after the plaintiff's application to the Collector to make an award in respect of the land the Collector refuses to do so, the plaintiff's remedy lies in a suit of this nature. Refers to *Mantharavadi Venkayya v. Secretary of State for India in Council* (1), *Rameswar Singh v. Secretary of State for India* (2), *Imdad Ali Khan v. Collector of Farakhabad* (3). Section 18 of the Land Acquisition Act does not bar this suit, because that section applies only in a case where an award has been made and not where the Collector refuses to make an award.

Babu Ram Charan Mitter (with him Babu Srish Chunder Choudhary), for the Respondent, not called upon.

JUDGMENT.

FLETCHER, J.—This appeal is preferred by the plaintiff against the decision of the learned Subordinate Judge of Chittagong, dated the 19th June 1916, affirming the decision of the Munsif at Fatikheri. The facts are these: In the year 1908, the Government of Eastern Bengal and Assam made a declaration under the provisions of the Land Acquisition Act with reference to the compulsory acquisition of a particular piece of land and the structures standing thereon and the trees growing upon the same for the purpose of providing the site for the residence of a judicial officer. The ordinary notice was issued calling upon the parties claiming interest to come in before the Collector and prefer their claim. That notice was served upon the present plaintiff. He came in and appeared before the Collector. The Collector adjudicated on his claim and found that the only right that the present plaintiff had was a right to

the structure on the land and the tree or trees growing thereon: and for those the plaintiff was awarded the sum of Rs. 60 only. Being dissatisfied with that award, instead of applying to the Collector to make a reference under the provisions of section 18 of the Land Acquisition Act, the plaintiff instituted the present suit for damages against the Secretary of State for India in Council claiming Rs. 175 as the value of the land which had been acquired by the Government. I am quite clear that a suit of this sort does not lie. The plaintiff had an ample remedy by applying to the Collector to make a reference under section 18 of the Land Acquisition Act and to have his rights adjudicated on by the Civil Court. It is argued in this case that the award is not an award. I do not know what else it is, and when I asked the learned Vakil appearing for the appellant what he called that piece of paper upon which the Collector had written what purports to be his award, the nearest approach to what the learned gentleman's view was of this paper was that he called it a proceeding under section 11 of the Land Acquisition Act. It is no use calling an award a proceeding under section 11 of the Land Acquisition Act. If it is an award, it is quite clear that the plaintiff's remedy lies under the Act. Then it is said that the authorities establish that the plaintiff has a right of suit in a case like this. They do nothing of the sort. The authorities, when properly read, are clearly against the plaintiff's contention. The two cases which are chiefly relied on, namely, the case of *Mantharavadi Venkayya v. Secretary of State for India in Council* (1) and *Rameswar Singh v. Secretary of State for India* (2), are clearly against the plaintiff's contention. All that those cases establish is this, that where the Collector won't take up the matter and won't make an award, then in order that the plaintiff may not be deprived of his remedy, he may maintain a suit in the ordinary Court for compensation which the Collector declines to assess. Those do not apply to the case where the Collector has made an award and where the plaintiff has got a right of calling upon the Collector to refer the matter to the Civil Court under the provisions of section 18 of the

(1) 27 M. 535.

(2) 34 O. 470; 11 C. W. N. 356; 5 C. L. J. 669.

(3) 7 A. 817; A. W. N. (1885) 242; 4 Ind. Dec. (N. S.), 392.

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Land Acquisition Act. In my opinion, the learned Judge was right in holding that the plaintiff could not maintain a suit of this nature. In that view, the present appeal fails and must be dismissed with costs.

WALMSLEY, J.—I agree.

Appeal dismissed.

PATNA HIGH COURT.

APPEAL FROM ORIGINAL ORDER NO. 247 OF 1917.

October 24, 1918.

Present:—Mr. Justice Rye and Mr. Justice Jwala Prasad.

Babu CHANDRIKA PRASAD SINGH—

—APPELLANT

versus

Maharaja KESHO PRASAD SINGH—

RESPONDENT.

Execution of decree—Trespasser, rights of, to execute decree.

The question of the right of a trespasser to execute a decree obtained on behalf of an estate depends largely upon the nature of the decree and of the objection taken by the judgment-debtor to the proceeding instituted by the trespasser. Where a decree is due to an estate the person who for the time being is recognized as the proprietor of the estate is the proper person to execute the decree. [p. 704, col. 2; p. 705, col. 1.]

Appeal from an order of the Subordinate Judge, Shahabad.

Messrs. *Sivasaran Lall and Rai Tribhuanath Sahai*, for the Appellant.

Messrs. *Krishna Sahay, Nirsu Narain Sinha and D. N. Sircar*, for the Respondents.

JUDGMENT.—In this case the judgment-debtor, by litigation terminated by a decree of the High Court of Calcutta in 1904, became indebted to the Dumraon Raj in two sums representing the cost of the litigation, namely, Rs. 502 the cost of the High Court, and Rs. 451 the cost of the Subordinate Judge's Court, and in addition to these to an unascertained sum to cover mesne profits pending the period of the trespass to remedy which the litigation was directed. The question of mesne profits was taken up in the Subordinate Judge's Court, in accordance with the directions of the High Court. A compromise petition was filed, in which it was stated that the mesne profits should be

taken to be Rs. 1,320 and that the decrees made by the High Court and by the Subordinate Judge for costs should not bear interest. The then decree-holder, the Maharani of Dumraon, took various steps, in execution of this compromise decree. She died in December 1907. She was succeeded temporarily by a son, whom it was alleged she had adopted. Litigation followed and on the 18th September 1911 the present Maharajah of Dumraon obtained possession of the estate. The present application for execution of the decree was made on the 14th April 1917 and was preceded by an application made on the 3rd August 1914 and disposed of on the 28th April 1915. That again was preceded by an application made on the 3rd July 1911 and disposed of on the 15th September 1911. It is conceded that if the application of the 3rd July 1911 was a genuine step taken in aid of execution, the present proceedings are not barred by the three years' rule. It is, however, contended that they are barred by the twelve years' rule.

The ground upon which it is urged that the application of the 3rd July 1911 was not a genuine step taken in aid of execution is that this step was taken by the alleged adopted son, who was in possession of the estate under the Court of Wards from 1907 to 1911. We are of opinion that the question of the right of a trespasser to execute a decree obtained on behalf of the estate will depend largely upon the nature of the decree and of the objections taken by the judgment-debtor to the proceedings instituted by the trespasser. The Court of Wards took possession of the estate immediately after the Maharani's death and was in possession of it for four years. If the contention of the judgment-debtor be sound that any steps taken by the Court of Wards to execute the decree due to the estate during this period were not genuine steps taken in aid of execution but were steps invalid by reason of the fact that they were taken by a trespasser, then the whole of the decrees due to the estate prior to the year 1907 would have been wiped off by the trespass. We are of opinion that where a decree is due to an estate, the person who for the time-being is recognised as the pro-

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prietor of the estate is the proper person to execute the decree due to the estate and that in this case the Court of Wards was, as representative of the estate, the proper person to take out execution. This was acknowledged by the judgment-debtor himself in proceedings beginning on the 10th July 1908 and terminating on the 10th February 1911. He allowed payment orders for Rs. 51 and Rs. 600 to be given to the Court of Wards on behalf of the trespasser. It is not open to him to say now that these proceedings were not genuinely taken in aid of the execution. Nor is it open to him to say that the debt due upon this decree was not a debt due to the estate but a personal debt of the Maharani, for we find him allowing in 1911 these payments to be made to the ward who was the adopted son, not of the Rani but of her husband, the late Maharajah. The objection, therefore, that the whole decree is barred by limitation by reason of the three years' rule cannot be sustained.

The objection as regards the decrees for costs under the twelve years' rule must be upheld. It is strenuously urged by Mr. Nirsu Narain Sinha that the compromise decree was substituted for the original decrees for costs. In the first place the Subordinate Judge had no jurisdiction to accept any compromise decree in substitution for the decree either of the High Court or of its own Court previously passed. All that the compromise decree could do with regard to the decrees for costs was to limit the manner of their execution. The compromise decree is not a new decree for costs but merely an embodiment in a document of an agreement to execute these decrees in a particular way. The debts under the decrees remained untouched. These debts were both prior to 1904 and the decrees for costs were, therefore, barred by the twelve years' rule of limitation in 1917. The decree for mesne profits stands on a different footing. We have seen the judgment of the High Court of Calcutta and note that specific directions were given to the Subordinate Judge to ascertain the mesne profits in the course of the execution proceedings. The compromise decree, therefore, was the first valid ascertainment of the mesne profits and as this, the only

decree for mesne profits, bears date 1907 it is not barred. The sums paid, amounting in all to Rs. 651, may equitably be debited to the decrees for costs. The decree for costs was prior to the decree for mesne profits and it is an equitable rule that in allocating payment to a number of debts, the debts should be satisfied in order of priority. The result, therefore, is that the decree-holder is entitled to bring the property in suit to sale in execution of that part of the compromise decree which has reference to the mesne profits. In the circumstances of the case we make no order as to costs in this Court or of the Court below.

JWALA PRASAD, J.—I agree to the order made in this case.

Order accordingly.

MADRAS HIGH COURT.

SECOND APPEAL No. 376 of 1917.

September 4, 1918.

Present:—Mr. Justice Phillips and Mr.

Justice Kumaraswami Sastriar.

ANANTHA BHATTA—PLAINTIFF

—APPELLANT

versus

MAVINAMALE ANANTHA BHATTA

AND OTHERS—DEFENDANTS—RESPONDENTS.

Execution of decree—Attachment—Mulgani tenant in South Canara—Right to improvements, whether can be attached.

The rights of a Mulgani tenant in South Canara are the same as the rights of a tenant in Malabar, and his claim to compensation for improvements, which is an inchoate right and becomes perfected only at the time of eviction, cannot be attached and sold in execution of a decree.

Second appeal against the decree of the Court of the Subordinate Judge, South Canara, in Appeal Suit No. 88 of 1916 (Appeal Suit No. 12 of 1916 on the file of the District Court), preferred against the decree of the Court of the District Munsif, Karkal, in Original Suit No. 134 of 1915.

Messrs. H. Balakrishna Row and Ramanath Suijir, for the Appellant.

Mr. B. Sitarama Row, for the Respondents.

JUDGMENT.—The question is whether the right to improvements of a Mulgani tenant can be attached and sold in execution.

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It is conceded that his rights are the same as the rights of a tenant in Malabar, and it has been held by this Court in *Achuta v. Kali* (1) and *Bressa Menon v. Shamu Patter* (2) that a right to compensation for improvements is merely an inchoate right which only becomes perfected at eviction. It is a right to be enforced only at the time of eviction and the extent of the right is dependent on what may be the relations between the landlord and tenant at that time and also on the number and nature of the improvements in existence then. In the present case the lease, being permanent, the right may never mature. This being so, we must hold that such a right cannot be attached.

Whether individual improvements can be attached and sold is a question which does not arise in this case and need not be discussed.

The second appeal is dismissed with costs.

M. C. P.

Appeal dismissed.

(1) 7 M. 545; 2 Ind. Dec. (N. S.) 932.

(2) 21 M. 135; 7 Ind. Dec. (N. S.) 454.

PRIVY COUNCIL.

APPEAL FROM THE MADRAS HIGH COURT.

July 11, 1918.

Present:—Lord Sumner, Lord Phillimore, Sir John Edge and Mr. Ameer Ali.

KUNDUKURI VEERABASAVARAJU
PANTULU AND OTHERS—PLAINTIFFS—
APPELLANTS

versus

KUNDUKURI BALASURYA PRASADA
RAO PANTULU AND ANOTHER—DEFENDANTS
—RESPONDENTS.

Hindu Law—Mitakshara—Dravidian branch—Adoption—Widow, whether can adopt with consent of remote reversioner.

Under the Dravidian branch of the Mitakshara Law, in the absence of authority from her deceased husband, a widow may adopt a son with the assent of his male agnates. [p. 107, col. 2.]

In the case of an undivided family, the consent must be obtained by the widow within that family; if the father-in-law is alive, from him, if not alive, from the deceased husband's brothers. The assent of separate and remote kinsmen is insufficient. [p. 710, col. 1.]

The principle is the same if the husband dies separate from his kindred. The widow must still obtain the assent of her father-in-law, and if he be dead, of the divided brothers or the other

nearest Sapindas. In considering what assent is sufficient, rights of property cannot be disregarded; and the widow cannot be allowed to adopt on the assent of remoter relations when there are nearer ones in existence. [p. 710, cols. 1 & 2.]

Appeal from a decree of the Madras High Court, dated April 17, 1914, affirming a decree of the District Judge of Ganjam.

FACTS of the case are sufficiently stated in their Lordships' judgment. The only question for determination in the appeal was as to the validity of the adoption of the plaintiff-appellant No. 1. The trial Judge found that the consent of the Sapindas, on which such adoption was based, was insufficient; also, that the widow who adopted the plaintiff had no power surviving in her to make such adoption, whatever assent she received. The High Court (Sir C. Arnold White, C. J., and Oldfield, J.) affirmed the dismissal of the suit on the first ground only.

Hence this appeal.

Messrs. *De Gruyther, K. O.*, and *Parikh*, for the Appellants.—The necessary consent of Sapindas was in fact given. Both Courts are against us on this point, but their findings are not conclusive, as the question is really one of law. The authorities show that the widow's motives in making an adoption are immaterial, but that the corrupt giving of assent is bad. All that has to be shown is that the Sapindas exercised their discretion *bona fide*: that they consented upon what they believed to be the wish of the deceased that an adoption should take place.

[*Mr. Dunne, K. O.*, for the Respondents.—The case is covered by *Madana Mohana Deo v. Purushothama Deo* (1) decided on April 26th last.]

That is quite different from the present case.

[*LORD SUMNER*.—If it be clear that the widow never thought of any spiritual benefit to her husband, but merely wanted to spite someone, cannot the adoption be invalidated?]

That is no worse than her failing to adopt from private motives although authorised.

(1) 46 Ind. Cas. 481; 35 M. L. J. 138; 5 P. L. W. 179; 8 L. W. 167; 16 A. L. J. 725; (1918) M. W. N. 621; 24 M. L. T. 231; 28 O. L. J. 403; 41 M. 355; 20 Bom. L. R. 1041; 45 I. A. 156 (P. C.).

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Her motives are immaterial. It is true that the nearest Sapindas here have not given their consent, but we have the consent of others, and it is not necessary that all should assent: you only need sufficient assent to show that the adoption was in the interest of the deceased, or should be presumed to be in his interest.

Collector of Madura v. Mootoo Ramalinga Sathupathy [Ramnad case] (2); *Vellanki Venkata Krishna Rao v. Venkata Rama Lakshmi* (3); *Venkatakrisnamma v. Annapur-
namma* (4); *Parasara Bhattar v. Rangaraja Bhattar* (5).

Messrs. Dunne, K. C., and Dube, for the Respondents, were not called on.

JUDGMENT.

MR. AMEEB ALI.—This appeal arises out of a suit brought by the plaintiff, Basavaraju, on the 22nd December 1909, in the Court of the District Judge of Ganjam, in the Madras Presidency, for possession of considerable landed property by virtue of his right as the nearest reversioner by adoption to one Viswanadha Rao, the last male owner. And the question for determination by this Board is whether the adoption under which he claims title is valid under the Hindu Law. Viswanadha died in 1880, and since his death the properties were held by his widow, Mahalakshamma, for a Hindu widow's estate until her decease in 1908, when the defendants, who are admittedly the grandsons of Viswanadha's paternal granduncle and who, on failure of the adoption alleged by the plaintiff, would be entitled as the nearest reversioners, took possession of the same and their possession was confirmed by the Revenue Authorities, before whom the question now in dispute was first litigated.

The plaintiff's claim is based on the allegation that Basavaraju, the father of Viswanadha, and one Pedda Sanyasiraju were two brothers, and that Pedda predeceased Basavaraju, leaving a widow named Narasayamma, who in 1896 adopted him as a son to her husband. He is thus,

(2) 12 M. L. A. 397; 10 W. R. P. C. 17; 1 B. L. R. P. C. 1; 2 Suth. P. C. J. 135; 2 Sar. P. C. J. 361; 20 E. R. 389; 3 Mad. Jur. 298; 1 Ind. Dec. (N. S.) 1.

(3) 1 M. 174; 4 I. A. 1; 1 Ind. Jur. 63; 26 W. R. 21; 3 Sar. P. C. J. 669; 3 Suth. P. C. J. 353; 1 Ind. Dec. (N. S.) 116 (P. C.).

(4) 23 M. 486; 10 M. L. J. 73; 8 Ind. Dec. (N. S.) 741.

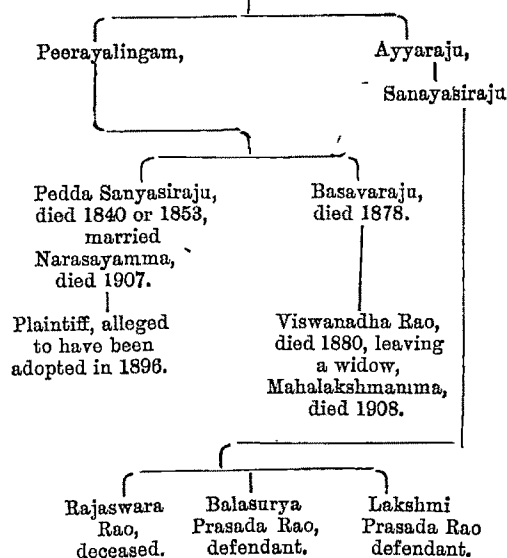
(5) 2 M. 202; 4 Ind. Jur. 393; 1 Ind. Dec. (N. S.) 412.

he asserts, nearer in degree as the paternal uncle's son to Viswanadha and has, therefore, a title superior to that of the defendants to the succession to his estate.

The *Ramnad case* [*Collector of Madura v. Mootoo Ramalinga Sathupathy*] (2) established the proposition that under the Dravidian branch of the Mitakshara Law, in the absence of authority from her deceased husband, a widow may adopt a son with the assent of his male agnates in the Dravida country, where such law is in force. The plaintiff, accordingly, placed his adoption on two grounds—first, that Narasayamma had direct authority from her husband to adopt a son to him; and secondly, that his own adoption was made with the authority of the husband's kindred.

After the institution of the suit, other parties, who had acquired interests in the properties in dispute from the plaintiff or from his guardian, were joined as co-plaintiffs; it is, however, unnecessary to refer to them in this judgment. The following pedigree will explain the exact relationship of the contesting parties:—

MABIAH.



The defendants challenged both the power of the widow to make any adoption and the validity of the assent or authority with which it was alleged to have been made. They contended that under the circumstances, which will be detailed later, Narasayamma had no power to make an

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adoption to her deceased husband, and that in any event the assent of the Sapindas, on which its validity was conditioned, was not legally sufficient. The District Judge, before whom the case came for trial in the first instance, in an able judgment in which he examined the facts as well as the law applicable to those facts with considerable care, came to a conclusion wholly adverse to the plaintiff. He held in substance that the plaintiff had failed to establish the alleged authority from the husband to the adopting widow, and that the consent of the Sapindas on which the claim was rested was not sufficient. The learned Judge further held that Peeraya and his two sons Pedda and Basavaraju formed a joint undivided Hindu family; that Pedda died in the lifetime of his father somewhere before 1842; that on his death his interest in the joint family property vested by right of survivorship in Peeraya and Basavaraju; and that he left no separate property to which his widow could succeed and hold separately. He held that, in this condition of the joint family, the power and capacity of his widow to make any adoption to him came to an end when the joint family property vested in Viswanadha's widow. He accordingly dismissed the plaintiffs' suit. The High Court of Madras on the plaintiffs' appeal did not consider it necessary to enter upon a consideration of this latter branch of the learned Judge's decision relating to Narasayamma's power to make the adoption. They, however, concurred with the first Court in its other findings, and in agreement with the trial Judge, held that the Sapindas' assent was not sufficient in law to validate the adoption in question, and dismissed the appeal.

The plaintiffs have now appealed to His Majesty in Council, and it has been strenuously urged on his behalf that the lower Courts have wrongly applied the law to the present case. As the trial Judge has in his judgment fully set out the facts, their Lordships are relieved of the necessity of stating them in any detail. They propose, therefore, to refer only to some salient points in the history of this family. It appears that Peerayalingam, the grandfather of Viswanadha, died in 1846, leaving him surviving his widow Veyamma, who was the owner in her own right of

the greater part of the property which forms the subject-matter of this litigation. The plaintiffs allege that Pedda died in 1853, whilst the defendants place his death so far back as 1840. As already stated, the trial Judge has found on the evidence that the latter date represents approximately the real date of his death. The finding is that he died some years before his father's death in 1846. Veyamma died in 1855, when the entire family estate vested in Basavaraju, the surviving son of Peeraya. He died in 1878, leaving a son Viswanadha, who survived him only two years. On his death his widow succeeded to the estate, and held it as a Hindu widow until 1908. Narasayamma, the widow of the predeceased co-parcener, had become, on the death of her husband, entitled to maintenance, which she received from the estate until her death in 1907. Peerayalingam, the grandfather of Viswanadha, had a brother named Ayyaraju; his son was also called Sanyasiraju and the present defendants are the sons of Sanyasi. At the time of the alleged adoption, this Sanyasi, who might be conveniently called Sanyasi II, was alive. Upon this state of facts, the two questions of law which the High Court had to determine were exactly the two which the District Judge has discussed and decided. *First* (and this went to the very root of the plaintiffs' title), whether Narasayamma had, under the circumstances of Peerayalingam's family any power in 1896 surviving in her to make the adoption; *secondly*, if she had, whether the assent that is put forward is sufficient. As already observed, the High Court have abstained from expressing an opinion on the first point.

Assuming that Narasayamma had, when she purported to adopt the plaintiff Basavaraju, the power to make the adoption, the question arises whether that power was validly exercised. In the absence of authority from the husband, the valid exercise of the power by a Hindu widow in the Dravida country is conditioned on the assent of her husband's Sapindas. In the present case the claim is rested on the assent of seven kinsmen. The District Judge has, for convenience of reference and examination, divided the agnatic relations of Viswanadha living at the time of the alleged adoption into

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five groups in the order of propinquity. In the first group are included Sanyasiraju (the defendants' father) and the defendants. Sanyasiraju died in 1899; it has been found that his assent was not asked for nor given. In the second group are included three persons whose consent is said to be contained in a paper, Exhibit B. Both Courts have held their signatures to be forgeries. To group No. 3 belong plaintiff Basavaraju's father, his paternal uncle, and a witness of the name of Ayyappa Raju. These three have certainly given their assent to the adoption.

To group No. 4 belonged a man named Borayya Bhusana, since deceased, who is alleged to have conveyed his assent in a letter addressed to the widow. This letter contains a general approval of her intention to make an adoption, but does not evince a consent to any specific adoption. There are several men in the remotest group who do not seem to have been approached and do not enter into the consideration of the case. The question then is whether, in the absence of authority from the husband and of the consent of the nearest Sapinda, the assent of remote Sapindas is sufficient to validate the exercise of the widow's power. None of the decided cases deal with the concrete question under consideration. The decision in the *Ramnad case* [*Collector of Madura v. Mootoo Ramalinga Sathupathy*] (2), which forms the principal authority on the validity of an adoption with the consent or authority of the husband's Sapindas, declares in general terms the class of kinsmen among whom the consent should be sought; and the generality of the expressions has in some instances given rise to doubts. But a close examination of the judgment shows clearly to their Lordships' mind what the Board intended to indicate. Dealing first with the case of a joint and undivided family, joint in food, worship and estate, the Board observed as follows:—

"The question who are the kinsmen whose assent will supply the want of positive authority from the deceased husband is the first to suggest itself. Where the husband's family is in the normal condition of a Hindu family—i. e., undivided—that question is of comparatively easy solution. In such a case the widow, under

the law of all the schools which admit this disputed power of adoption, takes no interest in her husband's share of the joint estate, except a right to maintenance. And though the father of the husband, if alive, might, as the head of the family and the natural guardian of the widow, be competent by his sole assent to authorize an adoption by her, yet, if there be no father, the consent of all the brothers who, in default of adoption, would take the husband's share would probably be required, since it would be unjust to allow the widow to defeat their interest by introducing a new co parcener against their will."

There the widow had acquired some property which was held by her husband separately from the other members of the family, which is not the case in the present instance, as Pedda left no separate property. Dealing with the case of a widow so situated, Sir James Colville went on to say:—

"Where, however, as in the present case, the widow has taken by inheritance the separate estate of her husband, there is greater difficulty in laying down a rule. The power to adopt, when not actually given by the husband, can only be exercised when a foundation for it is laid in the otherwise neglected observance of religious duty, as understood by Hindus. Their Lordships do not think there is any ground for saying that the consent of every kinsman, however remote, is essential. The assent of kinsmen seems to be required by reason of the presumed incapacity of women for independence rather than the necessity of procuring the consent of all those whose possible and reversionary interest in the estate would be defeated by the adoption. In such a case, therefore, their Lordships think that the consent of the father-in-law, to whom the law points as the natural guardian and 'venerable protector' of the widow, would be sufficient. It is not easy to lay down an inflexible rule for the case in which no father-in-law is in existence. Every such case must depend upon the circumstances of the family. All that can be said is that there should be such evidence of the assent of kinsmen as suffices to show that the act is done by the widow in the

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proper and *bona fide* performance of a religious duty, and neither capriciously nor from a corrupt motive."

The decision in the *Ramnad case* [*Collector of Madura v. Moottoo Ramalinga Sathupathy*] (2) was followed and explained in *Vellanki Venkata Krishna Rao v. Venkata Rama Lakshmi* (3), which established the following propositions: That the requisite authority in the case of an undivided family is to be sought by the widow within that family; that it is in the members of that family that she must presumably find such counsellors and protectors as the law makes requisite for her; and that she cannot at her will travel out of that undivided family and obtain the authorization required from separated and remote kinsmen of her husband. This being the position of a widow in an undivided family, what are the conditions imposed on her if her husband happens to die in a state of separation from his kindred? Division does not affect her personal dependence or give her an independent status to alter by her own authority the succession to the estate which she takes as the widow of her husband. She is still dependent for counsel and protection upon the nearest Sapindas of her husband, who are the most closely united to him by ties of blood, or, to use the language of Hindu lawyers, by "community of corporal particles." The father of the deceased, if still alive, continues to be her "natural guardian and venerable protector." He has furthermore a direct interest in the protection of the estate, for in case of her death without leaving her surviving a daughter or the mother of her deceased husband, he has a right to the reversion. His authorization is, therefore, essentially requisite to the validity of an adoption by her to her husband. If there is no father the divided brothers take his place by virtue of the tie of blood as her husband's nearest Sapindas; they become her natural guardians and the protectors of her interests. They also have an interest in the protection of the inheritance. In the absence, then, of the father the assent of the divided brothers is equally requisite for the validity of the widow's adoption. If a majority assent and one refuses, his objection may be discounted. But the absence of their consent, or in case there is only one, of

his consent, cannot be made good by the authorization of distant relatives remotely connected whose interest in the well-being of the widow or the spiritual welfare of the deceased, or in the protection of the estate, is of minute character, and whose assent is more likely to be influenced by improper motives. In this connexion it seems desirable to bear in mind the following observations of the Board in *Sri Virada Pratapa Raghunada Deo v. Sri Brozo Kishoro Patta Deo* (6):—

"But it is impossible not to see that there are grave social objections to making the succession of property, and, it may be, in the case of collateral succession, as in the present instance, the rights of parties in actual possession, dependent on the caprice of a woman, subject to all the pernicious influences which interested advisers are too apt in India to exert over women possessed of, or capable of exercising dominion over, property. It seems, therefore, to be the duty of the Courts to keep the power strictly within the limits which the law has assigned to it."

It is true that in the judgment of this Board in the *Ramnad case* [*Collector of Madura v. Moottoo Ramalinga Sathupathy*] (2) some expressions are used which might imply that the question of reversionary interest forms only a secondary consideration in determining what Sapindas' assent is primarily requisite, but the remarks that follow as to the right of co-parceners in an undivided family to consider the expediency of introducing a new co-parcener, coupled with the observations of the Board in the subsequent case [*Vellanki Venkata Krishna Rao v. Venkata Rama Lakshmi* (3)], show clearly that rights to property cannot be left out of consideration in the determination of the question.

In the latter case [*Vellanki Venkata Krishna Rao v. Venkata Rama Lakshmi* (3)] the Board observe as follows:—

"There should be such proof of assent on the part of the Sapindas as should be sufficient to support the inference that the

(6) 1 M. 69; 3 I. A. 154; 11 Mad. Jur. 188; 25 W. R. 291; 3 Sar. P. C. J. 583; 3 Suth. P. C. J. 263; 1 Ind. Dec. (N. S.) 45 (P. C.).

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adoption was made by the widow, not from capricious or corrupt motives in order to defeat the interest of this or that Sapinda, but upon a fair consideration, by what may be called a family council, of the expediency of substituting an heir by adoption to the deceased husband."

And an eminent Hindu lawyer, dealing with the question whose consent is requisite to the validation of an adoption when the husband is separate, remarks that an adoption is more a temporal than a spiritual institution, there being no spiritual reason for adoption if the deceased left a fraternal nephew; and that the requisites of a valid adoption are all temporal; therefore, the spiritual consideration should not be allowed to influence the judgment regarding the secular essential. And he then goes on to add—

"Some light is thrown on the point by the decisions relating to alienations by widows with the assent of the next heir." —Golap Chandra Shastri, on the Hindu Law of Adoption.

The reasons which make the assent of divided brothers a requisite condition apply *mutatis mutandis* to the case of the nearest Sapindas other than brothers. In the present case, Sanyasiraju II was unquestionably the nearest Sapinda to Pedda at the time of Narasayamma's adoption. He was also unquestionably nearest to Viswanadha. The case for the plaintiff is that in 1882 he had given his consent to Narasayamma making an adoption, which was repeated in 1894. The trial Judge who heard the evidence found as a fact that both allegations were false; and the High Court agree in that view. The concurrent finding of the two Courts on this point is not open to question on this appeal. Their Lordships consider, even if it were open to discussion, the reasons given by the District Judge for disbelieving the story to be conclusive.

It was argued at the Bar that no application was made for the assent of Sanyasiraju II, because it was known that he would refuse. This, in their Lordships' opinion, is a futile reason for not applying for his assent.

In their Lordships' opinion this suit must fail on the second ground on which the trial Judge decided the case, *viz.*, that Narasayamma did not obtain the requisite assent necessary

for the valid exercise of that power. Their Lordships express no disapproval of the decision of the District Judge on the first point, but, like the High Court, do not find it necessary to decide it.

Their Lordships will, accordingly, humbly advise His Majesty that the decree of the High Court dismissing the suit should be affirmed and the appeal should be dismissed with costs.

Appeal dismissed.

Solicitor for the Appellants.—Mr. Edward Dalgado.

Solicitor for the Respondents.—Mr. Douglas Grant.

PATNA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL No. 178 OF 1917.

December 5, 1918.

Present:—Sir Dawson Miller, Kt., Chief Justice, and Mr. Justice Mullick.

Babu KUNJ LAL—APPELLANT

versus

Babu BANWARI LALL AND OTHERS—

RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XI, r. 21, Sch. II, paras. 14, 21—Discovery of documents, order for—Failure to obey order, effect of—Arbitration out of Court—Revocation of submission, grounds for—Delay caused by voluntary absence of party, effect of—Award failing to determine question submitted, effect of—Procedure—Limitation Act (IX of 1908), Sch. I, Art. 178—Application to file award—Date of award, what is.

Where a party fails to comply with an order for discovery, the proper remedy is for the party seeking discovery to apply to have the proceedings stayed or the suit dismissed. [p. 718, col. 1.]

Where parties submit their differences to arbitration, they cannot be allowed to revoke or withdraw from the submission except for very good cause. [p. 714, col. 1.]

Where delay in making an award by the arbitrators was caused by the voluntary absence of one of the parties, that party cannot impugn the award on the ground of delay. Nor is such delay a sufficient ground for revocation of the submission by the party in default. [p. 714, col. 2.]

In cases where a reference to arbitration is made by the order of the Court, the Court may remit the award for the determination of matters left undetermined under paragraph 14 of Schedule II of the Civil Procedure Code, but in the case of arbitration without the intervention of the Court

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paragraph 21 of the Schedule confers no such power on the Court and if any of the matters referred to in paragraph 14 of the Schedule is proved, the Court has no option but to refuse to file the award. [p. 715, col. 1.]

The date of the award referred to in Article 178 of Schedule I of the Limitation Act is the date when the award is delivered to the parties so that they have notice of its contents, and not the date on which it is actually written and signed. [p. 719, col. 2.]

Appeal from an order of the Subordinate Judge, Muzaffarpur.

Messrs. Saroshi Charan Mitter and Sudhansu K. Mitter, for the Appellant.

Messrs. Purnendu Narain Singh, Gour Chandra Pal and Nitai Chandra Ghose, for the Respondents.

JUDGMENT.

MILLER, C. J.—This is an appeal from an order of the Additional Subordinate Judge of Muzaffarpur refusing the appellant's application to file an arbitration award under Schedule II, clause 20, of the Civil Procedure Code. The plaintiff and the defendants Nos. 1 and 2 are members of a Hindu joint family. The defendant No. 3 is the widow of a deceased co-parcener of the family. In 1908 the members of the family had separated in mess. On the 1st April 1911 by a registered deed the plaintiff and defendants Nos. 1 and 2 submitted the partition of the family property and settlement of certain matters in dispute between them in connection therewith to the arbitrament of Babu Jnanendra Mohan Dutta and Babu Apurba Krishna Mitter as arbitrators. The submission provided that the award order and partition and arbitration of the arbitrators or umpire in all or any of the matters so referred should be final and conclusive between the parties and their representatives. No limit of time was prescribed for making the award. By a previous agreement of the 27th January 1908 the same parties had submitted a partition of their joint property to three arbitrators, who had entered on the arbitration and made a partial partition of the property but owing to delay in completion of the award the parties agreed by mutual consent to cancel the submission, and by the present submission it was provided that the arbitrators might adopt partially or wholly the matters already settled or decided by the former arbitrators. The arbitrators duly entered on the arbitration in the year 1911 and adjourned from

time to time. A great number of meetings were held and it was not until the 8th October 1915 that the final award was made. The value of the property was about Rs. 2,10,000 and no doubt there was a considerable amount of work to be done. It further appears that the defendant No. 2 lived during a considerable portion of that time at Patna and Hilsa, a long distance from Muzaffarpur where the meetings were held, and probably it was not always easy to convene meetings to suit the convenience of all parties. Further the defendant No. 2 was absent for about a year of the time on pilgrimage. The defendant No. 3 Musammât Deoki Bibi joined in the arbitration by agreement in writing dated the 1st May 1915, submitting her interest in the property to be determined by the same arbitrators in the same arbitration. The procedure adopted by the arbitrators with the consent of all parties appears to have been to deal with separate portions of the property at different times as the arbitration proceeded, and provisional decisions were arrived at from time to time distributing the different properties between the co-sharers in proportion to their shares. Minutes of the proceedings were kept and the decisions were entered in the minute book. By July 1915 practically the whole estate had been in this way partitioned. On the 14th July in that year a draft award was drawn up and submitted to the parties, who were invited to formulate objections thereto for final discussion. Up to this time there was nothing to show that any party was dissatisfied with the manner in which the arbitration was conducted or the length of time occupied, but on the 12th July 1915 on the eve of the publication of the draft award the defendant No. 2 wrote a letter to each of the arbitrators in similar terms, purporting to revoke and cancel the submission on the ground of delay in completing the award. The arbitrators apparently did not feel justified at this stage in desisting from their labours at the request of one party alone and they proceeded to hear objections by the parties to the draft award. The defendant No. 2 himself appeared and took part in the objection proceedings, and on the 8th October 1915 the arbitrators

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having disposed of the objections published their award. On the 14th March 1916 the plaintiff applied to the Subordinate Judge to file the award. The defendants filed objections. The Subordinate Judge rejected the plaintiff's application upon a number of grounds, which may be summarised as follows :—

(1) That there was no valid reference to arbitration as undue influence was exercised by one of the arbitrators Babu Jnanendra Mohan Dutta on the defendant No. 1 to induce him to agree to the submission.

(2) That the defendant No. 2 was justified in revoking the submission owing to long and unreasonable delay in making the award.

(3) That the arbitrators left undetermined certain matters submitted to them.

(4). That the arbitrators were guilty of misconduct in the following particulars:

(a) In failing to insist upon the production of certain accounts in the possession of the plaintiff dealing with matters in controversy in the arbitration.

(b) In that one arbitrator sat alone from the 7th November 1914 to the 11th August 1915.

(c) In that on three days there were *ex parte* hearings.

(d) In that certain matters outside the scope of the reference were dealt with by the arbitrators.

(5). That the arbitrators exhibited a bias in favour of the plaintiff.

(6). That the application was barred by limitation.

With regard to the first point it appears that Babu Jnanendra Mohan Dutta had acted as Pleader to the family and was more or less in their confidence. Both the defendants were educated men and presumably capable of looking after their own affairs. It would appear that there had been some discussion and possibly dissatisfaction about the dilatoriness of the arbitrators appointed by the earlier submission referred to and on the 18th March 1911 Babu Jnanendra Mohan Dutta wrote a letter to the defendant No. 1 in these terms:—

"I am sorry the arbitration matter is

still pending without final decision. I don't think the arbitrators will finish the work soon. As we look to the interest of you all, we advise you to refer to a separate arbitration and I and Apurba Babu are willing to act as arbitrators on moderate fees. Babu Harish Chandra and Babu Kunja Lal are agreeable to this. If you also consent to the matter please come and settle the affairs. May this find you all right."

In the result the parties agreed to revoke the earlier submission and to appoint Babu Jnanendra Mohan Dutta and Babu Apurba Krishna Mitter in their place. The Subordinate Judge came to the conclusion that this was an improper letter to write, that Jnanendra Babu should have advised the parties to seek independent advice which was not done, and sums up the matter by saying that defendant No. 1 was persuaded by Jnanendra Babu to submit to the new arbitration and adds: "In my opinion defendant No. 1 was not free to act to the best dictates of his conscience. There was no valid reference in this case." I confess I have some difficulty in following the reasoning by which the learned Judge arrives at the conclusion that there was no valid reference. I can see nothing improper in a letter such as that written by Babu Jnanendra Mohan Dutta to the defendant No. 1, offering himself as arbitrator after apparently discussing the matter with the plaintiff and the other defendant who were agreeable to the course suggested. I have also read the evidence of the defendant No. 1 and I am unable to discover the slightest indication of anything in the nature of fraud or even of undue pressure or persuasion upon the defendant to agree to the terms of the submission. Even had there been some persuasion exercised to induce the defendant No. 1 to consent to a course agreed to by the other parties, I cannot see, unless some fraud or impropriety is shown, that this would be any reason for holding that the submission was not valid. In my opinion this part of the learned Judge's decision cannot stand.

The second point on which the Subordinate Judge's decision is based cannot, in my opinion, be supported. His decision

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on this point appears to me to be based upon a misunderstanding of the effect of the judgment in *O. R. Coley v. V. A. DaCosta* (1). Where parties submit their differences to arbitration, they cannot be allowed to revoke or withdraw from the submission except for very good cause. In the present case before any objection was taken to the delay by the defendant No. 2, the arbitration was practically completed and although no final award had been made, this defendant had a very fair idea as to how he would stand at the end of it. One cannot shut one's eyes to the fact that he was not altogether satisfied with the properties allotted to his share. Some of them had not turned out as well as he expected. But up to the eleventh hour he had shown no inclination to be dissatisfied with the length of time occupied in the proceedings. Indeed it was mainly due to the fact that he himself had been on pilgrimage for a year and for part of the rest of the time lived at a distance from the other parties that the proceedings were protracted and, in my opinion, it would be contrary to the whole spirit of the law affecting submission to arbitration to permit one party to revoke his authority at his own pleasure without shewing some better reason than that which appears in the present case. In *O. R. Coley v. V. A. DaCosta* (1) shortly after the submission the arbitrator appointed by the respondent (one of the parties to the submission), before any material progress had been made in the arbitration, went to a hill station for the benefit of his health and all proceedings were suspended for about 7 months from the date of the submission and there was no prospect of anything further being done in the near future. The appellant (the other party) thereupon revoked the submission. In spite of this the Subordinate Judge shortly afterwards ordered the submission to be filed, and on the refusal of the appellant's arbitrator and the umpire to act, appointed another arbitrator and umpire in their places without any notice to the appellant. The new arbitrators then met and subsequently delivered an award. The proceedings of the new arbitrators were heard *ex parte*

in the absence of the appellant, although he was served with notice. The Court found that where there is unreasonable delay in proceeding with the arbitration, one of the parties may revoke the submission if the delay is not explained or justified by any act on his part. They also found that the proceedings of the new arbitrators were tainted with illegality for other reasons not material to the present discussion. I agree with the principles laid down in that case, but the circumstances of the present case are entirely dissimilar. The only reason which appears for any delay in completing the proceedings in the present case is that mentioned by the arbitrators themselves in their award, namely, the voluntary absence of the party who now seeks to impugn the award on the ground of delay. In my opinion, no case has been made out which would justify the Court in refusing to file the award on the ground of delay.

The third point is the one which presents most difficulty in this appeal. By the terms of the submission the arbitrators had the option of adopting partially or wholly the matters already settled and decided by the former arbitration. It was also provided that the arbitrators should divide and partition in any manner as to them might seem fit and proper all such property, moveable and immoveable, as was still jointly owned by the parties. They were also to settle and decide all accounts between the parties and to adjust or otherwise settle and decide all credits and debts due and owed by the joint banking business of the parties, and for the purposes of such division "make any allotment of such credits and debts between the parties as to them might seem just and proper. There were a large number of villages jointly owned by this family. Most of these villages had been partitioned in the former proceedings, including certain Zemindaries at Ulao. The allotment of those villages previously arrived at was adopted by the new arbitrators. There were, however, three or four villages of Ulao Elaka which had not been previously partitioned, and these were advisedly kept joint by the arbitrators as they were adjacent to the family residence of the parties

(1) 17 C. 200; 8 Ind. Dec. (N. S.) 672.

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and the award provided that each of the parties should take a third share in each of these villages. There were also some *diara* lands consisting of two villages, which were advisedly kept joint as they could not be valued with precision. The learned Judge came to the conclusion that the award was bad by reason of this defect and could not, therefore, be filed. The rules contained in the Second Schedule of the Civil Procedure Code relating to arbitration without the intervention of the Court provide (paragraph 21) that where the Court is satisfied that the matter has been referred to arbitration and that an award has been made thereon and where no ground such as is mentioned or referred to in paragraph 14 or paragraph 15 is proved, the Court shall order the award to be filed and shall proceed to pronounce judgment according to the award. Paragraphs 14 and 15 form part of the procedure applicable to references ordered by the Court. Paragraph 14 authorises the Court to remit the award to reconsideration of the arbitrators where (*inter alia*) the award has left undetermined any of the matters referred to arbitration or where it determines any matter not referred to arbitration, unless such matter can be separated without affecting the determination of the matters referred. Paragraph 15 relates to the grounds upon which alone an award can be set aside. These include corruption or misconduct of the arbitrator or umpire, fraudulent concealment of material matters by the parties or their wilfully misleading or deceiving the arbitrator or umpire.

Whilst it is clear that in cases where the reference is made by the order of the Court the Court may remit the award for the determination of matters left undecided under paragraph 14 of the Schedule, it has been held by the Courts of this country that paragraph 21 of the Schedule confers no such power in the case of arbitration without the intervention of the Court and that if any of the matters referred to in paragraph 14 are proved, the Court has no option but to refuse to file the award. It is in my opinion regrettable that such power does not exist and the absence of any such power under the rules must, in many cases, work great hardship and incon-

venience upon the parties. It may well be that after great labour and expense have been incurred by the parties in settling their differences by arbitration, one of them in whose favour the matters referred have been decided may find himself unable to file the award and obtain the judgment of the Court thereon if some small portion of the matters referred to arbitration has been left undetermined. It is, however, in my opinion, too late now to question the construction which has been placed upon paragraph 21 by the High Courts of Bombay, Allahabad and Calcutta and if it should appear that the arbitrators without the consent of the parties have failed to partition the *Mauzas* in question when they were required to do so by the submission, there will be no option but to refuse to file the award. It becomes necessary, therefore, to consider how far, if at all, the parties have either by the submission or by subsequent consent agreed to the course followed by the arbitrators. It is true that the submission by clause 2 gives the arbitrators the option to adopt partially or wholly the matters already settled or decided by the former arbitrators. The former arbitrators partitioned practically the whole of the villages leaving those in question joint, and it is contended that paragraph 2 of the submission entitled the arbitrators to adopt in its entirety the decision arrived at by the former arbitrators and to retain these villages and the *diara* lands as joint property. I am afraid I cannot accept this argument. In so far as the previous arbitrators left undivided any of the joint property, I think it was the intention of the submission that the present arbitrators should deal with it.

It is next contended that clause 17 of the submission, which provides that the award order, partition and arbitration of the arbitrators or umpire in all or any of the matters referred to them shall be final and conclusive, contemplates that any of the matters referred to the arbitrators and dealt with by them shall be binding upon the parties notwithstanding that other matters are left undecided. Had this clause stood alone there would have been much force in this argument, but after consideration of the document as a whole and especially clauses 3, 4 and 5 I have come to the conclusion

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that it was the intention that all the joint property of the parties should be partitioned in one way or another, in so far as it was capable of partition. And even if the arbitrators with the best intentions in the world failed to carry out the terms of the submission in any material particular, it seems to me that we have no power to file the award which would on this hypothesis be incomplete. So far as the Ulao villages are concerned, they were in fact partitioned between the parties in equal shares. Their interest, therefore, ceases to be that of joint tenants such as the interest enjoyed by co-parceners and becomes that of tenants-in-common, giving each of the parties a separate interest and separate rights in the subject-matter. The submission nowhere provides that the whole of the immoveable properties shall be partitioned by metes and bounds, although speaking generally I think it must be assumed that it was the intention of the parties that this method should be adopted. And had the whole of the immoveable property been divided by shares instead of by metes and bounds, I think it would have been correct to say that the arbitrators had failed to carry out the duties imposed upon them. Where, however, there are special incidents attaching to a small portion of the property, such as the four villages of Ulao Elaka by reason of their propinquity to the family residence of the parties, which make it more convenient for all of them that this property should be divided into shares only, I think it may safely be assumed that such a mode of division in this particular instance was not outside the contemplation of the parties. In the well-known judgment delivered by Lord Westbury in the case of *Appovier v. Rama Subba Aiyar* (2) it is pointed out that "if there be a conversion of the joint tenancy of an undivided family into a tenancy-in-common of the members of that undivided family, the undivided family becomes a divided family with reference to the property that is the subject of that agreement and that is a separation in interest and in right although not immediately followed by a *de facto* actual division of the subject-matter." In my opinion there was within the terms contemplated by the sub-

mission a partition of this property having regard to its peculiar character. The same reasoning applies, in my opinion, with equal force to the *diara* villages which, as I read the award, were also partitioned in the same manner, namely, into thirds, and which could not be valued with that precision necessary to enable the arbitrators to divide them by metes and bounds.

It appears moreover from a perusal of the minutes of the meetings of the arbitrators that there was some discussion between the parties as to the manner in which this property not hitherto partitioned should be dealt with. At the 14th meeting held on the 7th January 1912 the matter was referred to and it was agreed to consider at a subsequent meeting whether any partition would take place or not. At a later meeting held in 1912 the following minute is recorded: "The parties agree that excluding certain properties which they agree to keep joint, we shall divide the properties in three lots and then put the lots up to bids and then make the allotments." The property therein referred to was clearly immoveable property as no personal property was kept joint, and at a later date at a meeting held on the 30th April 1913, after the arbitrators had been to Ulao to inspect the residential house of the parties, it is recorded that the immoveable properties were arranged in three lots of nearly equal value and drawn by lot between the parties. It is clear I think that the word "bids" in the previous entry refers to something in the nature of drawing lots. Now it is not suggested that there was any other property except that of the *diara* villages and Ulao which the parties agreed to keep joint, and I think it must be taken until the contrary be shown that the agreement to keep joint in the sense of not dividing by metes and bounds can only refer to the *diara mahals* and the Ulao villages which the arbitrators in their award say were advisedly kept joint. It is true that at a subsequent date when objections to the draft award were put forward at the invitation of the arbitrators in October 1915, the defendant No. 1 claimed that the four Ulao villages should be divided and that he should get one of them which he named, I do not think,

(2) 11 M. I. A. 75; 8 W. R. P. C. 1; 1 Suth. P. O. J. 657; 2 Sar. P. C. J. 218; 20 E. R. 30.

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however, that at that stage of the proceedings when he had agreed to the previous partition two years earlier and the parties had been put in possession, he was entitled to insist upon a different basis of partition, and in my opinion the arbitrators were justified in refusing to accede to this demand. The reasons given by him for claiming the division of the Ulao villages by metes and bounds are that the villages which had been already allotted to him were some distance away in the Bhagalpur and Dumka districts and that labourers and other necessaries could not be obtained in those Mauzas whilst in the village which he claimed they could. I hold that the award cannot be impeached on this ground.

Under the same heading it was also contended that the arbitrators failed to partition Mauza Rahimpur. The defendants claimed this as joint property. The evidence about it is very scanty but so far as it goes, it appears that this village was purchased by the plaintiff in the *farzi* name of Gobind Sahai in the year 1909 after the parties had separated in mess and were carrying on a separate business. There was no evidence to show that it was joint property. The award does not specifically mention it but in Schedule X which deals with claims and objections of the respective parties, the arbitrators after dealing with a number of claims and objections state in paragraph 17 "claims made by the one party or the other similar to those mentioned in the foregoing paragraphs of this award are all disallowed". The paragraphs in question deal with many things the partition of which was claimed as being joint property. In some cases it was found that they did not exist and in others that the claim failed for want of proof. I think, therefore, it must be taken that the arbitrators intended to disallow this claim. In any case it is for those contesting the validity of the award to show that the property in question was joint property which the arbitrators omitted to partition in compliance with clause 3 of the submission. They have failed to do so.

It was next contended that certain moveables were not divided. These consisted of a sewing machine, some iron safes

and a diamond ring. It is sufficient to say that the arbitrators dealt with this claim in Schedule X, paragraph 12, and dismissed it for want of proof.

In the same way it was contended that debts due by the banking business had not been apportioned. There is no evidence that any such debts existed but if they did, they would be covered by clause 11 of the award and each party would be liable for one-third share. Moreover debts due from the joint family could be realised by creditors from any member of the family and a division of particular debts between the members could not for any practical purpose be made otherwise than by shares. The assets might be and were allotted, but the debts could not be assigned so as to bind the creditors. Clause 5 of the submission gave the arbitrators a wide power as to the method of adjusting the debts of the banking business, if any, and the method adopted seems to me to have been the most practical and in accordance with the terms of the submission. The next point was that a balance of Rs. 1,293 out of a sum of Rs. 5,015 said to have been paid to Gobind Sahai, one of the former arbitrators, was left unaccounted for. The arbitrators dealt with this in Schedule X, clause 5, and disallowed the claim for want of proof. I do not see how we can question this finding. Such evidence as there was in support of the contention that any such balance existed was certainly inconclusive.

The fourth objection, heading (a), refers to certain documents relating to some of the *lahnas* awarded to the plaintiff and which the arbitrators ordered the plaintiff to produce. The *lahnas* in question appear as items Nos. 2 and 7 of Schedule 1A of the award. No. 2 was a mortgage decree obtained by the family against one Mukham Singh. No. 7 was some shares in the Tirhut Stores. The decree appears to have been for a sum of Rs. 400 and was assessed by the arbitrators after bidding by the parties at that amount. There is nothing to show that it was worth more. The Tirhut Stores shares were assessed in the same way and valued at Rs. 200. On the 11th August 1915 the defendant No. 1 applied by letter to the arbitrators to order the plaintiff to produce the decree

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and account of Mukhram Singh's decree and an account of dividends received from the Tirhut Stores. The letter was sent on to the plaintiff, who endorsed it: "It is not stated which *bahi* is required." On the 14th August a discussion took place before the arbitrators, who ordered the plaintiff to produce the accounts asked for. The order was not complied with. The defendant No. 1 called attention to this again in his written objections to the draft award on the 2nd October. The defendant No. 2 does not appear to have mentioned it. In Schedule A of the award giving the list of *lahnas* allotted to the plaintiff, a note appears to the effect that no evidence was adduced by the parties about the amount of Mukhram Singh's debt and the dividend of Tirhut Stores. Where a party fails to comply with an order for discovery, the proper remedy is for the party seeking discovery to apply to have the proceedings stayed or the suit dismissed. The decree against Mukhram or a certified copy could also have been produced by the defendants themselves without any difficulty, if it would assist them and if any dividend was paid by the Tirhut Stores which carried on business in Muzaffarpur, the defendants could easily have obtained evidence of the fact. None of these courses were adopted and I am not prepared to hold that the arbitrators were bound of their own initiative to refuse to proceed until the order had been complied with, still less to hold that the course adopted amounted to misconduct. The defendants, both before the arbitrators and again in the present proceedings, have had every opportunity of proving that the accounts not produced would have shown that the assessment of the two items named was under-estimated, if such were the fact, and that the arbitrators were misled, but they have not availed themselves of the opportunity and there is nothing to show that any injustice has been done. This objection in my opinion fails.

As to objections 4 (b) and (c), it is true that one arbitrator sat alone for the period named to hear and record objections by the parties and on three days there were *ex parte* hearings in which each party in turn explained his objections. This pro-

cedure, which would have been objectionable in ordinary circumstances, was adopted with the full concurrence of all the parties and they cannot now be allowed to take exception to a course in which for the sake of convenience they previously concurred. The minute of the 24th meeting on the 16th September 1914 records: "It is agreed by all the parties that J. M. Dutta would receive the objections of the parties and their evidence, if any, the decision to be come to by both arbitrators jointly." The procedure thus agreed to was carried out. One of the arbitrators sat to hear and record the objections on a number of days and subsequently on the 19th September and the 1st and 2nd October 1915 each of the parties appeared before the arbitrator in turn and explained his objections. It appears from the evidence that no decisions were come to by the arbitrator on these occasions. He merely recorded the objections. The objections as recorded were considered and decided subsequently by the two arbitrators sitting together. In the circumstances no exception can be taken to this course.

The objection 4 (d) refers to two suits referred to as Nos. 126 and 132 of 1911. In the first the claim was by the mother of defendant No. 2 claiming money deposited in the defendants' banking business. In the second the plaintiff was the present plaintiff's son claiming a like deposit. The learned Judge says these matters were beyond the reference and the action of the arbitrators was *ultra vires*, but gives no reasons for arriving at this conclusion. It seems to me that under clause 5 of the submission it was within the powers of the arbitrators to settle all debts due by the joint banking business, which these claims were. It is said that the real claimants were the defendant No. 2 in the one case and the plaintiff in the other. If this is so, the arbitrators would have power to deal with it under paragraph 4 of the submission which enables them to settle all accounts between the parties. Moreover from a perusal of the minutes of the 8th, 9th and 10th meetings it is impossible to arrive at any other conclusion than that all parties consented to these claims being dealt with in the arbitration. This objection cannot be supported.

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As regards the fifth objection, the learned Judge draws attention to some instances in which the arbitrators refused by their final award to alter the provisional allotment by which certain properties were apportioned to the plaintiff's share, although in the meantime these properties turned out better than anticipated. In one case a mortgage decree allotted to the plaintiff at the decretal amount was realised by him by sale of the property which he purchased. The property proved worth more than the decretal amount. The arbitrators refused to revise the assessment of the decree and, in my opinion, quite rightly. The increment was due to the fact that the plaintiff purchased the mortgaged property, which it was open to anyone to purchase. His speculation turned out profitable. In another case a garden house was allotted to the plaintiff and he was put in possession. Before the final award it was purchased by Government under the Land Acquisition Act for a larger sum. The properties of this nature had been allotted by the former arbitrators and the parties had been in separate possession for a long time. The arbitrators had adopted the previous allotment and retained the parties in possession long before the final award and refused to interfere with the assessment (see clause 3 of the award). The learned Judge said, this showed undue bias in favour of the plaintiff. Many similar instances were discussed by the parties before the arbitrators in objection to the draft award and before the final award. The arbitrators in some instances, for reasons given, modified the provisional assessment in favour of one party or the other. In other cases they refused to do so. The learned Judge appears to have reviewed the evidence and pointed out some instances in which the award turned out profitable to the plaintiff and criticises the decision come to by the arbitrators. His criticisms would have been appropriate in argument before the arbitrators before the award was made, but with due respect to the learned Judge I think he was travelling outside his province in reviewing the evidence and accusing the arbitrators of bias because he himself would have arrived at a different decision on the evidence. We were invited to adopt the same course but must respectfully decline to do so.

The next point dealt with by the learned Judge appears to me to be based on a misapprehension of Schedule VIII of the award. This schedule adjusts the monetary liability between the parties and makes the amounts payable in two *kists* of three months each with interest at 6 per cent. and adds that if the conversion of the award to a decree of Court is delayed by any party entitled to get the same, interest will not run on the amounts awarded. The learned Judge treats this as a penal clause designed to stifle fair and legal objections to the award on pain of forfeiting interest. In my opinion this was not meant to penalise proper legal objections to the award. If a valid objection to the award were taken by any party and upheld, then the award could not be filed and the stipulation as to interest would avail nobody. If a baseless objection be taken and delay be caused in filing the award, I can see nothing objectionable in depriving the unsuccessful party of interest for the period of delay in filing the award caused by his own unsuccessful objection.

The last point dealt with the question of limitation. The learned Judge treated the date of the draft award as the date of the award within the meaning of Article 178 of Schedule I of the Limitation Act. With great respect to the learned Judge his decision is based upon a misapprehension of the judgment in *Dutto Singh, In the matter of the petition of* (3). That case decides that the date of the award referred to in the Limitation Act was the date when it was delivered to the parties so that they had notice of its contents, and not the date when it was actually written and signed which in many cases might be much earlier. In other words, the date was the date of publication, which is not complete until delivery to the parties. The draft award was not the award at all and its publication was not the publication of the award. The final award differed in many respects from the draft, which from its very nature and the purpose for which it was made could not be regarded as the award. The present application was clearly within six months of the date of the award, and this objection also fails.

(3) 9 C. 575; 4 Ind. Dec. (N. S.) 1031.

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In the result the appeal will be allowed and the judgment and decree of the Subordinate Judge will be set aside; the award will be filed and judgment entered in accordance therewith. The appellant will be allowed costs here and in the Court below against the parties who appeared.

MULLICK, J.—I agree.

Appeal allowed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 105
OF 1917.

August 8, 1918.

Present:—Mr. Justice Fletcher and
Mr. Justice Walmsley.

RAJANI KANTA BHADRA—PLAINTIFF—

APPELLANT

versus

PANCHANANDA—DEFENDANT—

RESPONDENT.

Transfer of Property Act (IV of 1882), s. 59—Mortgage bond—Attestation—Scribe executing bond on behalf of mortgagor, whether attesting witness.

The scribe of a mortgage bond who executes the document for and on behalf of the mortgagor is not competent to attest his own signature. [p. 721, col. 2.]

A mortgage bond purported to be attested by the scribe and another witness. The mortgagor being an illiterate man, the document was executed by the scribe for and on behalf of the mortgagor and no mark or thumb impression of the mortgagor appeared on the bond:

Held, that the bond was not attested by two witnesses as required by section 59 of the Transfer of Property Act. [p. 721, col. 2.]

Appeal against the decree of the Subordinate Judge, 2nd Court, Tipperah, dated the 23rd of August 1916, reversing that of the Munsif, 2nd Court, Brahmanbaria, dated the 3rd of September 1915.

FACTS appear from the judgment.

Babu Birendra Kumar De, for the Appellant.—This appeal is on behalf of the plaintiff, and it arises out of a suit on a mortgage bond. The Court of first instance decreed the suit, but on appeal the lower Appellate Court reversing the decision of the primary Court dismissed the suit. Both the original mortgagor and the mortgagor are dead and

the suit was brought by the son of the mortgagor against the son of the mortgagor. The main defence was that the amount (principal and interest) due under the mortgage bond had been satisfied. The ground on which the Court of Appeal below dismissed the suit is that the bond has not been duly proved as required by law, although the point was taken neither in the Court of first instance nor in the memorandum of appeal presented in the Court of Appeal. It was only at the time of the hearing of the appeal that this point on which the decision of the lower Appellate Court is based was raised for the first time. My first point is that the lower Appellate Court should not have allowed the defendant to urge this point in appeal, especially when the plaintiff was not served with any notice that this point would be urged in appeal.

[FLETCHER, J.—The Appellate Court has got discretion to allow a point of law to be urged although the point was not raised in the first Court and not taken in the memorandum of appeal, provided it can decide the point from the evidence on the record before it.]

No doubt it can do so. But in exercising the discretion the Appellate Court must also consider other circumstances connected with the point raised for the first time. In this case it should have considered that in the written statement there is not only no denial of the execution of the document and of its having been duly attested by witnesses, but also there is the plea of the fact of payment of all amount due under the bond, which has been disbelieved by the first Court. In fact the execution of the bond has been admitted, and so the defendant cannot turn round and say that the deed was not duly executed or that the execution has not been duly proved, because a party to a suit cannot be allowed to take up inconsistent pleas to the detriment of the other party.

My next point is that the Court of Appeal below has erred in law in holding that the scribe who signed the name of the mortgagor (who was an illiterate man) cannot be taken to be an attesting witness, and, therefore, the execution of the bond has not been proved as required by law. Refers to section 59 of the Transfer of Property Act. In this case the mortgage bond was not

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signed by the mortgagor's Attorney. The mortgagor himself was present but as he was an illiterate man and so could not sign his name, his name was signed by the pen of the scribe who must have been present at the time of the execution. Refers to *Dinamoyee Debi v. Bon Behari Kapur* (1).

[Babu Hemendra Kumar Das, for the Respondent.—The decision of their Lordships of the Judicial Committee reported as *Shamu Patter v. Abdul Kadir Rowthan* (2) is authority on this point.]

The facts of that case are somewhat different from those of this case, and so that case cannot support the defendant's contention. My submission is that where the name of the mortgagor was written by the pen of the scribe who was all along present, the scribe who signs his name as an attesting witness may be taken as an attesting witness competent to prove the execution of the bond.

[FLETCHER, J.—A person cannot attest his own signature.]

The scribe is not attesting his own signature but he is attesting the signature of the person whom he represented at the time of the execution of the deed.

Babu Hemendro Kumar Das, for the Respondent, referred to *Shamu Patter v. Abdul Kadir Rowthan* (2); *Sarurjigar Begam v. Barodakant Mitter* (3) and *Ram Bahadur Singh v. Ajodhya Singh* (4), in which this point was decided.

JUDGMENT.

FLETCHER, J.—This is an appeal by the plaintiff against the decision of the learned Subordinate Judge of Commilla, dated the 23rd August 1916, reversing the decision of the Munsif at Brahmanbaria. The plaintiff brought the suit to enforce a simple mortgage. The plaintiff is the heir of the original mortgagee and the defendant is the heir of the original mortgagor. The learned Judge of the lower Appellate Court has dismissed the suit for the

reason, amongst others, that it has not been proved that the document sued upon was executed in the manner required by section 59 of the Transfer of Property Act.

The facts found are these: The original mortgagor was an illiterate man and the document was drawn up by the scribe—one Uma Nath Dutt. The mortgagor not being able to sign his name, the document was executed on his behalf by Uma Nath, and it is found and is supported by an inspection of the mortgage-deed that no mark or seal or thumb impression of the mortgagor appears on the mortgage-deed. The learned Judge considered that the document had not been attested by two witnesses as required by section 59 of the Transfer of Property Act, the only persons purporting to sign the document being Uma Nath as the scribe and one witness Prokash. It is quite clear in the circumstances that Uma Nath, having executed the document for and on behalf of the mortgagor, was not competent to attest his own signature as an attesting witness, even in the view that the subscription of his name as the scribe amounted to attestation within the meaning of section 59 of the Transfer of Property Act. In that view, only Prokash was the attesting witness. The document having been attested by only one attesting witness was not, therefore, executed in the manner prescribed by section 59 of the Transfer of Property Act. In my opinion, this case is clearly covered by the observations of the Privy Council in the case of *Shamu Patter v. Abdul Kadir Rowthan* (2). I agree with the conclusion arrived at by the learned Judge of the lower Appellate Court. The present appeal, therefore, fails and must be dismissed with costs.

WALMSLEY, J.—I agree.

Appeal dismissed.

(1) 7 C. W. N. 160.

(2) 16 Ind. Cas. 250; 35 M. 607; 16 C. W. N. 1009; 23 M. L. J. 321; 12 M. L. T. 338; (1912) M. W. N. 935; 10 A. L. J. 259; 14 Bom. L. R. 1034; 16 C. L. J. 596; 39 I. A. 218 (P. C.).

(3) 5 Ind. Cas. 539; 37 C. 526; 14 C. W. N. 974; 11 C. L. J. 563.

(4) 34 Ind. Cas. 370; 20 C. W. N. 699; 1 P. L. J. 129; 3 P. L. W. 93.

GUR DAYAL v. BEGG SUTHERLAND & CO.
 OUDH JUDICIAL COMMISSIONER'S
 COURT.

EXECUTION OF DECREE APPEAL NO. 36 OF
 1918.

September 6, 1918.

Present:—Mr. Lindsay, J. C., and Mr. Stuart,
 A. J. C.

Babu GUR DAYAL—JUDGMENT-
 DEBTOR—APPELLANT

versus

MESSRS. BEGG SUTHERLAND AND CO.—

DECREE-HOLDERS—RESPONDENTS.

*Oudh Civil Digest, para. 172—Execution of decree—
 Decree transferred from one Court to another—
 Competence of Court to persevere with execution where
 first attempt to execute has failed.*

A decree does not become incapable of execution within the meaning of paragraph 172 of the Oudh Civil Digest merely because one attempt to execute it has proved unsuccessful. The Court to which a decree is sent for execution is competent to persevere with the execution until it is made to appear either that satisfaction has been obtained or that execution is no longer possible.

A decree having been transferred to a Court for execution, the decree-holder made an application for arrest of the judgment-debtor. The Court directed the issue of a warrant of arrest, which was returned with the endorsement that the judgment-debtor could not be found. Immediately afterwards the decree-holder again made an application for the arrest of the judgment-debtor and the Court directed the issue of a second warrant:

Held, that the Court had jurisdiction to direct the issue of a second warrant.

Appeal against the order of the Subordinate Judge, Lucknow, dated the 23rd August 1918.

Babu Hari Kishen Dhaon, for the Appellant.

JUDGMENT.—This appeal is up before us under Order XLI, rule 11, and after hearing the arguments of Counsel we have come to the conclusion that it must be dismissed.

The facts are as follows. The appellant Gur Dayal is a person against whom a decree for close on Rs. 14,000 was obtained in the Court of the Subordinate Judge at Cawnpore. This decree was transferred for execution to the Court of the Subordinate Judge of Lucknow and after the transfer an application was made on behalf of the decree-holders for the arrest of the appellant-judgment-debtor. It is said that a warrant was issued and that it was returned with an endorsement to the effect that the judgment-debtor could not be found. The learned Counsel informs us that

after this return had been made, the Court ordered the proceedings to be filed (*dakhil daftar*). Immediately after this another application was made for the judgment-debtor's arrest. This time the warrant was executed and Gur Dayal was taken into custody.

The argument before us is that after the first warrant for arrest had been returned unexecuted, the executing Court had no further jurisdiction to deal with the matter and that it was the duty of the Court there and then to return the execution proceedings to the Court at Cawnpore. In support of this argument a reference is made to paragraph 172 of the Oudh Civil Digest, which deals with the procedure to be observed by Courts in Oudh which receive applications from other Courts for execution. It is provided by the rule contained in this paragraph that the execution record is to be returned to the Court which made the decree in three cases, namely, (1) when the decree has been executed wholly or in part, (2) when the decree is found for any reason to be incapable of execution, and (3) if no application is made for execution after the expiry of one year from the date on which the decree is received. The rule further provides that in no case is the execution file to be consigned to the record room of the executing Court. The appellant's Counsel takes his stand upon that portion of the rule which provides for the return of the execution record when the decree is found for any reason to be incapable of execution. In other words, the contention seems to be that because the first warrant which was issued for the arrest of the judgment-debtor was returned unexecuted, the decree could no longer be executed by the issue of a second warrant. We are unable to entertain this argument. In no way is it possible to say that a decree becomes incapable of execution because one attempt to execute it has turned out to be infructuous. In short, it cannot be said that the jurisdiction of the executing Court is to be confined to one attempt to execute the decree and no more. In our opinion it is competent to the Court which is executing the decree to persevere with the execution, until it is made to appear either that satisfaction has been obtained or that execution is no longer

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possible. We have no doubt that the Subordinate Judge of Lucknow had jurisdiction to issue this second warrant for the arrest of the judgment-debtor.

The appeal is dismissed accordingly.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 500 OF 1917.

September 23, 1918.

Present:—Mr. Mittra, A. J. C.

MADHUSUDAN DAS—DEFENDANT

—APPELLANT

versus

40 BISSUJI—PLAINTIFF—RESPONDENT.

Easements Act (V of 1882), s. 60 (b)—License, whether can be revoked.

Under section 60 (b) of the Easements Act a license may be revoked by the grantor, unless the licensee acting upon the license has executed a work of permanent character and incurred expenses in the execution.

Plaintiff, out of gratitude, allowed the defendant who was his medical adviser to occupy a certain house. The defendant erected a compound wall, fixed up a water pump, flagged the floor with stones and erected two huts:

Held, that the improvements executed by the defendant were of a permanent character and that, therefore, the license was not revocable during the lifetime of the defendant.

Appeal from the decree of the Court of the District Judge, Raipur, dated the 27th July 1917, in Appeal No. 27 of 1917.

Mr. M. R. Bobde, for the Appellant.

Mr. J. C. Ghose, for the Respondent.

JUDGMENT.—The Courts below have found that the defendant-appellant was given a license to live in a house belonging to the plaintiff. It would appear that the plaintiff was under the medical treatment of the defendant and the house was given to live in out of gratitude. There was no written agreement as to the terms on which the defendant was to occupy it. It has been held by the Courts below that the defendant was a mere licensee. The point raised in this second appeal is that the case is covered by section 60, clause (b) of the Indian Easements Act. Under that section a license may be revoked by the grantor unless the licensee acting upon the license has executed a work of permanent character and incurred expenses in execution. The first Court found that the defendant had spent Rs. 600 (six

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hundred) in what may be described as improvements. The finding of the lower Appellate Court is that only Rs. 200 (two hundred) was spent by the defendant. The lower Appellate Court finds that the improvements consist of a compound wall, the fixing up of a water pump, the flagging of the floor with stones and the erection of two huts. Having recorded these findings, the learned District Judge thinks these are nothing more than what an ordinary licensee paying no rent would make for adding to his comforts. I am unable to agree with him in his view that a licensee would spend so much as Rs. 200 (two hundred) for his own comforts when the license can be determined at any moment. These findings substantially comply with the terms of the Statute and I think that the license should have been held not revocable. The first Court properly dismissed the suit, holding that the license was not revocable during the lifetime of the licensee. The appeal is decreed. The decree of the lower Appellate Court is set aside and the decree of the first Court restored. Each party will bear his own costs of the two Appellate Courts.

Appeal allowed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 867 OF 1917.

April 25, 1918.

Present:—Mr. Justice Shah Din.

BELI RAM AND ANOTHER—PLAINTIFFS

—APPELLANTS

versus

UMAR BAKHSH AND OTHERS—DEFENDANTS

—RESPONDENTS.

Custom—Abadi, house in, occupied by kamin—Collateral, whether entitled to succeed.

Under the ordinary village custom a near collateral of a deceased kamin is entitled to retain possession of a house in the village *abadi* which was occupied by the deceased.

Second appeal from the decree of the Senior Subordinate Judge, Gujranwala, dated the 27th November 1916.

Mr. Kharak Singh, for the Appellants.

Mr. Taj-ud-Din, for the Respondents.

JUDGMENT.—I have not thought it necessary to call upon the Counsel for the respondents in this case, as after hearing the appellants' Pleader I think that the decree passed by the Senior Subordinate

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Judge, Gujranwala, which is under appeal, is correct and must be maintained. The Senior Subordinate Judge has held, on the authority of a recent decision of this Court, reported as *Kala v. Hasham* (1), that the respondent Umar Bakhsh, being a near collateral of Ahmad Din, deceased, who had been in possession of the house in dispute as a *kamin* under the appellants, is entitled to retain possession of the same under the ordinary village custom applicable to such cases. Ahmad Din left a widow Musammât Budhi, who resided in the house for about a year and then abandoned it. It is argued that there is no definite finding by the Senior Subordinate Judge that Musammât Budhi had abandoned the house as held by the Munsif. But on the appellants' own showing Musammât Budhi has left the house, for otherwise they had no right to bring the present suit for possession, and it is clear that the fact of the abandonment of the house by Musammât Budhi was not disputed before the Subordinate Judge. It is next argued that since Umar Bakhsh is not a near collateral of Ahmad Din, he has no right to succeed to the house in suit. But admittedly Umar Bakhsh is uncle of Ahmad Din, and as such he is his near collateral. The argument is untenable on the face of it and hardly deserves refutation. It is further contended that the appellants are not ordinary agricultural proprietors in the village who gave a site in the *abadi* to a *kamin* to build upon under circumstances which would entitle the *kamin* and his collaterals to have a right of residence in the house. But this point was not taken in the lower Courts and no issue was framed regarding it. I cannot, therefore, allow it to be raised at this stage of the proceedings. Lastly, it is urged that since the respondents pleaded that they were full owners of the house and not village *kamins* having only a right of residence therein in succession to Ahmad Din, the Senior Subordinate Judge, having found that the respondents' alleged ownership was not established, should have decreed the appellants' claim. But as pointed out by the Subordinate Judge, the

plea of permanent right of residence could be raised in the alternative by the respondents and was so raised by them; and upon that point, the finding being in their favour, the suit of the appellants was rightly dismissed.

The appeal fails and is dismissed with costs.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 118 OF 1918.

September 30, 1918.

Present:—Sir Henry Drake-Brockman, Kt., J. C.

Seth MOHAN LAL—PLAINTIFF—

APPELLANT

versus

GANESH RAM AND ANOTHER—DEFENDANTS

—RESPONDENTS.

Limitation Act (IX of 1908), s. 19 (1)—Acknowledgment, what amounts to—Endorsement of payment implying liability for balance, whether sufficient.

An endorsement of payment on the back of an instalment bond in the handwriting of the debtor, impliedly acknowledging his liability for the balance of the debt due under the bond, amounts to an acknowledgment of liability for the purposes of section 19 (1) of the Limitation Act.

Maniram v. Seth Rupchand, 2 N. L. R. 130; 4 C. L. J. 94; 8 Bom. L. R. 501; 10 O. W. N. 874; 1 M. L. T. 199; 3 A. L. J. 525; 16 M. L. J. 300; 33 C. 1047; 33 I. A. 165 (P. C.), followed.

Appeal against the decree of the Additional District Judge, Seoni, in Civil Appeal No. 60 of 1917, decided on the 18th December 1917, arising out of Civil Suit No. 153 of 1917, decided by the Munsif, Seoni, on the 18th August 1917.

Mr. *Brakshah*, for the Appellant.

Mr. *G. L. Subhedar*, for the Respondents.

JUDGMENT.—This second appeal arises out of a suit brought on the 9th May on foot of a bond (Exhibit P-1), dated the 18th February 1903. By this document the defendants who are respondents in this Court, promised to pay Rs. 1,000 due to the plaintiff-appellant by 5 instalments of Rs. 200 each. The payments were to be made in the month of Baisakh of each of five consecutive Sambat years beginning with 1967, so that they were due as follows:—

1. Between the 25th April and the 24th May 1910.

(1) 35 Ind. Cas. 291; 127 P. L. R. 1916; 63 P. W. R. 1916.

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2. Between the 14th April and the 13th May 1911.

3. Between the 2nd April and the 1st May 1912.

4. Between the 21st April and the 20th May 1913.

5. Between the 11th April and the 9th May 1914.

The first instalment was paid in full on the 16th May 1910. Two other payments were made, namely, Rs. 126-4-0 on the 10th November 1912 and Rs. 57-5-0 on the 30th October 1913. All these payments were evidenced by an endorsement written on the back of the bond by the defendant Ganesh Ram and signed both by him and by his co defendant Ramchand. The endorsement has been translated thus :

"Repayments made.

Rs. a. p.

200 0 0 Baisakh Sudi 8, 1967.

First instalment paid.

243 9 0 Second instalment, Baisakh Sudi 15, 1968.

Paid on account of the third instalment, Rs. 43-9-0.

Rs. 135-4-0 Katik Sudi 1, 1939.
Garden expenses caused to be credited.

Rs. 57-5-0 Katik Sudi 1, 1970
(30th October 1913). Garden expenses caused to be credited.

413 9 0

The bond contains a stipulation that if any instalment remained unpaid wholly or in part on due date, the balance should be paid along with the next instalment, failing which the entire balance should become exigible in lump. Interest at 8 annas per cent. per mensem was made payable on each defaulted instalment from the date of default. It is common ground that the cause of action arose on the 1st May 1912, and in the plaint reliance is placed upon the defendants' endorsement on the bond, which bears date the 10th May 1914. The defendants pleaded limitation, and the trial Judge dismissed the suit after finding on a single preliminary issue that the endorsement did not give the plaintiff a fresh period of limitation from the time of its being signed. His view was that the writing did not of itself import any acknow-

ledgment of existing liability and that section 19 (1), Indian Limitation Act, had, therefore, no application to the case.

—In appeal section 19 was not relied upon for the plaintiff, but the lower Appellate Court took the same view as the trial Judge of the term of the endorsement.

In this Court section 19 (1), Indian Limitation Act, is again relied upon for the plaintiff appellant and the following authorities are cited: *Bheemangowda v. Beranah* (1), *Janki Prasad v. Ghulam Ali* (2) and *Pamulapati Venkatakrishnaiah v. Kondamudi Subbrayudu* (3).

None of these cases was referred to by either of the lower Courts. In the first the terms of the endorsement are not given in the report. In the second the debt was a judgment-debt and the judgment-debtor, after making payments out of Court, endorsed the decree in his own handwriting in words which were translated as follows:—

"I, Ghulam Ali, judgment-debtor of this decree, have myself paid Rs.—and have endorsed this payment on the decree in my own handwriting."

It was held that the description of himself as judgment-debtor necessarily implied the admission of liability under the decree. In the third case the endorsement ran thus:—

"Rs. 378 13th July 1905. Rs. 378 only have been paid towards this document by Subbarayudu.

Rs. 22. Again on the same day, Rs. 22 only has been paid."

Both the learned Judges who decided the case had no doubt that these endorsements embodied an acknowledgment of liability.

Srinivasa Aiyangar, J., remarked as follows:—

"The debtor states in terms that he pays Rs. 378 towards the amount due on the bond and on the same day, made another payment of Rs. 22 and made another endorsement. I construe the endorsement as meaning that the debtor made a part payment of the amount due on the bond (on that day over Rs. 1,500 was due as shown on the face of the bond), which is

(1) 7 M. H. O. R. 358.

(2) 5 A. 201; A. W. N. (1882) 221; 3 Ind. Dec. (N. S.) 164.

(3) 36 Ind. Cas. 240; 40 M. 698; 3 L. W. 576; (1916) 2 M. W. N. 256.

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certainly an acknowledgment that more money was due."

The circumstances of the present case are very similar to those in the recent Madras case and I am clearly of opinion that the endorsement amounts to an acknowledgment of liability. In *Vithal v. Gopal Rao* (4) I pointed out that section 19, Indian Limitation Act, does not require the exact amount of liability to be stated in the acknowledgment. The defendants expressly admitted by writing that they paid Rs. 43.9.0 on account of the third instalment, thus indicating that the balance of that instalment was still unpaid. Moreover, when the third payment (Rs. 57.5.0) was made, the fourth instalment had already fallen due and the reference to the 1st, 2nd and 3rd instalments only raises the implication that nothing had been paid against the fourth instalment. Similarly by the time the endorsement was written the fifth instalment also had fallen due and the necessary implication from the omission to show any payment as made against it is that it remained wholly unpaid. This view seems to be supported by the decision of their Lordships of the Privy Council in *Maniram v. Seth Rupchand* (5), where a mere admission that the defendant had open and current accounts with the plaintiff was held to amount to an acknowledgment of liability to pay any sum which on taking of an account might be found due.

On behalf of the defendants-respondents I am referred to *Khawaja Muhammad Janula v. Venkatarayar* (6). In that case the defendant who pleaded limitation had entered the payment in the plaintiff's account-book; the body of the entry included the defendant's signature but no signature was appended. It was held that writing the name in any part of the document would suffice for a signature, provided the writer intended by entering his name to indicate that the acknowledgment was his own. The judgment of Scotland, C. J., shows that to

obtain the benefit of a new period of limitation the plaintiff must prove that the party sued has in writing, authenticated by his signature, either in express terms or by reasonable construction acknowledged and admitted that the debt or part thereof is due from him. The payment made in that case satisfied the debt in part only and it was held that the entry aforesaid might serve as a sufficient acknowledgment in writing.

Being of opinion that the endorsement on the bond amounts to an acknowledgment of liability for the purposes of section 19, Indian Limitation Act, I set aside the decrees of the lower Courts and remand the case for disposal on the merits to the Court of first instance. The Court-fee paid on the memorandum of second appeal will be refunded and other costs in this Court will be costs in the cause.

Case remanded.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 2906
TO 2921 OF 1916.

July 23, 1918.

Present:—Mr. Justice Newbould and
Mr. Justice Panton.

ISWAR DALIN AND OTHERS—DEFENDANTS
—APPELLANTS'

versus

GIRINDRA KUMAR NAG, MINOR, BY HIS
FATHER AND GUARDIAN JATINDRA KUMAR
NAG AND ANOTHER—PLAINTIFFS—

RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. I, r. 2—Bengal Tenancy Act (VIII B. C. of 1885), s. 148 A—Joinder of causes of action—Suit for rent by co-sharer landlord—Prayer for recovery of share of rent against tenants, whether can be joined with prayer for relief in alternative against co-sharer landlords.

The plaintiff as purchaser of an eight-annas share of an estate brought a suit against the tenants making his co-sharers *pro forma* defendants, with a prayer to recover his share of the rent from the tenant defendants or in the alternative from the *pro forma* defendants, if it was found that the latter

(4) 1 Ind. Cas. 240; 5 N. L. R. 8.

(5) 2 N. L. R. 130; 4 C. L. J. 94; 8 Bom. L. R. 501; 10 C. W. N. 874; 1 M. L. T. 199; 13 A. L. J. 525; 16 M. L. J. 300; 33 C. 1047; 33 I. A. 165 (P. C.).

(6) 2 M. H. C. R. 79.

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had realized the share of the rent due to the plaintiff:

Held, (1) that the prayer for the relief against the *pro forma* defendants could be joined with the prayer for the recovery of rent against the principal defendants inasmuch as Order I, rule 3, of the Civil Procedure Code provides for the joinder of such claims, and it is a well-established practice to join such claims; [p. 728, col. 2.]

(2) that the *pro forma* defendants having recovered the whole rent, asserting only an eight-annas interest in the superior right, they were bound to make over half of the rent collected to the owner of the other half of the proprietary right. [p. 728, col. 2.]

Appeals against the decrees of the Additional District Judge, Midnapore, dated the 30th of June 1916, reversing the decrees of the Munsif, 2nd Court at that place, dated the 25th of June 1915.

FACTS appear from the judgment.

Babu Biraj Mohan Mozumdar (with him Babu Jyotish Chander Hazra), for the Appellants.—These appeals are on behalf of the *pro forma* defendants who are co-sharer landlords, and arise out of suits for the recovery of arrears of rent said to be due to the plaintiffs in respect of their eight-annas share in the Mehal. In 1907 the plaintiffs purchased a four annas share in the Mehal at revenue sale. In 1909 they purchased by a deed of conveyance two-annas share. Subsequently in 1911 they purchased at Court sale another two annas share. The Court of first instance dismissed the suit on the ground that the plaintiffs had failed to establish the relationship of landlord and tenant. On appeal, the Court of Appeal below found that the lands in suit were *nij jote* lands and that the 16-annas rent was being realized by the *pro forma* defendants for the last twenty years, but passed a rent-decree for the eight annas share of the rent against the *pro forma* defendants who are the eight-annas landlords, without upsetting the finding of the first Court that the relationship of landlord and tenant did not exist between the plaintiffs and the tenant defendants and that neither the plaintiffs nor their predecessors-in-interest had realized any rent in respect of these lands. I submit that in a suit so framed the plaintiffs cannot get a rent-decree against the *pro forma* defendants (eight-annas landlords) and that no decree in favour of the plaintiffs can be passed so long

as the finding of the primary Court stands good. Where, as in this case, by arrangement between the co-sharer landlords some of the landlords have been recovering 16 annas share of the rent from some of the tenants, at all events, for not less twenty years, the arrangement cannot be upset except by proper and judicial proceedings taken for that purpose, and a suit for rent in which the co-sharer landlords have been joined as *pro forma* defendants cannot effect that purpose. When the finding of the primary Court as regards the failure of the plaintiffs to establish the relationship of landlord and tenant stands good, it is certain that they cannot get a decree against the tenants. The plaintiffs cannot also get a decree for the recovery of their share of the rent against the co-sharer landlords (*pro forma* defendants) in a suit framed under section 14SA of the Bengal Tenancy Act. If the plaintiffs can at all recover their share from the *pro forma* defendants, they can do so only by a suit for contribution. The co-sharer landlords have been joined simply with a view to comply with the provisions of section 148A, Bengal Tenancy Act, so that the plaintiffs might get a rent-decree. The *pro forma* defendants (appellants), who are the owners of the eight-annas share, cannot be made liable in a suit for rent against the tenants for the rents which have been realized by them in excess of their shares. No rent decree can be passed in a suit of this nature. There is no doubt that the form of the decree is not in accordance with law. The present case is on all fours with the case of *Baikantha Nath Sen v. Ramapati Chatterjee* (1). See also the case of *Lala Ram Saran Lal v. Nem Narain Singh* (2). On the authority of these cases, my submission is, the decision of the Court of Appeal below cannot stand. Two distinct and separate causes of action, *viz.*, one against the tenants and the other against the co-sharer landlords, have been wrongly joined in this suit for rent. There is a misjoinder of causes of action in this suit. Refers to Order II, rule 3, Civil Procedure Code.

(1) 45 Ind. Cas. 767; 27 C. L. J. 101.

(2) 6 C. W. N. 326.

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[Babu Mohindra Nath Roy for the Respondents.—Even if there is any defect, that is cured by the provisions of section 99, Civil Procedure Code.]

Section 99 cannot cure the defect, inasmuch as the misjoinder of causes of action in this case has affected the merits of the case.

Babu Mohindra Nath Roy (with him Babu Satcouripati Roy), for the Respondents.—In the prayer portion of the plaint your Lordships will find that the prayer of the plaintiffs is that a decree may be passed against the tenant-defendants for their share of the rent, together with a prayer in the alternative that if it be found that the amount due to the plaintiffs had been realized by the *pro forma* defendants, a decree for the sum so realized be passed against the latter. The Court of Appeal below was satisfied that the sum due to the plaintiffs had been realized by the *pro forma* defendants and so it passed and rightly passed a decree against the latter. There is no defect in the frame of the suit or in the joinder of parties to the suit or in the form of the decree. Refers to Order I, rule 3 of Act V of 1908. The cases referred to in support of the appellants' case do not apply to the facts of this case.

Babu Biraj Mohan Mojumdar replied.

JUDGMENT.—The plaintiff in these suits is a purchaser of an 8-anna share of a certain estate. He brought the 16 suits out of which these appeals arise and others to recover his share of rent from the principal defendants making their co-sharers *pro forma* defendants. The first Court dismissed the suits, on the ground that no relationship of landlord and tenant existed between the plaintiff and the principal defendants. The lower Appellate Court has granted the plaintiff a decree for his share of the arrears of rent claimed against the *pro forma* defendants, on the finding that the full rent had been paid to the *pro forma* defendants by the principal defendants. In our opinion, on the facts found this decision is justified. It appears from the plaint that the plaintiff clearly asked in the alternative for a decree against the *pro forma* defendants, if it was found that they had realized the rent due to the plaintiff's share. It is contended that the prayer for this relief could not be joined

to the prayer for the recovery of rent against the principal defendants, but in our opinion Order I, rule 3, of the Civil Procedure Code provides for the joinder of such claims and it is a well-established practice to join such claims. For the defendants-appellants it is alleged that the plaintiff's only remedy is a suit for partition and that without that he is not entitled to recover any rent. It is said that there has been an arrangement between the different co-sharers by which the *pro forma* defendants are in sole possession of certain plots of land and that such an arrangement cannot be disturbed by a rent suit of this nature. In the first place, we may remark that in the written statement of the *pro forma* defendants no allegation of an amicable arrangement in respect of the different portions of the estate was alleged. In the next place, we observe that in a road-cess return submitted by the *pro forma* defendants they only asserted an 8-anna interest in the property in suit. When these defendants recover the whole rent asserting only an 8-anna interest in the superior right, they are obviously bound to make over half of the rent collected to the owners of the other half of the proprietary right. The real difference between the two lower Courts is that the Munsif has accepted the *pro forma* defendants' plea that this road-cess return, was filed by mistake, while the learned District Judge has disbelieved the story of mistake and held that it contained a binding admission. On these findings the decrees of the learned District Judge were right. We accordingly dismiss these appeals with costs.

Appeals dismissed.

PATNA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL No. 127 OF 1918.

November 21, 1918.

Present:—Mr. Justice Atkinson and
Mr. Justice Manuk.

MANINDRA NATH ROY AND ANOTHER—
APPELLANTS

versus

KANHAI RAM MARWARI—
RESPONDENT.

Limitation Act (IX of 1908), s. 20, Sch. I, Art. 182,

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(7)—*Part payment of principal, whether must be signed by debtor—Execution of decree—Instalment decree—Default in payment—Limitation, commencement of.*

Under section 20 of the Limitation Act a fresh period of limitation can only begin to run if the fact of the person making the payment or part payment of the principal debt appears in the handwriting of such person. [p. 729, col. 2; p. 730, col. 1.]

Unless an instalment decree clearly leaves the decree-holder no option on the happening of a default but to execute the decree once and for all for the whole amount due under it, the decree-holder may execute it on the happening of the first, second or any subsequent default, and limitation will run against him only in respect of each instalment separately from the date on which each such instalment may become due and payable. [p. 731, col. 1.]

Appeal from a decision of the District Judge. Manbhum.

Mr. Hari Bhusan Mukherji, for the Appellants.

Mr. N. C. Roy, for the Respondent.

JUDGMENT.

ATKINSON, J.—The plaintiff in this suit sued the defendants for a money-debt alleged to be due by the defendants to the plaintiff. The suit was compromised on the basis that the defendants would pay to the plaintiff a sum of Rs. 975 in full discharge of principal and interest by annual *kists*. A decree was drawn up in the form of a consent decree; and it provided that the sum of Rs. 975 should be paid by instalments. The decree itself is dated the 29th April 1912, and the instalments were to become payable on the 1st April of each succeeding year after the date of the decree until the entire debt of Rs. 975 was satisfied and discharged. The decree also provided that in the event of default being made in the payment of any one of the instalments, the balance remaining unpaid should immediately fall due and be forthwith recoverable.

The instalment payable on the 1st April 1913 amounted to Rs. 200 and that sum was in fact paid. The instalment due on the 1st April 1914 was Rs. 150 and this sum was also paid. Both the aforesaid instalments were paid on the 1st April 1914. Since the 1st April 1914 no payments have been made in respect of the *kists* for the years 1915, 1916 and 1917.

The plaintiff accordingly instituted an application seeking leave to execute the

decree to recover the unrealized instalments for the respective *kists* due for the years 1915, 1916 and 1917.

Admittedly the first two instalments amounting to Rs. 350 have been paid by the judgment-debtor.

The learned Vakil appearing on behalf of the petitioners and defendants contends before us that inasmuch as no payment or valid acknowledgment was made or given for the payments made for the *kists* falling due on the 1st April 1913 and on the 1st April 1914, the amount due for the succeeding *kists* could not be recovered, and the right to issue execution of the decree is now barred by lapse of time. The foundation of this argument is based on the construction of section 20 of the Limitation Act (Act IX of 1908). On the analysis of this section it is quite clear that the argument addressed to us is not well-founded in point of law.

It is contended that the learned Judge was wrong in the conclusion at which he arrived, inasmuch as he held that the signature of the person endorsing the fact of payment at the time the instalments for 1913 and 1914 were paid, was the genuine signature of the person called Kangal Rai, and that, therefore, the debt for which execution was sought could be recovered. It is clear from the tenor of the judgment of the learned Judge that he never had present to his mind the application of the proviso to section 20 of the Limitation Act. If he had, he would have been obliged to hold on the evidence that the signature of Kangal Rai in respect of the payments made was invalid, inasmuch as it was not established by proof that Kangal Rai was the duly authorised agent of the judgment-debtor, and that Kangal Rai in fact made the payments alleged in discharge of the instalments for the years 1913 and 1914.

The decree-holder himself admits in his evidence that the *kists* for the years 1913 and 1914 were paid by the judgment-debtor and by no one else; and that the same were paid in discharge of principal and interest due, and consequently by virtue of the proviso to section 20 of the Limitation Act, it is clear that a fresh period of limitation can only begin to run if the fact of the person making the payment

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or part payment of the principal debt appears in the handwriting of such person.

The part payment made was made by the judgment-debtor and not by Kangal Rai, and, therefore, in order that such payment should operate as a fresh period from which limitation should begin to run, it was essentially necessary that the judgment-debtor should sign and endorse the fact of the payment so made by him. The signature as to the fact of payment, even if genuinely made by Kangal Rai, would not satisfy the requirements of the Limitation Act inasmuch as he did not make the payment relied on even, though he may have been authorized to endorse the fact of payment by the judgment-debtor.

This point was considered in this Court in a case reported as *Bishun Perkash Narain Singh v. Muhammad-Sadique* (1). In that case we adopted the interpretation of section 20 of the Limitation Act laid down in the Full Bench ruling reported as *Mukhi Haji Rahmuttulla v. Coverji Bhuja* (2). The case reported in the Patna Law Journal (1) and the Full Bench ruling in Calcutta (2), in their facts, resemble very much the facts of the present case. Therefore, we are of opinion that the point taken by the learned Vakil on behalf of the petitioner is not well-founded and cannot be supported in point of law.

It does not appear that the learned Judge properly applied the law applicable to the facts of this case. If the case rested merely on the true interpretation of section 20 of the Limitation Act, the learned Judge's decision would have been erroneous.

The short answer given by Mr. Roy, learned Counsel appearing on behalf of the decree-holder, to the point taken by the judgment debtor seems completely to dispense with the necessity of deciding the question of the construction of section 20 of the Limitation Act in this case. However, we feel it right to express our opinion thereon owing to the erroneous decision of the learned Judge. Mr. Roy bases his argument on Article 182, clause 7 of

the Limitation Act of 1908; and he argued that the learned Judge was in error as to the nature and effect of the alleged payments made in 1913 and 1914 which he conceived, had the legal effect of keeping the principal debt alive. Mr. Roy argues that he is not concerned with any such proposition.

The application before the Court was for leave to execute the decree for recovery of specified sums of money due on the respective dates upon which the same were payable; and Mr. Roy contends that because the decree is in that form, it gives the decree-holder a right to enforce payment of each instalment as it falls due within 3 years from the date on which the instalment became automatically payable under the decree.

The wording of clause 7, Article 182, runs as follows: "(Where the application is to enforce any payment which the decree or order directs to be made at a certain date) such date."

Accordingly Mr. Roy argues that by reason of clause 7 of Article 182, he is entitled to execute the decree for 1915, 1916 and 1917 and to recover all the *kists* respectively payable on the 1st April 1915, 1st April 1916 and 1st April 1917, these being instalments which accrued due and were payable within 3 years from the date of the application for leave to issue execution.

We think that Mr. Roy's argument is well-founded; and that he correctly interprets the powers exercisable under Article 182, clause 7.

The cases reported as *Ajudhia v. Kunjal* (3), *Shankar Prasad v. Jalpa Prasad* (4) and *Lachmi Narain v. Sarju Farshad* (5) all consistently support the argument addressed to us by Mr. Roy and, as we believe, accurately declare the law. The right to execute accrues and continues for three years from the date when the default is made in the payment of any one instalment.

The learned Vakil on behalf of the petitioner relies on the case reported as *Hurri Pershad Chowdhry v. Nasib Singh* (6), where

(1) 35 Ind. Cas. 375; 1 P. L. J. 474.

(2) 23 O. 546; 12 Ind. Dec. (N. S.) 363 (F. B.).

(3) 30 A. 123; 5 A. L. J. 72; A. W. N. (1908) 36.
(4) 16 A. 371; A. W. N. (1894) 115; 8 Ind. Dec. (N. S.) 241.

(5) 38 Ind. Cas. 634; 15 A. L. J. 102; 39 A. 230.

(6) 21 O. 542 at p. 546; 10 Ind. Dec. (N. S.) 992.

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a different view of the law appears to have been taken from that laid down in the long line of decisions in the Allahabad High Court. With great respect to the learned Judges' decision reported as *Hurri Pershad Chowdhry v. Nasib Singh* (6), we are unable to follow their reasoning. The decisions reported in the Allahabad Series (3), (4), (5) appear to us to be consistent with the exact wording of Article 182, clause 7, and it would be, in our opinion, contrary to the ends of justice if any artificial construction was to be put on Article 182, clause 7, which is clear and express in its terms and void of ambiguity.

It must be remembered that in the cases cited in the Allahabad Series (3), (4), (5) it was pointed out that a decree-holder having a decree in the form of the decree in the present case, has a right to execute the decree for the whole amount due if default be made; and to have the decree, as far as possible, construed in his favour. Therefore, unless the decree clearly leaves the decree-holder no option on the happening of a default but to execute the decree once and for all for the whole amount due under it, the decree-holder may execute it on the happening of the first, second or any subsequent default; and limitation will run only against him in respect of each instalment separately from the time when each such instalment may become due and payable.

For these reasons we think that the arguments of Mr. Roy is well-founded and that the application for leave to issue execution is not barred; and that the plaintiff is entitled to recover by this execution proceeding the *kists* due for the years 1915, 1916 and 1917.

We accordingly dismiss the appeal and we direct that the judgment-debtor do pay to the plaintiff the sum of 2 gold *mokurs* as costs of this appeal.

MANUK, J.—I agree.

Appeal dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 209 OF 1918.

September 6, 1918.

Present:—Pandit Kanhaiya Lal, A. J. C.

Munshi GULAB RAI AND ANOTHER—

PLAINTIFFS—APPELLANTS

versus

Syed KAZIM ALI AND ANOTHER—

DEFENDANTS—RESPONDENTS.

Grove-holder acquiring proprietary rights in village—Sale of proprietary right—Rights in grove, whether transferred—Merger.

A grove-holder, who obtains by inheritance the superior proprietary rights in the village in which the grove stands, does not lose his right to the grove when the superior proprietary rights so inherited by him pass by virtue of an auction sale to a third person.

Appeal against the decree of the District Judge, Rae Bareilly, dated the 25th March 1918, confirming that of the Munsif, Rae Bareilly, dated the 15th September 1917.

Mr. Ali Mohammad, for the Appellants.

JUDGMENT.—The question for consideration in this appeal is whether a grove-holder, who obtains by inheritance the superior proprietary rights in the village in which the grove stands, loses his right to the grove when the superior proprietary rights so inherited by him pass by virtue of an auction sale to a third person. The Courts below found that the auction sale only affected the superior proprietary rights in the land as distinct from the grove.

The learned Counsel for the plaintiffs-appellants relies on the decision in *Surja Narain Mandal v. Nanda Lal Sinha* (1), which follows an earlier decision in *Raja Kishendatt Ram v. Raja Mumtaz Ali Khan* (2). But the case of a lessee acquiring the rights of a lessor stands on a quite different footing. When the lessee becomes the owner of the rights of the lessor, the lease determines. Similarly when a mortgagee becomes the owner of the rights of the mortgagor, the mortgage ceases to exist as such. But a right to land is quite distinct from a right to a grove or the pro-

(1) 33 C. 1212.

(2) 5 C. 198; 5 C. L. R. 213; 6 I. A. 145; 4 Sar. P. C. J. 17; 3 Suth P. C. J. 637; Rafique & Jackson's P. C. No. 58; 3 Ind. Jur. 426; 3 Shome L. R. 1; 2 Ind. Dec. (N. S.) 1737.

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perty in the trees comprised therein. The sale certificate contains no indication that the grove was included in the sale. When a sale is effected of a fractional share in a village, all legal incidents thereof pass with it. But a grove held by the proprietor from before the time he became a proprietor is not necessarily a legal incident of his proprietorship of the land. The right to the grove stands, in the above circumstances, on a quite different footing from a right to the land.

The appeal is, therefore, dismissed.

Appeal dismissed.

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER NO. 95
OF 1916.

April 17, 1918.

Present:—Mr. Justice Sadasiva Aiyar
and Mr. Justice Spencer.

RAMASAMI REDDI—DEFENDANT NO. 1—
COUNTER-PETITIONER NO. 1—APPELLANT
versus

SOKKAPPA REDDI AND ANOTHER—

PLAINTIFF AND DEFENDANT NO. 3—PETITIONER;
AND COUNTER-PETITIONER NO. 3—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), O. XXXIV,
r. 5—Transfer of Property Act (IV of 1882), s. 90—
General Clauses Act (X of 1897), s. 6 (c)—Limitation
Act (IX of 1908), Sch. I, Arts. 181, 182—Mortgage suit
—Decree under Transfer of Property Act—Final decree
under Civil Procedure Code, application for, maintain-
ability of—Order absolute—Limitation.*

A preliminary decree for sale was passed in a mortgage suit under the provisions of the Transfer of Property Act. The new Civil Procedure Code, Act V of 1908, having come into force before the expiry of the time fixed in the preliminary decree for payment of the mortgage amount, the mortgagee applied for a final decree under Order XXXIV, rule 5, Civil Procedure Code:

Held, (1) that a final and executable decree was passed in the case under the Transfer of Property Act, notwithstanding that the direction in the decree for the sale of the property was made conditional on default of payment of the amount found due to the plaintiff by a certain date; [p. 733, col. 1.]

(2) that the decree-holder's remedy was to apply for an order absolute; [p. 733, col. 2.]

(3) that the matter was governed by Article 182 and not by Article 181 of the Limitation Act. [p. 733, col. 1.]

Nimmala Mahankali v. Kallakuri Subba Rao, 41 Ind. Cas. 268; 32 M. L. J. 455, dissented from.

Per *Sadasiva Aiyar, J.*—The repeal of the provisions of the Transfer of Property Act regarding mortgage decrees could not, having regard to section 6, clause (c) of the General Clauses Act, deprive the holder of a mortgage decree passed under it of his remedy by way of getting an order absolute in respect of his right under the decree so as to make it executable in the strict sense. [p. 733, col. 2.]

Appeal against the order of the Court of the District Court, Madura, in Appeal Suit No. 230 of 1915; preferred against the order of the Court of the District Munsif, Tirumangalam, in Execution Petition No. 32 of 1915, in Original Suit No. 38 of 1906.

FACTS.—On 16th July 1908 the Court passed a mortgage decree in favour of plaintiff, which directed that the decree amount should be paid within six months. Before the time expired, the new Code of Civil Procedure, Act V of 1908, came into force. In May 1911 the decree-holder applied for an order for sale under Order XXXIV, rule 5, Civil Procedure Code. A second application was made in 1914 praying for a final decree. The Court having returned it for presentation on the execution side, it was so presented. It was contended that the application was barred under Article 181. This was overruled and the application was allowed. On appeal this decision was upheld. A second appeal to the High Court was dismissed by Justices Spencer and Srinivasa Aiyangar. The appellant applied for a review of the order having regard to a decision of another Divisional Bench in the case reported as *Nimmala Mahankali v. Kallakuri Subba Rao* (1).

Mr. K. V. Sessa Aiyangar, for the Appellant.

Mr. C. V. Seshagiri Sastri for Mr. K. V. Krishnaswamy Aiyar, for the Respondents.

JUDGMENT.

SPENCER, J.—On further consideration I am not satisfied that the decision, dated the 20th March 1917, of Srinivasa Aiyangar, J., and myself in Appeal against Appellate Order No. 95 of 1916 was wrong. It is argued on the strength of

(1) 41 Ind. Cas. 268; 32 M. L. J. 455,

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the subsequent decision by another Bench in *Nimmala Mahankali v. Kallakuri Subba Rao* (1) that the fact that in this case the date for payment was the date after the Code of 1908 came into force is enough to distinguish this case from the cases in *Balaji Rao v. Harirama Chetty* (2), *Singaravelu Pillai v. Santhana Krishna Mudaliar* (3), *Mahammad Husain v. Abdul Kareem* (4) and *Natesa Udayan v. Annasami Udayan* (5), which we followed. I think that a final and executable decree was passed in this case under the Transfer of Property Act, notwithstanding that the direction in the decree for sale of property was made conditional on default of payment of the amount found due to the plaintiff by a certain date. With due respect to the learned Judges who decided *Nimmala Mahankali v. Kallakuri Subba Rao* (1), I am of opinion that the introduction of the new Code did not give rise to any new right under Article 181 of the Limitation Act to have a fresh final decree passed in consequence of the provisions of the Transfer of Property Act, under which these proceedings—commenced, being superseded (see section 6, General Clauses Act). In other words, if Article 182 governed the proceedings on 16th July 1908 when the decree was passed, the introduction of the new Civil Procedure Code on 1st January 1909 did not have the effect of making it incumbent on the decree-holder to apply under Article 181 for a final decree under Order XXXIV, rule 5. The second appeal must be again dismissed with costs.

SADASIYA Aiyar, J.—I fully concur in the opinion just now pronounced by my learned brother. The question whether Article 181 (old Article 170) or Article 182 (old Article 179) of the Limitation Act is applicable to an application for an order absolute under the Transfer of Property Act procedure is of little importance as, whether the former or the latter article applied to the initial application, a subsequent application, whether for an order absolute or for execution in the strict sense, will be governed by the provisions of clause 5 of Article 182, which gives 3 years' period, from the

fresh starting point created by the initial application, which is an application for execution or, at least, an application to take a step-in-aid of execution. [See, however, *Abdul Majid v. Jawahir Lal* (6) which shows that Article 182 (old Article 179) is the Article really applicable even to the initial application.] I am further of opinion that, having regard to the General Clauses Act, section 6, clause (c), the repeal of the provisions of the Transfer of Property Act could not deprive the holder of a mortgage decree passed under it of his "remedy" by way of getting an order absolute "in respect of" his right under the decree so as to make it executable in the strict sense. I, therefore, dissent respectfully from the *obiter dicta* in *Nimala Mahankali v. Kallakuri Subba Rao* (1) on which the petitioner relies and agree that the second appeal should be dismissed with costs.

M. C. P.

Appeal dismissed.

(6) 23 Ind. Cas. 648; 36 A. 350; 12 A. L. J. 624; 16 Bom. L. R. 395; 18 C. W. N. 963; 19 C. L. J. 626; 27 M. L. J. 17; (1914) M. W. N. 485; 16 M. L. T. 44; 1 L. W. 483 (P. C.).

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 320 OF 1917.

July 5, 1918.

Present:—Mr. Justice Walmsley and Mr. Justice Panton.

BHUSAN CHANDRA GHOSE AND OTHERS
—PLAINTIFFS—APPELLANTS

versus

JAHAR MAL BHUTRA AND OTHERS—

Pro forma DEFENDANTS—RESPONDENTS.

Landlord and tenant—Tenant, suit by, to have it determined which of two defendants is his landlord, maintainability of—Interpleader.

A tenant has no right to bring a suit to have it determined which of the two defendants, both of whom claim rent from him is his landlord. [p. 734, col. 2.]

Nangji Koer v. Umatul Batul, 13 Ind. Cas. 40; 15 C. L. J. 653, followed.

Appeal against the decree of the Subordinate Judge, 1st Court, Hooghly, dated

(2) 32 Ind. Cas. 39.

(3) 31 Ind. Cas. 9; (1915) M. W. N. 643.

(4) 29 Ind. Cas. 237; 39 M. 544; 17 M. L. J. T. 424.

(5) 34 Ind. Cas. 756; 3 L. W. 468.

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the 29th of November 1916, affirming that of the Munsif, 2nd Court at Howrah, dated the 15th of June 1915.

FACTS material to the report will appear from the following judgment of the lower Appellate Court:—

"The plaintiffs sued the defendants in the Court below for a declaration that the defendants Nos. 1 and 2, who had obtained a rent decree against the plaintiffs alleging themselves to be the owners of a moiety share of the superior right, had no title to the land and that the defendants Nos. 3 to 5, who are the 15-pice Zemindars of Mouza Khurut Kamudia, are the landlords under whom the plaintiffs hold the disputed plot at a yearly rental of Sissa Rs. 4. They further prayed for a refund of Rs. 44 and odd realised by the defendants Nos. 1 and 2 in execution of that rent decree, impeached it as fraudulent and collusive and asked for an injunction restraining the defendants Nos. 1 and 2 from realising rent from them.

The principal defendants who alone contested the suit, urged that this suit being in the nature of an interpleader suit is not maintainable and that it is barred as *res judicata*.

The learned Munsif gave effect to the defendants' contentions and dismissed the plaintiffs' suit.

The plaintiffs have appealed and their contention before this Court is that the learned Munsif took an erroneous view of the law and dismissed their suit. On the merits of the case they urged that the learned Munsif having believed their version should have allowed their claim.

I think the learned Munsif took a correct view of the law and the plaintiffs' suit is not maintainable. In deciding the question of *res judicata* the essence of the allegations of the parties must be considered and what the real bone of contention was in the previous litigation must be seen. The relation of landlord and tenant having been found to exist between the plaintiffs and the defendants Nos. 1 and 2 in the previous suit fought up to the Appellate Court the plaintiffs cannot now turn round and re-open the matter, dressing their allegations in a different garb and casting the self-same contentions, which had been

found to be untrue, in an apparently different mould. Moreover a tenant has no right to bring a suit to have it determined which of two defendants, both of whom claim rent from him, is his landlord and the ruling followed by the learned Munsif has full application to the facts of the present case. I, therefore, agree with the learned Munsif in holding that the plaintiffs' suit being in the nature of an interpleader suit is not maintainable and that they cannot re-open the question of tenancy under the defendants Nos. 1 and 2, and so this appeal is dismissed with costs. It is not necessary to discuss the grounds urged in the cross-appeal after what has been found above and so I dismiss it."

Babu Mohendra Nath Roy (with him Babu Manmotho Nath Roy), for the Appellant.—The present suit differs substantially from the suit in *Nanji Koer v. Umatul Batul* (1). The only relief sought in this case is that one set of landlords was the real landlord and the other not. The other side says that such a suit would be barred by *res judicata*, because in the earlier rent suit the question was also whether the relationship of landlord and tenant existed between the parties as in this suit. Clearly the earlier suit was not between the same parties but between the plaintiff and one set of defendants. Here another party has been added. In the Full Bench case of *Dwarkanath Roy v. Ram Chand Aich* (2), under similar circumstances, the suit was not considered to be barred by *res judicata*. A brings a suit against B. C claims under A and D under B. If C brings a suit against D on a point which was decided in a suit between A and B, certainly such a suit shall be barred, but not if a new party is added. In *Dwarkanath Roy v. Ram Chand Aich* (2) a new party was added by the plaintiff and the suit there was a suit for rent, as in my case. Hence the facts there correspond to the facts in this case. It may be argued that the parties here are not arranged as in *Dwarkanath Roy v. Ram Chand Aich* (2), but that is no argument at all. In a rent suit

(1) 13 Ind. Cas. 40; 15 C. L. J. 653.

(2) 26 C. 428; 3 C. W. N. 266; 13 Ind. Dec. (N. S.) 876.

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the only question that arises is whether the relationship of landlord and tenant existed between the parties for the period for which the suit is brought, and no question of title at all arises. This and this only is the point in issue, therefore, the suit ought not to have been dismissed on any of the grounds stated by the lower Court. My points are:—

(1) It is not an interpleader suit within the meaning of section 88 of the Civil Procedure Code. Therefore, Order XXXV, rule 5, is not a bar.

(2) The suit is not barred by *res judicata*. The scope of an interpleader suit is defined by section 88 of the Civil Procedure Code. The suit as framed is not an interpleader suit but is a suit for a declaration that the real landlords are defendants Nos. 3 to 5. *K. S. Bannerjee v. Rajchandra Dutt* (3) cited.

The frame of the suit in *Nanji Koer v. Umatul Batul* (1) is entirely different from that in the present suit.

In the case in *Nanji Koer v. Umatul Batul* (1) the suit was for a declaration that a certain person was the landlord, whereas in this suit the declaration sought for is that certain persons are not the landlords. Even if that decision covered a case like this, I submit the decision was not right.

Babus *Bepin Behari Ghose, II*, and *Sarat Chandra Roy Chowdhury*, for the Respondents, was not called upon.

JUDGMENT.

WALMSLEY, J.—The facts of this case are practically identical with the facts of the case of *Nanji Koer v. Umatul Batul* (1), and on the principles enunciated in that case the present appeal must be dismissed. It is suggested that we should regard that case as wrongly decided; but I can see no reason for taking that view. The present appeal is dismissed with costs.

PANTON, J.—I agree.

Appeal dismissed.

(3) 5 Ind. Cas. 577; 37 O. 552; 14 O. W. N. 784; 11 O. L. J. 577.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1413 OF 1917.

September 12, 1918.

Present :—Mr. Justice Phillips and Mr. Justice Kumaraswami Sastri.

ARUNACHALA CHETTIAR—DEFENDANT
—APPELLANT

versus

MUTHU *alias* SALAKSHI AMMAL

AND OTHERS—LEGAL REPRESENTATIVES

OF PLAINTIFF AND SUPPLEMENTAL

RESPONDENTS—RESPONDENTS.

Succession Certificate Act (VII of 1899), ss. 4(1), 16, 18—Assignee of certificate holder, suit by, maintainability of—Assignment before grant of certificate, effect of.

An assignee of a person to whom a succession certificate has been granted is entitled to sue for a debt due to the assignor and to obtain a decree thereon without obtaining a certificate in his own name. [p. 736, col. 1.]

Raman Lalji Maharaj v. Hari Das, 34 Ind. Cas. 364; 14 A. L. J. 677; 38 A. 474, approved.

Allahdad Khan v. Sant Ram, 17 Ind. Cas. 486; 35 A. 74; 10 A. L. J. 506, dissented from.

The certificate, until revoked, affords protection to the assignee, though it was obtained by the assignor after the assignment. [p. 736, col. 1.]

Second appeal against the decree of the District Court, Tanjore, in Appeal Suit No. 360 of 1915, preferred against the decree of the Court of the District Munsif, Tiruvalur, in Original Suit No. 443 of 1914.

FACTS appear from the judgment.

Messrs. T. V. Muthu Krishna Aiyar and N. Muthuswami Aiyar, for the Appellant.—Plaintiff is the assignee of the pro-note from the widow of the payee of the note. She assigned the note and then applied for the grant of a succession certificate. Then the certificate which was obtained in her name was made over to the assignee. The grant of a succession certificate is only personal to the grantee. Under section 4 of the Succession Certificate Act a person in whose name the certificate is granted is alone entitled to sue and it cannot enure to the benefit of the assignee. *Allahdad Khan v. Sant Ram* (1). Again, at the date of the assignment of the note the widow had no valid title to the suit note and the certificate cannot have retrospective effect.

Mr. S. Muthia Mudaliar, for the Respondents.—The grant of certificate enures for the benefit of the assignee. Section 4 (1)

(1) 17 Ind. Cas. 486; 35 A. 74; 10 A. L. J. 506.

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of the Succession Certificate Act does not require that the person suing should have the certificate in his own name. The protection is afforded by the certificate and when once it is granted, it is valid and effective in the hands of any one who purchases the debt from the certificate holder. *Allahdad Khan v. Sant Ram* (1) has been dissented from in *Raman Lalji Maharaj v. Hari Das* (2).

As to the second contention, a certificate obtained by a person who had no right to it may be revoked by proceedings under section 18 of the Act, but it continues to be effectual until such revocation.

JUDGMENT.—Appellant's first contention is that plaintiff, being only the assignee of the person to whom succession certificate had been granted, is not entitled to a decree without obtaining a succession certificate in his own name. This contention is supported by the ruling in *Allahdad Khan v. Sant Ram* (1), but that decision has been doubted in *Rang Lal v. Annu Lal* (3) and has been dissented from by both the Judges in *Raman Lalji Maharaj v. Hari Das* (2). One of the main grounds for the decision in *Allahdad Khan v. Sant Ram* (1) is that section 16 of the Succession Certificate Act affords protection only when payment is made to the certificate holder, and not to his assignee. We respectfully regret that we are unable to accept this argument, for payment to the assignee is as valid as payment to the assignor in the absence of any restriction imposed by law. Further, section 4 (1) of the Act only requires the production of a certificate and not a certificate in the name of the person suing. Agreeing with *Raman Lalji Maharaj v. Hari Das* (2) we overrule this contention.

The next contention is that plaintiff's assignor obtained the succession certificate after she had effected the transfer to plaintiff. This may or may not form a ground for revoking the certificate under section 13, but until revoked, the certificate is valid and affords protection and this objection must also fail.

The second appeal is dismissed with costs.
M.C.P.

Appeal dismissed.

(2) 34 Ind. Cas. 364; 14 A. L. J. 677; 38 A. 474.
(3) 22 Ind. Cas. 349; 36 A. 21; 11 A. L. J. 968.

CALCUTTA HIGH COURT.

CIVIL APPEAL No. 22 OF 1918.

March 23, 1918.

Present:—Sir Lancelot Sanderson, Kt.,
Chief Justice, and Justice Sir John
Woodroffe, Kt.

Rai Bahadur MANI LAL NAHAR—
APPELLANT

versus

MOWDAD RAHAMAN—RESPONDENT.

Specific Relief Act (I of 1877), s. 45—High Court powers of, exercise of—Delay in presenting petition, effect of—Public officer refusing to entertain petition—High Court, order of, form of—Calcutta Municipal Act (III B. C. of 1899), Sch. V, r. 2 (a)—Rai Bahadur, whether sufficient description of candidate.

Section 45 of the Specific Relief Act gives certain powers to the High Court, which the High Court can exercise subject to the conditions which are specified in the provisos to the section. [p. 738, col. 1.]

The conditions contained in provisos (a) to (c) of the section are cumulative. [p. 738, col. 1.]

In exercising the powers conferred upon it under section 45 of the Specific Relief Act, the High Court should, in all cases, regard its exercise of the extraordinary jurisdiction as discretionary, and subject to considerations of the importance of the particular case or of the principle involved in it, or of delay on the part of an applicant, and of his merits with respect to the case in which the interference of the Court is sought. Should other special causes appear for or against the Court's intervention, due weight ought to be given to them, regard being always had to the principles already enunciated. [p. 738, col. 2.]

The respondent, who was a candidate for election as a Municipal Commissioner of the Corporation of Calcutta, applied to the Chairman of the Corporation to reject the nomination paper of the appellant, a rival candidate, on the ground that the nomination paper did not contain any description of the appellant and that he had been seconded by one who was not a voter. The application was made two weeks after the appellant had sent in his nomination paper and two days before the day fixed for the election. The Chairman declined to entertain the application, on the ground that it was made too late. On the following day, i.e., on the day previous to the election the respondent applied to the High Court under section 45 of the Specific Relief Act, and obtained an order that the name of the applicant be expunged from the list of nominated candidates. On the next day, i.e., on the day for the election, the election took place, and the name of the appellant having been expunged from the list, the respondent as the only candidate was deemed elected. The appellant appealed against the order directing the expunging of his name from the list of candidates and the appeal came on for hearing on the day after the election:

Held, (1) that having regard to the facts of the case and especially to the delay in presenting the petition by the respondent and the fact that no one

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could possibly be misled by the description in the nomination paper, it was a matter of considerable doubt whether the case was one in which the High Court should have interfered; [p. 738, col. 2; p. 739, col. 1.]

(2) that the order of the Court should have been limited to a direction to the Chairman to entertain the application which he had wrongly refused to entertain on the ground that it was too late; [p. 739, col. 1; p. 740, col. 1.]

(3) that the appeal must fail, inasmuch as the election had taken place, and a decision in favour of the appellant would be infructuous. [p. 739, col. 1.]

Quære.—Whether the addition of the words 'Rai Bahadur' to the appellant's name was a sufficient description of the appellant within the meaning of Schedule V, rule 2 (a) of the Calcutta Municipal Act—

Appeal against the judgment of Mr. Justice Chaudhuri, dated the 19th March 1918.

Mr. A. Aetoom (with him Messrs. P. K. Mozumdar and M. N. Kanjilal), for the Appellant.

Mr. N. Sircar (with him Mr. S. O. Bose), for the Respondent.

JUDGMENT.

SANDERSON, C. J.—This is an appeal by Rai Bahadur Mani Lal Nahar against the judgment of my learned brother Mr. Justice Chaudhuri.

The matter came before the learned Judge by way of a petition under section 45 of the Specific Relief Act by one Mowdad Rahaman, who was a candidate for election as a Municipal Commissioner for Ward No. 14 at the Sixth Municipal Election, and upon that petition it was ordered that the Chairman of the Corporation of Calcutta and Rai Bahadur Mani Lal Nahar, another candidate for election as a Municipal Commissioner for the said ward at the said election, should show cause why he should not declare the nomination paper of the said Rai Bahadur Mani Lal Nahar invalid. The Rule was made absolute by the learned Judge, who delivered the following judgment:—"This application has been made at a very late stage and I am strongly inclined to hold that it is the result of the decision of this Court in a similar matter which has been before me and the Appellate Court, but it must be said at the same time that no other remedy is open to the applicant. It has been held in a similar case that want of description of a candidate in a nomination paper is a fatal objection. The title such as Rai Bahadur which a man may hold is not his description." The learned Judge then said that

he, therefore, held that the nomination paper in question ought not to have been accepted. He then referred to a decision of Mr. Justice Norris reported as *Rajendra Lal Mittra*. In the matter of (1), and, following the precedent of that case he directed that the nomination of Rai Bahadur Mani Lal Nahar should be expunged from the list.

The facts are as follows:—

The appellant sent in his nomination paper on the 4th of March in this year. The last day for sending in the nomination papers was the 5th of March 1918, and, according to the affidavit of the appellant, it appears that he was informed by Mr. Sen, Solicitor to the Corporation, that the applicant, that is to say, Mowdad Rahaman, or any candidate for election could have seen the nomination paper at any time thereafter. On the 16th of March a list of the candidates who had been nominated was published. On the 18th of March my learned brother Mr. Justice Woodroffe and I delivered a judgment in the election case appeal between *Narendra Nath Mitter v. Radha Charan Pal Bahadur* (2), a case, which I shall have reason to say later on, was of a very different nature from the present one. On the afternoon of the same day the applicant in this case applied to the Chairman of the Corporation to reject the nomination paper of Rai Bahadur Mani Lal Nahar, the appellant in this case. The grounds for that application were that the nomination paper did not contain any description of the said Rai Bahadur Mani Lal Nahar, and that he had been seconded by one Rai Sahib Haradhan Basu who was not a voter in the said Ward No. 14, as appeared from the printed copy of the Election Roll prepared and published by the Chairman. The Chairman of the Corporation declined to entertain this application on the ground that it was too late. On the 19th, the following day, a petition was presented before my learned brother Mr. Justice Chaudhuri and the order nisi which I have already read was made at 11 o'clock in the morning. The hearing of the Rule was fixed for 4 p. m. on the same day, and at or about that time the learned Judge made the order absolute, upon the grounds which are stated in the

(1) 19 C. 195n; 9 Ind. Dec. (N. S.) 575.

(2) 48 Ind. Cas. 314; 22 C. W. N. 943; 28 C. L. J. 289.

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judgment which I have already read. The next day, the 20th, was the day for the election. On that day Mr. Avetoom, the learned Counsel for the appellant, applied to this Court for leave to serve short notice of appeal upon the respondent, and this Court granted him that leave and directed that notice should be served upon the respondent for the hearing of the appeal on the following day, namely, the 21st. On the 21st, the day after the election had taken place, this appeal was heard by my learned brother Mr. Justice Woodroffe and myself; it was adjourned for further argument until yesterday, and on that occasion we reserved judgment until this morning. These are the facts of the case.

Now, the section under which this application was made was section 45 of the Specific Relief Act, I of 1877. Before I read that section it is necessary to refer to section 50 which provides:—"Neither the High Court nor any Judge thereof shall hereafter issue any writ of *mandamus*." But by section 45 certain powers are given to the High Court which the High Court can exercise, subject to the conditions which are specified in the proviso. Section 45 runs as follows:—"Any of the High Courts of Judicature at Fort William, Madras, and Bombay may make an order requiring any specific act to be done or forborne, within the local limits of its Ordinary Original Civil Jurisdiction, by any person holding a public office, whether of a permanent or a temporary nature, or by any Corporation or inferior Court of Judicature".

Then there are five provisos added to the section. Proviso (b) is as follows:—"That such doing or forbearing is, under any law for the time being in force, clearly incumbent on such person or Court in his or its public character, or on such Corporation in its corporate character." Proviso (c) is as follows:—"That in the opinion of the High Court such doing or forbearing is consonant to right and justice."

It is not disputed that the conditions contained in the provisos (a) to (e) in this section are cumulative; and, the effect of the section is dealt with in the decision of the Bombay High Court in *Shiva Nathaji v. Joma Kashinath* (3), the judgment being

(3) 7 B. 341; 7 Ind. Jur. 656; 4 Ind. Dec. (N. S.) 229 (F. B.).

delivered by Mr. Justice West. The passage which I desire to read is at page 370, and is as follows:—"The Specific Relief Act, I of 1877, Chapter VIII, in abolishing the writ of *mandamus*, enacts that the High Court may require any specific act to be done or forborne within the limits of its Ordinary Civil Jurisdiction by any.....in inferior Court of Judicature' (here it is not an inferior Court of Judicature, but a public officer), but the conditions are imposed (a) of a wrong to the applicant; (b) of a duty clearly incumbent on the inferior Court; (c) consistency of the order sought with justice; (d) 'that the applicant has no other specific and adequate legal remedy; and (e) 'that the remedy given by the order will be complete.' These provisions, which express the results of an experience of centuries gained by superior Courts in England, working without statutory limits to their jurisdiction, show very clearly the proper conditions of peremptory interference even when there has been an excess of jurisdiction, or a failure to exercise it, by the lower Court." Then the learned Judge proceeded to state certain conclusions which the Court thought might be deduced with reference to the whole subject. I need refer to one only, which is No. 6. It runs as follows: "The Court will, in all cases, regard its exercise of the extraordinary jurisdiction as discretionary, and subject to considerations of the importance of the particular case, or of the principle involved in it, of delay on the part of an applicant and of his merits with respect to the case in which the interference of the Court is sought. Should other special causes appear for, or against, the Court's intervention, due weight is to be given to them, regard being always had to the principles already enunciated." The learned Counsel for the respondent did not dispute the accuracy of the conclusions which the learned Judges deduced in this case. Consequently we may take it that the principles there stated are the principles upon which we ought to act in this case.

Now, having regard to the facts of this case, which I have already stated, and having regard especially to the delay which occurred in presenting the petition by the respondent, and the fact that no one could

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possibly be misled by the description or want of description in the nomination paper, if I had been sitting as the Court of first instance, I should have had considerable doubt whether the Rule should have been made absolute. But in any event if the Rule were to be made absolute, I am of opinion that it should have been limited to a direction to the Chairman of the Corporation to exercise his jurisdiction and to hear and determine the application which had been made to him and which he had refused to entertain on the ground that it was too late. The application to the Court was based on the ground that the Chairman failed to perform his duty as a person holding a public office in refusing to entertain the petition, and I think that the order, if made at all, should have been confined to a direction to him to perform that duty. We, however, are not sitting as a Court of first instance but as a Court of Appeal. The order of the learned Judge was in fact made that the name of the appellant should be expunged from the list of nominated candidates. The Chairman of the Corporation was bound to give effect to that order. The result was that the appellant's name was expunged from the list, and the name of Mowdad Rahaman was the only name appearing on the list of nominated candidates; and, by reason of one of the rules (rule 5) for the "conduct of election," which provides that "in the event of there being not more than one candidate for election in any ward, such candidate shall be deemed to be elected," Mowdad Rahaman, being the only nominated candidate, has been deemed to be elected as Commissioner of that Ward. Therefore, it appears to me that if we were to allow this appeal and to give a judgment on the above-mentioned ground overruling the decision of the learned Judge such a judgment would be infructuous: for the appellant's name has been expunged from the list of nominated candidates, the election has taken place without the inclusion of the appellant's name in the list of candidates, and we have now, on this appeal, no power to set that right. For this reason, I think, that we should not allow this appeal.

I express no opinion on the question whether the addition of the words "Rai

Bahadur" to the appellant's name taken by itself, or in conjunction with the statement that the appellant is recorded as a Voter No. 679 of Ward No. 14, is a sufficient "description" within the meaning of the rule: It is not necessary for my judgment, and as far as I am concerned, this question is left open. In the case of *Narendra Nath Mitter v. Radha Charan Pal* (2) we did express the opinion that the words "who is recorded as Voter No. 1553 of Ward No. 6" by themselves were not a "description" within the meaning of rule 2 (a). This opinion was expressed at the instance of the learned Advocate-General who appeared for the appellant, but it was not necessary for our decision in that case: for, in that case, amongst other objections it appeared that the person who had signed the nomination paper as a seconder had signed as an approver also, which we held was not in order. Further, one of the names appearing as that of an approver was the name of a firm and not that of a voter and consequently there were only 16 approvers instead of 18 as required by the rule. There were other reasons to which I need not refer: It is sufficient for me to say that in the previous case there were substantial objections to the nomination paper, whereas in this case to my mind the objections are trivial and unsubstantial.

For these reasons the appeal, in my judgment, must be dismissed but in view of the facts of the case I think that it should be dismissed without costs.

WOODROFFE, J.—Had this case come before me as Judge sitting on the Original Side, it would have been a matter of considerable doubt whether the case was one in which this Court should interfere under section 45 of the Specific Relief Act.

But the learned Judge has in fact made the order and directed that the appellant's name should be expunged from the published lists of candidates. As a result, the Chairman, being obliged to obey the order of the Court, has expunged the name of the appellant, with the result that the respondent has been deemed to be elected.

The question, therefore, now is, will any fruitful result ensue should we reverse the learned Judge's order. It seems that any order passed without going into the merits

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would be of little, if any, use: And, apart from difficulties attending under the circumstances of this case a reversal even on the merits, to go into such merits would assume that the other points in the case, such as the alleged delay and form of the learned Judge's order, had been decided against the appellant, which I am not prepared to say would have been the case. For this is involved in the doubt I entertain whether the application should have been maintained in the Court of first instance. If, for instance (as I am disposed to think), the learned Judge instead of directing the appellant's name to be expunged should have directed the Chairman to entertain the application which he wrongly refused to entertain on the ground that it was too late, such a decision would preclude an examination into the merits, which *ex hypothesi* would have to be left for the Chairman to determine. But such a decision not touching the merits would probably not avail the appellant, apart from practical difficulties in asking the Chairman to consider this matter after what has followed in the previous order.

Under the circumstances, therefore, and without expressing an opinion on the question under appeal whether there was a sufficient description, I would not interfere with the decision under appeal and would, therefore, dismiss the appeal but without costs.

I should like to add with regard to our former decision cited to us that it proceeded on a different state of facts, and though we were invited to express and did express an opinion on the question whether the reference to the Electoral Roll was a sufficient description, all that we held was that in itself it was not a sufficient description, and, this was not necessary having regard to the fact that whether there was or was not in such case a description of the candidate, his case failed both for want of a legal seconder and a sufficient number of approvers.

This judgment of mine does not, of course, affect any other remedies which the appellant may have otherwise than by the proceedings before us.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL APPEAL No. 380 OF 1917.

July 31, 1918.

Present: — Sir John Wallis, Kt., Chief Justice,
and Mr. Justice Seshagiri Aiyar.

GARUDA SANYASAYYA—DEFENDANT—
APPELLANT

versus

NERELLA MUTHEMMA AND OTHERS—
PLAINTIFF AND DEFENDANTS—RESPONDENTS.

Hindu Law—Trust, charitable—Misappropriation of trust funds by trustee—Liability of trustee's son—'Avyavaharika debts,' meaning of—Liability to account—Period of accountability—Discretion of Court—Civil Procedure Code (Act V of 1908), s. 92—Suit in respect of choultry—Persons 'interested,' meaning of.

Under Hindu Law the son of a trustee of a public charity is liable for the funds of the trust misappropriated by his father. The fact that the father was guilty of a criminal offence does not affect the liability of the son. [p. 741, col. 2.]

An Avyavaharika debt only means a debt not opposed to good morals. [p. 741, col. 2.]

Chakouri Mahton v. Ganga Proshad, 12 Ind. Cas. 609; 39 C. 862 at p. 869; 16 C. W. N. 519; 15 C. L. J. 228, approved.

Durbar Khachar v. Khachar Harsur, 32 B. 348; 10 Bom. L. R. 297, dissented from.

The Courts have a discretion in limiting the period for which accounts should be rendered by a trustee. [p. 742, col. 1.]

In a suit for settling the scheme of a public choultry, the residents of the locality where the choultry is situate and who are also members of the community for whose benefit the charity was founded, are persons having an 'interest' in the charity within the meaning of section 92, Civil Procedure Code [p. 741, col. 2.]

Appeal against the decree of the District Court, Vizagapatam, in Original Suit No. 2 of 1916.

FACTS appear from the judgment;

Mr. P. Narayanamurthy, for the Appellant.—The plaintiffs, in the first place, have no *locus standi* to maintain this suit. They must allege and prove a specific interest in the charity. Mere residence in the vicinity of the choultry will not be a sufficient 'interest' within the meaning of section 92, Civil Procedure Code.

The father and grandfather of the 1st defendant, who were his predecessors-in-office, misappropriated the trust funds and rendered themselves amenable to a criminal charge. The 1st defendant cannot be liable for a criminal act of his father and grandfather. The 'debt' of a Hindu father for which the son is liable is an obligation incurred which is not tainted with criminality.

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The debt of 1st defendant's predecessors is an Ayyavaharika debt, which is excluded by the Hindu commentators from the category of debts of the father which bind the son. *Durbar Khachar v. Khachar Harsur* (1).

Again the obligation of the trustees to account for collections by them is not a 'debt' for which a son is liable under Hindu Law.

Mr. V. Ramesam, for the Respondents. — The plaintiffs have sufficient interest to maintain the suit. They are members of the community whom the charity is intended to benefit and are also residents of the locality where the choultry is situated. The 'interest' contemplated in section 92, Civil Procedure Code, should not be restricted to some specific right to or claim in the charity.

The amounts misappropriated out of the collections and not accounted for by the trustees are a debt repayable to the trust. It is more than an obligation to account. The son of the trustee is liable for the misappropriated amount and cannot evade liability on the ground that the defaulter offended against the Criminal Law.

The 1st defendant cannot bring himself under the exception, from the category of debts descendible to the sons, of Ayyavaharika debts. The expression denotes only debts not opposed to good morals. *Chakouri Mahton v. Ganga Proshad* (2).

JUDGMENT.—This is a suit for the removal of the 1st defendant from the trusteeship of a certain charity and for settling a scheme of management. The District Judge directed his removal and framed a scheme. In appeal to this Court a large number of questions were argued. We agree in the main with the conclusions on facts come to by the learned District Judge. We hold that there was a dedication of the choultry to charity under Exhibit E. We see no vagueness in the trust deed and we further agree with the District Judge that the whole of the choultry, not simply a portion of it, was dedicated to the charity.

Mr. Narayanamurthy argued two questions of law, on which it is necessary to

say a few words. We do not agree with him that the plaintiffs are not entitled to institute the suit under section 92 of the Civil Procedure Code. They are residents of the locality in which the choultry is situated and are members of the community for whose benefit the charity was founded. In our opinion, these facts give them sufficient interest to institute the suit. The second question relates to the liability of the 1st defendant for the application of the funds of the charity by his grandfather and father. It was strenuously argued before us that the 1st defendant is not liable because his father and grandfather must be deemed to have criminally misappropriated the funds. The facts are, the grandfather for some time conducted the charity. Later in his life, he neglected it and appropriated the income to his own use. The father, who was under the deed of trust entitled to the office of the trustee, never applied the income for purposes of charity. In our opinion the exceptions contained in the text of Usanas quoted by Vijnaneswara do not cover the present case.

After enumerating in the same language as the other Rishis the categories of father's debts for which the sons are not liable, Usanas and Vyasa add a supplementary category of debts which are Ayyavaharika and Vijnaneswara follows them in this. There has been much difference of opinion as to the meaning to be given to this word. Literally it means not usual or business like, but having regard to the context and to the fact that this category was introduced by these two Rishis alone as supplementary to the categories given by the majority of the Rishis, most of which relate to debts of an objectionable character, we agree with Mookerjee, J., in *Chakouri Mahton v. Ganga Proshad* (2) in preferring Colebrooke's translation "not opposed to good morals." The decision in *Durbar Khachar v. Khachar Harsur* (1), strongly relied upon by the learned Vakil for the appellant, seems to have been doubted in *Ramkrishna Trimbak v. Narayan Shivrao Aras* (3) and has not been accepted as good law in *Chakouri Mahton v. Ganga Proshad* (2) and in *Sumer Singh v. Liladhar* (4).

(1) 32 B. 348; 10 Bom. L. R. 297.

(2) 12 Ind. Cas. 609; 39 C. 862 at p. 869; 16 C. W. 519; 15 C. L. J. 228.

(3) 31 Ind. Cas. 301; 40 B. 126; 17 Bom. L. R. 955.

(4) 9 Ind. Cas. 624; 33 A. 472; 8 A. L. J. 306.

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and *Venuḡopal Naidu v. Ramanadhan Ochetty* (5). We prefer to follow these latter decisions. At the same time we are not prepared to say with Sadasiva Aiyar, J., in the latter case that every obligation "which is supportable as valid by legal arguments and on which a right could be established in the creditor's favour in a Court of Justice" will be binding on the son. It was the duty of the trustees to collect the income and their subsequent misappropriation of it does not affect the liability to account which they incurred by reason of the collection. The fact that the misappropriation amounted to a criminal offence appears to us to be irrelevant.

In our opinion the son is accountable for the misappropriation of the trust funds by his father and grandfather. The subtle distinction drawn between accountability and debt by Mr. Narayanamurthy does not commend itself to us.

The further question is whether the 1st defendant should be held liable for all the collections not accounted for by his predecessors. He succeeded to the office of trustee 2 years before the suit. His father succeeded to the trusteeship in 1884 and was the manager of the family and of the charity until 1914. In our opinion the 1st defendant should be made liable only for collections during the last 12 years. It is not denied that Courts have a discretion in fixing the period for which accounts should be rendered. In *Attorney-General v. Exeter, Mayor of* (6) Sir Thomas Plumer, Master of the Rolls, said:—"It has, I think, been properly stated on both sides that there is no fixed limit of time in directing an account against a trustee of a charity. Notwithstanding the case which has been cited from a very inaccurate book, the Statute of Limitations is not the rule.....It does not, however, follow that relief will be given after a great length of time, it being the constant course of Courts of Equity to discourage stale demands; even in cases of fraud, in which, if recent, there would have been no doubt, lapse of time has induced

the Courts to refuse their interference. In cases of charities this principle has often been acted on. When there has been a long period, during which a party has, under an innocent mistake, misapplied a fund, from the laches and neglect of others, that is, from no one of the public setting him right, and when the accounts have in consequence become entangled, the Court, under its general discretion, considering the enormous expense of the enquiries, the great hardship of calling upon representatives to refund what families have spent, acting on the notion of its being their property, has been in the habit, while giving the relief, of fixing a period to the account." In the present case the 1st defendant's grandfather and father had been left in the sole enjoyment of the charity properties without being called upon to account for their administration. The 1st defendant himself has not been shown to have been benefited by their conduct.

In these circumstances we have decided to fix 12 years as the limit of time for which accounts should be rendered by the 1st defendant. Subject to this modification the appeal will be dismissed with costs of the plaintiffs to come out of the charity. We may mention that in the framing of the scheme, 1st defendant may be nominated, if otherwise not disqualified, to be one of the trustees of the charity.

M. C. P.

Decree modified.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 576 OF 1917.
September 4, 1918.

Present:—Mr. Batten, A. J. C.

RAMCHANDRA AND OTHERS—PLAINTIFFS—
APPELLANTS
versus

DATTATRAYA alias BANDU—DEFENDANT
—RESPONDENT.

Appeal, second—Finding of fact not deduced from evidence, whether binding—Will—Draft, unsigned, whether can operate as Will.

(5) 14 Ind. Cas. 705; 37 M. 458; 11 M. L. T. 427; 28 M. L. J. 61.

(6) (1822) Jacob 443; 37 E. R. 918.

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A finding of fact, in order to be binding in second appeal, should be one that can be reasonably deduced from the evidence. If it is not such a finding, the High Court has authority to interfere with it. [p. 743, col. 2.]

A draft Will unsigned and undated may be legally a Will if it contains the last wishes of the testator. [p. 743, col. 1.]

(Case-law discussed.)

Appeal from the decree of the Court of the District Judge, Nagpur, dated the 8th of August 1917, in Appeal No. 115 of 1917.

The Hon'ble Sir E. K. Bose and Mr. M. B. Kinkhede, for the Appellants.

Messrs. M. V. Joshi and C. B. Parakh, for the Respondent.

JUDGMENT.—Appeal by the plaintiffs. The appeal arises out of a suit brought by the plaintiffs-appellants for the possession of a house which forms only one item of the property in dispute between the parties, but the suit relates only to the house. The plaintiffs' father Govindrao was one of four brothers, Venkat Rao, Makund Rao, Govind Rao and Gopal Rao. The defendant is the son of Gopal Rao. The plaintiffs' case is that the property was the self-acquired property of Venkat Rao, who was separate from his brothers. The plaintiffs' claim to the house is based on a Will said to have been executed by Venkat Rao shortly before his death, which occurred on the 12th August 1914. The Will is in the handwriting of Venkat Rao, but is not signed or dated. If the document contains the final expression of Venkat Rao's final wishes as to the disposition of his property, the fact that it is not signed or dated would not prevent its being regarded as a valid Will. The question before me is whether or not the District Judge was right in holding that the document did not contain Venkat Rao's final wishes. The learned Advocate for the respondent contends that this Court as a Court of second appeal is bound to accept the finding of fact that Venkat Rao did not intend the document to be his final Will, but left it unsigned because he wished to postpone the final disposal of his property and intended before signing it to vary it to some extent. The learned Advocate for the appellants contends that though he is bound by the District Judge's finding that the evidence of the first and eighth witnesses for the plaintiffs is true,

yet the deduction to be drawn from their evidence is a mixed question of law and fact and this Court is competent to reconsider the question in second appeal. He relies on the rulings in *Iachmeswar Singh v. Manowar Hussein* (1) and *Bishun Singh v. A. W. N. Wyatt* (2). In my opinion both of those cases are to be distinguished from the present case. In the first cited ruling their Lordships of the Privy Council found that the first Court had decided the question of adverse possession not merely as a question of simple fact but as involving questions of law also. The facts as found did not legally constitute adverse possession. In the second case cited it was held that the High Court in second appeal, though bound to accept the facts found, is entitled to examine whether the inference drawn from those facts is legitimate. In the present case the questions of law and fact are clearly distinct. The lower Appellate Court has made no mistake about the law. It recognises that even a draft Will unsigned and undated may be legally a Will if it contains the last wishes of the testator, but it has found on the evidence and as a fact that it did not contain the last wishes of the testator. This is a fact and not an inference to be drawn from a fact. The finding of fact is one that is binding on this Court, provided that the finding is one that can be reasonably deduced from the evidence. If it is not a fact that can reasonably be deduced from the evidence, this Court has authority to interfere. I have read the evidence of the first and eighth witnesses for the plaintiffs, which is the only evidence on the point. The District Judge has held that the witnesses are honest witnesses and as to this I see no reason whatever to disagree. From their evidence it appears that some days before Venkat Rao's death the Will was produced before Venkat Rao, and of these two witnesses one pointed out that the Will was unsigned and that the provision for the testator's wife was insufficient and on this Venkat Rao expressed his intention of considering the matter afresh and of signing the Will after he

(1) 19 C. 253; 19 I. A. 48; 6 Sar. P. C. J. 133; 10 Ind. Dec. (N. S.) 614 (P. C.).

(2) 11 Ind. Cas. 729; 16 C. W. N. 540; 14 C. L. J. 515.

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had so re-considered it. The eighth witness, however, took away the draft Will but has offered no intelligible explanation why he did so after Venkat Rao expressed his wish to re-consider the draft and to sign it after re-considering it. The District Judge has held as a fact that in these circumstances it was evident that Venkat Rao had plainly signified that the draft as it stood, was not his final Will. I consider I am bound by this finding. It is certainly a reasonable one. If I am not so bound, I entirely agree with the conclusion of the facts arrived at by the District Judge. The learned Advocate for the appellants refers to the following cases: *Janki v. Kallu Mal* (3), *Aulia Bibi v. Ala-uddin* (4), *Pandurang Hari Vaidya v. Vinayak Vishnu Kane* (5), *Sahib Mirza v. Umda Khanam* (6) and *Gopaldas v. Musammat Bandan* (7). I accept the position that if it were clear that the draft contained the final wishes of Venkat Rao, the fact that he did not sign it, although he had expressed his intention of signing it, would not be a bar to its validity as a Will, that each case has to be judged according to its own circumstances, and in this case the District Judge has held, and I agree with him, that the testator plainly signified that the draft did not contain his final wishes but that he wished to consider it before he signed it. For these reasons I am of opinion that the learned District Judge was right in holding that the document written by Venkat Rao is not a valid Will.

It is next urged that the defendant is estopped, because he applied for mutation of one of the villages in his name on the ground that it had been willed to him by Venkat Rao. The question has been fully considered by the District Judge and I agree with his conclusions that there was no estoppel. When the defendant made the claim for mutation he had not seen the Will and was unaware of the full circumstances relating to it. Moreover, mutation was granted in his favour on

- (3) 2 Ind. Cas. 213; 31 A. 236; 6 A. L. J. 171.
 (4) 28 A. 715; 3 A. L. J. 519; A. W. N. (1906) 210.
 (5) 16 B. 652; 8 Ind. Dec. (N. S.) 913.
 (6) 19 C. 444; 19 I. A. 83; 6 Sar. P. C. J. 180; Bañque & Jackson's P. C. No. 126; 10 Ind. Dec. (N. S.) 740.
 (7) 15 C. P. L. R. 101 at p. 104.

the ground that he was in possession of the village. The learned Advocate for the appellants relies on the cases reported as *Durga Das Khan v. Ishan Chandra Dey* (8) and *Rajah Venkata Narasimha Appa Rao Bahadur v. Rajah Surnani Venkata Purushottama Jugganadha Gopala Row Bahadur* (9). The circumstances of this case are entirely different. The person who holds property under a Will may be estopped from disputing other person's claims under the same Will, but here the defendant has elected to repudiate the Will altogether and makes no claim whatever under it. In these circumstances there is no estoppel. For the above reasons the appeal is dismissed with costs.

Appeal dismissed.

(8) 39 Ind. Cas. 223; 44 C. 145 at p. 153.

(9) 18 M. L. J. 409; 4 M. L. T. 5; 31 M. 321.

OUDE JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 447 OF 1917.

September 13, 1918.

Present:—Pandit Kanhaiya Lal, A. J. C.

CHHATARPAL AND OTHERS—

PLAINTIFFS—APPELLANTS

versus

HARDEO BAKHSH SINGH AND ANOTHER—

DEFENDANTS—RESPONDENTS.

Pre-emption suit—Set-off, right to—Joinder of claims—Money left with vendee out of sale consideration to pay off incumbrances—Vendee, failure of, to discharge incumbrances, effect of.

A pre-emptor, who is also a prior mortgagee of the property sold, cannot in his suit for pre-emption claim in reduction of the purchase-money such interest to which he may have become entitled by reason of the failure of the vendee to pay to him and to the other creditors of the vendor moneys which had been left with him out of the sale consideration for discharging incumbrances on the property sold [p. 745, col. 2.]

Second appeal against the decree of the District Judge, Hardoi, dated the 17th July 1917, confirming that of the Subordinate Judge, Hardoi, dated the 27th April 1917.

Babu Bisheshwar Nath Srivastava, for the Appellants.

Babu Basudeo Lal and Mr. M. A. Ali, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for pre-emption and the only question for determination is whether a pre-emptor is entitled to claim a

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set-off for the additional interest, which became payable to him and to the other creditors of the vendor on account of the failure of the vendee to pay the money left with him for payment to the above persons out of the consideration of the sale.

As pointed out in *Ram Ratan v. Jugrai* (1) and *Jagan Nath v. Sheoratan Singh* (2), the right of pre-emption is a right to the benefit of a contract or a right of substitution entitling the pre-emptor, by reason of a legal incident to which the sale itself was subject, to stand in the shoes of the vendees in respect of all the rights and obligations arising from the sale, under which he has derived his title. The question for consideration in this case, however, is whether the rights and obligations, arising between the date of the sale and the date of the suit or decree for pre-emption, are to be determined in the suit for pre-emption or in a separate proceeding, intended to enforce those rights or obligations. It is unquestionable that there are certain rights and obligations which must be determined in the suit for pre-emption itself, such as those which form a part of the contract of sale, or are necessary legal incidents of the price thereof. In *Tajmimul Husain v. Uda* (3), where a certain sum was fixed as the price of the property sold, and such sum was paid by the vendee, but it was subsequently agreed between him and the vendor as a part of the sale contract that the vendee should recover for his own benefit certain moneys due to the vendor at the time of the sale and the vendee recovered such moneys, it was held that the pre-emptor was entitled to the deduction of the amount of such moneys from the sum originally fixed as the price of the property, the reason being that the sum subsequently received by the vendee operated as a reduction of the price nominally fixed in the sale-deed. In *Hazari Lal v. Ram Narain* (4) the pre-emptor was declared liable to pay the arrears of under-proprietary rent paid by the mortgagees

for the period antecedent to his decree for foreclosure, which was the subject of pre-emption, because in the absence of any agreement, in writing, with the original proprietor to the contrary, section 154 of the Oudh Rent Act (XXII of 1886) imposed a statutory liability on the transferee to pay any arrears of rent due at the time of the transfer and the payment was made by him for the protection and preservation of the disputed property from sale in lieu of the said arrears. No question of protection arises in this case.

The interest here claimed by the pre-emptor is in the nature of damages, said to have been caused by the failure of the vendee to carry out his part of the contract with the vendor. The right to claim that interest flows out of the contract of sale, but it is not an integral part of it. It follows the contract of sale, not because the contract necessarily carries a right to it, but because something, which was then uncertain, has happened since the date of the sale, namely, the money left has not been paid or the contract has been broken, which gives a right to it. Section 13 of the Oudh Laws Act (XVIII of 1876) and Order XX, rule 14, of the Code of Civil Procedure only permit the determination of the price, and in certain cases of the market value.

The amount of interest cannot moreover be satisfactorily or finally determined, unless the mortgagees or the creditor for whom the money was left to be paid are before the Court in a suit properly framed for the purpose, for they may contest the adequacy of the money left for them, or it may appear that a tender was made to them and they had refused to accept it, or some of the creditors may have died and the right to receive on their behalf may be a subject of dispute. The pre-emptor happens to be one of the creditors in this case, but he is mixing up his position as a pre-emptor with his position as a prior mortgagee. The Courts below have rightly refused to allow him in this suit to set off the additional interest, due to him and to the other creditors, against the purchase money.

The appeal is, therefore, dismissed with costs.

Appeal dismissed,

(1) 8 O. C. 186.

(2) 7 Ind. Cas. 295; 13 O. C. 219.

(3) 8 A. 668; A. W. N. (1881) 44; 2 Ind. Dec. (N. S.) 392.

(4) 27 Ind. Cas. 420; 17 O. C. 379.

BISHANDAYAL SINGH v. JAISERI KUER.

PATNA HIGH COURT.

APPEAL FROM ORIGINAL DECREE NO. 41 OF 1916.

June 26, 1918.

Present:—Mr. Justice Roe and Mr.

Justice Coutts.

Babu BISHANDAYAL SINGH AND OTHERS

—DEFENDANTS—APPELLANTS

versus

Musammat JAISERI KUER AND OTHERS—
PLAINTIFFS AND Musammat GANESH KUER

AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Bandhu, who is—Sister's son, whether Bandhu—Alienation—Gaya shradh ceremony, performance of, whether legal necessity—Civil Procedure Code (Act V of 1908), O. VI, r. 17—Amendment of pleadings—Written statement—Plea, new, whether can be allowed to be taken at late stage—Benami transaction—Possession or title-deed not with purchaser—Presumption.

The term 'Bandhu' has been defined in the Mitakshara as a Bhinna Gotra Sapinda, that is to say, sprung from a different family but connected by common corporeal particles, or by consanguinity. [p. 747, col. 2.]

A sister's son is a Bhinna Gotra Sapinda and is, therefore, a Bandhu. [p. 747, col. 2.]

The performance of the Gaya Shraddh ceremony of a deceased Hindu is a legal necessity. In order, however, to make it binding upon the estate, so as to enable the widow of the deceased to raise money on the security of the estate, it must be proved that there was no sufficient income from the estate to meet the expenses of the ceremony. [p. 750, col. 1.]

Where more than a year after the settling of issues in a suit, when the case was completely ready for hearing, the defendant sought to be allowed to put in a fresh written statement raising a completely

new point about which the defendant had no real information:

Held, that he could not be allowed to do so. [p. 747, col. 1.]

Where from the circumstances surrounding a sale it is probable that the transaction is a *benami* one, the probability becomes a certainty when it is found that the ostensible purchaser is neither in possession of the property nor of the sale-deed. [p. 749, col. 1.]

Appeal against the decision of the Subordinate Judge, 3rd Court, Patna, dated the 25th February 1916.

Messrs. Purnendu Narayan Sinha, Ganesh Dutt Singh, Naresh Ohandra Sinha, Krishna Sahay and Jalgobind Prasad Sinha, for the Appellants.

Messrs. Pugh, Gangadhar Das, Sivananandan Rai and Ohandra Sekhar Banerji, for the Respondents.

JUDGMENT.

COUTTS, J.—This was a suit for recovery of possession with mesne profits of Mouzâh Jamalpur Burhya, Perganna Gyaspur, Touzi No. 132. The plaintiff No. 1, Ishri Prasad, Rai brought the suit as reversionary heir of one Surjun Singh, and the plaintiffs Nos. 2 and 3 were made parties as plaintiff No. 1 has mortgaged a part of the property sued for in order to defray the expenses of the suit.

It is necessary shortly to state the facts which have led up to the institution of the suit. The following genealogy will show the relationship of the plaintiff to Surjun Singh:—

BABU BAIJNATH SINGH=Musammat Man Koer, widow.

Babu Surjun Singh (dead)=Musammat Lakhpatti Koer, widow. }

Musammat Bibo Koer
daughter of
B. Baijnath Singh (deceased).B. Harakh Narain Rai
(died issueless).B. Sheo Narain Rai
(died issueless).B. Sham Narain Rai
(died issueless).

B. Pertab Narain Rai.

B. Iswari Pershad Rai,
plaintiff No. 1.

This genealogy was disputed at the trial of the suit, but it is now admitted to be correct.

Baijnath Singh died leaving as his survivors Surjun Singh, a minor, Musammat

Man Koer, his widow, and Musammat Bibo, his daughter. Surjun Singh died leaving Musammat Man Koer and Musammat Lakhpatti, his wife, who succeeded to his property. In 1881 Musammat Bibo died

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leaving Pertab Narain and other sons who died childless. On the 3rd March 1912 Pertab Narain died leaving the plaintiff No. 1 only, Ishri Prasad, the other sons of Musammatt Bibo having by this time died. This history of the family may also be taken as now undisputed. The plaintiff alleges that the property in suit was acquired by Musammatt Man Koer during the minority of Surjun Singh and from the income of his estate.

The first point taken in this appeal is, that the Subordinate Judge has wrongly refused to accept written statements which were filed by the defendants on the 23rd of February 1915. The importance of these written statements, which it is desired to bring in, is that in them for the first time an allegation was made by the defendants that the property in dispute was not the property, either ancestral or acquired, of Surjun Singh, and that therefore the plaintiffs have no right to sue. The learned Subordinate Judge refused to accept them, on the ground that the defendants could not be allowed to set up a new and inconsistent defence at such a late stage of the case, and, in my opinion, he has done so rightly. The suit was filed on the 5th January 1914, and in paragraph 4 of his plaint, the plaintiff stated that "the property was one of the properties appertaining to the estate of Babu Surjun Singh and it had been acquired during his minority through Musammatt Man Koer out of the income of his estate. Babu Surjun Singh held and enjoyed possession of the said property as owner." This is a very distinct statement as to how the property was acquired, and in the original written statements filed by the defendants in April 1914 there is no suggestion or allegation that this statement made in the plaint was untrue. Issues were framed on the 5th May 1914 but it was not until nearly a year later that the defendants asked to be allowed to put in these new written statements. By this time the case was completely ready for hearing and the hearing was actually to begin on the following day. It would obviously have been unfair to allow the defendants to raise a completely new point at this stage, and more particularly so when the

wording of the written statement shows clearly that the defendants had no real information on the matter. Reference has been made to the ruling in *Sri Rang Behary Lal v. Ranchheyu Lal* (1), but this is clearly against the appellants.

The second point which has been urged is that the plaintiff has not proved his heirship, and in regard to this two arguments have been advanced. The genealogy put forward by the plaintiff has now been accepted by the appellants and this genealogy shows that the plaintiff is the sister's son of Surjun Singh, but it is contended that a sister's son is not a Bandhu and that, therefore, the plaintiff is not an heir. This contention is, in my opinion, untenable. The term Bandhu has been defined in the Mitakshara as a Bhinna Gotra Sapinda, that is to say, sprung from a different family but connected by common corporeal particles, or by consanguinity. This has been held in a long series of rulings, namely:—*Lallubhai v. Mankuvarbai* (2), *Lallubhai Bapubhai v. Cassibai* (3), *Umaid Bahadur v. Udoi Chand* (4), *Babu Lal v. Nanku Ram* (5) and *Ramchandra Martand Waikar v. Vinayak Venkatesh Kothekar* (6), and the enumeration of Bandhus has been given in the Mitakshara but it has been authoritatively settled that this enumeration is not exhaustive. The law was very fully considered in *Babu Lal v. Nanku Ram* (5) and in *Ramchandra Martand Waikar v. Vinayak Venkatesh Kothekar* (6), and I need only refer to the conclusion of their Lordships of the Privy Council in the latter case: "The conclusion to which a close examination of the authorities leads their Lordships may be briefly stated as follows:—(a) that the Sapinda relationship on which the heritable right of

(1) 13 Ind. Cas. 128; 15 C. L. J. 439.

(2) 2 B. 388; 1 Ind. Dec. (N. S.) 682.

(3) 5 B. 110; 7 I. A. 212; 4 Sar. P. C. J. 164; 3 Suth. P. C. J. 795; 4 Ind. Jur. 533; 3 Shome L. R. 245; 7 C. L. R. 445; 3 Ind. Dec. (N. S.) 75.

(4) 6 C. 119; 6 C. L. R. 500; 5 Ind. Jur. 585; 3 Shome L. R. 148; 3 Ind. Dec. (N. S.) 78.

(5) 22 C. 339; 11 Ind. Dec. (N. S.) 228.

(6) 25 Ind. Cas. 290; 42 C. 384; 18 C. W. N. 1154; 27 M. L. J. 333; 1 L. W. 831; 16 M. L. T. 447; (1914) M. W. N. 835; 10 N. L. R. 112; 16 Bom. L. R. 863; 12 A. L. J. 1281; 20 C. L. J. 573; 41 I. A. 290 (P. O.).

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collaterals is founded, ceases in the case of the Bhinna Gotra Sapinda with the fifth degree from the common ancestor, and (b) that in order to entitle a man to succeed to the inheritance of another, he must be so related to the latter that they are Sapindas of each other, which is only a paraphrase of Manu's rule." Applying this principle to the present case, the plaintiff is a Bhinna Gotra Sapinda well within the degree laid down in this ruling and the further test that the plaintiff and Surjun Singh are Sapindas of each other is also satisfied.

It is next argued that even if this is so, the plaintiff cannot succeed if there is any Gotia between him and Surjun Singh, and that he is bound to establish by reasonable evidence that he is the nearest heir. I am not satisfied that in the present case there is any such onus on the plaintiff. In his plaint he clearly stated that he claimed the property as a Bandhu and made a distinct statement as to how this claim arose. The defendants in their original written statement simply contended that the genealogy was false, but that even if it were true a sister's son was not a Bandhu and could not succeed; they made no suggestion that there was any intervening Gotia between the plaintiff and Surjun Singh. If they had wished to raise this point, it was, in my view, necessary for the defendants to have stated it distinctly. The matter, however, is not of great consequence, because I am satisfied that even assuming that the plaintiff was bound to establish by reasonable evidence that he was the nearest heir, he has succeeded in doing so. It appears that Surjun Singh was of the Keshab Gotra and the contention of the learned Rai Bahadur is that the plaintiff should have established that there was no Keshab Gotra in existence who can be preferred to him. To require the plaintiff to search throughout India for a Keshab Gotra would be unreasonable, and what he did do was, I consider, sufficient. He says that he knew of no Keshab Gotra except in Patna and he was satisfied that they could not be preferred to him. There is no contradiction of this and we must accept his statement on this point. Up till a very late stage

there was no suggestion of there being any Keshab Gotras elsewhere. The first suggestion of this was made in the cross-examination of the plaintiff on the first day, and then the suggestion was that there were Keshab Gotras in Benares. This was dropped, however, on the following day and it was then suggested that there were Keshab Gotras in Allahabad. No names, however, were suggested and the plaintiff denied all knowledge of there being such Keshab Gotras. Subsequently the defendants developed this portion of their case and brought forward an alleged Keshab Gotra, Beni Madhub. This man was produced by one of the defendants' witnesses, Bishendayal. The evidence given by both these witnesses, as has been clearly shown by the learned Subordinate Judge, is false. There is nothing, therefore, to show that there is any intervening Gotra in existence and the plaintiff has, in my opinion, done all that was necessary to show that there is no such Gotra in existence.

The next point on which arguments have been addressed to us is the purchase by Nand Kishore. It is now admitted that Nand Kishore was the servant of the family of the defendants Nos. 1 to 17, but it is argued that, although this is so, the purchase from Musammatt Lakhpati was a *bona fide* purchase by him and not made *benami* on behalf of these respondents. This question of *benami* has been very fully and carefully dealt with by the learned Subordinate Judge. The only witnesses to the deed who have been examined are Basant Lal and Paryag Singh. The former was a servant of the defendants from before the time of the execution of the deed and Paryag Singh has been reckless in his statements in support of the defendants' case. The learned Subordinate Judge has, therefore, rightly not relied on the oral evidence. Certain documents, however, have been shown to us to show that Nand Kishore dealt with the property after the sale. Transactions, however, were bound to be made in the name of Nand Kishore shortly after the sale and these documents do not carry us much further. In the absence of reliable evidence we must be guided by the circumstances of the case, and having regard to these circumstances there is no doubt, in my mind, that the sale was a *benami* one. The property was

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sold on the 15th July 1884 for a consideration of Rs. 21,454. Now it has been established that Nand Kishore's private income at that time was only about Rs. 150 a year. There is no evidence, nor is there any suggestion, that he borrowed money to make this purchase and it is impossible to believe that he could have done so from his own funds. If, however, he had managed to do so, it cannot be doubted that he would have done all in his power to keep the property, yet we find that three years after the purchase there was a default in payment of revenue and the property was sold for the small arrear of Rs. 13-2-11. Of the arrear and of the sale Nand Kishore had full notice. There can also be no doubt that the purchase-money was not withdrawn by Nand Kishore. The balance of the purchase-money amounted to Rs. 16,000, yet three years later we find that Nand Kishore was reduced to borrowing a sum of Rs. 1,000 for which a bond (Exhibit 56) was executed in 1910, from which it appears that up to that date he had not been able to repay the amount.

To meet these difficulties the defendants have attempted to set up a new case, namely, that the purchase was by Nand Kishore jointly with another member of his family, Nand Lal. There is nothing, however, to support this case which was not made in the written statement, and as many years before the sale Nand Kishore and Nand Lal separated, there seems no doubt that the story is an afterthought. That the purchase was made by Nand Kishore is, therefore, in the highest degree improbable and this improbability becomes a certainty when we find that he was neither in possession of the property nor of the sale-deed. The evidence on this point has been very carefully considered by the learned Subordinate Judge and I find no reason to differ from his conclusions. The sale-deed was filed by these defendants in a succession certificate case, and in connection with this there is a very significant matter which leaves no doubt in my mind as to the *benami* nature of the purchase. The succession certificate case led to a suit by *Musammatt Lakhpati Kuer* and *Musammatt Ganesh Kuer* against *Bishandayal Singh* and others in respect of *Jamalpore* and to other *Mouzahs*. In this suit they stated that *Jamalpore* was purchased *benami* in the name of Nand Kishore. The

suit was contested by the defendant No. 1 but in the written statement the allegation of *benami* was not denied, and finally the suit was decreed on compromise. It is certain that if the purchase had not really been *benami*, the defendants would have denied the allegation and would have pleaded that the suit was not maintainable under section 36 of the Sale Law.

The next point argued is with regard to legal necessity, and it is contended that the sale by *Musammatt Lakhpati* was good because it was to obtain funds for the construction of a temple and the installation of idols and for performing the *Gaya Shradh* for her husband. The temple has been constructed and the idols have been installed. It is conceded that ordinarily this would not constitute an item of legal necessity, as, however, there is a recital in the sale-deed that the temple was to be constructed in compliance with the wishes of her ancestor, it has been argued that this is sufficient, and reliance is placed on the ruling in *Nanda Lal v. Jagat Kishore Acharjya* (7). In that case their Lordships of the Privy Council held "that under ordinary circumstances and apart from Statute, recitals indeed can only be evidence as between the parties to the conveyance and those who claim under them." But in that particular case they did not think these recitals could be disregarded, nor on the other hand did they consider that any fixed and inflexible rule could be laid down as to the proper weight which they are entitled to receive. The essential portion of this judgment for the purposes of this case is the following:—

"It is only necessary that a representation should have been made to the purchaser that such necessity existed and that he should have acted honestly and made proper enquiry to satisfy himself of its truth. The recital is clear evidence of the representation, and if the circumstances are such as to justify a reasonable belief that an enquiry would have confirmed its truth, then when proof of actual enquiry has become impossible, the recital, coupled with

(7) 36 Ind. Cas. 420; 21 C. W. N. 225; 20 M. L. T. 335; 31 M. L. J. 563; (1916) 2 M. W. N. 336; 4 L. W. 458; 18 Bom. L. R. 868; 14 A. L. J. 1103; 24 C. L. J. 437; 1 P. L. W. 1; 44 C. 183; 10 Bur. L. T. 177; 43 I. A. 249 (P. C.).

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such circumstances, would be sufficient evidence to "support the deed."

The question is whether the circumstances are such as to justify a reasonable belief that an enquiry would have confirmed the truth of the recital. In that case the circumstances did, but in this case they certainly do not. The oral evidence as to the directions of Surjun Singh is given by Paryag Singh; but this evidence has been rightly rejected by the Subordinate Judge. Surjun Singh had died about 25 or 30 years before the execution of the sale-deed. At the time he was only 15 or 16 years of age and had just married *Musammatt Lakhpatti Koer*. It is unlikely that under the circumstances he would have given any direction to build a temple or to instal idols, and if he had, *Musammatt Lakhpatti Koer* would certainly have carried out his wishes earlier. In addition to this we have it that the purchase was a *benami* one and the defendants certainly did not believe in the truth of the recital, because three years afterwards they fraudulently defaulted in payment of Government revenue and made a fraudulent purchase in order to try and perfect their title. I am satisfied, therefore, that this recital was merely inserted in order to try and give some validity to the purchase.

The position with regard to the *Gaya Shradh*, however, is different. The performance of the *Gaya Shradh* is undoubtedly a legal necessity. In order to make it binding, however, there should be no sufficient income from the estate to enable it to be performed. In this case *Musammatt Lakhpatti Koer* had ample funds to perform the *Gaya Shradh* without selling any property, and in addition to this the learned Subordinate Judge does not believe that the *Gaya Shradh* was ever performed. In this view I agree. It is true that there is a certain amount of oral evidence, but this is of a very unreliable character and an attempt has been made to back it up by documentary evidence which is undoubtedly fabricated.

The last point which has been urged is that even if the sale was a *benami* one, the defendants' title was perfected by the revenue sale as the defendants had no intention of defrauding the reversioner. This contention has no force. The first

purchase from *Musammatt Lakhpatti* was a fraudulent one. The default in revenue and the subsequent purchase at the revenue sale were also fraudulent, and the whole transaction is vitiated even if there was no express intention of defeating the plaintiff. I would, therefore, dismiss this appeal with costs, and in doing so I would note my appreciation of the extremely careful judgment of the learned Subordinate Judge.

ROE, J.—I entirely agree and have nothing to add.

Appeal dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 391 OF 1917.

September 13, 1918.

Present:—Mr. Lindsay, J. C.

SATISH CHANDER MUKERJI—

DEFENDANT—APPELLANT

versus

Pandit, MAHABALI PRASAD—PLAINTIFF
AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Immorality of woman, effect of—Tie of blood relationship, severance of—Succession to property of unchaste Hindu woman.

Immorality on the part of a Hindu woman does not sever the ties of blood relationship and there is no rule of Hindu Law which would prevent the blood relations of such a woman from succeeding to her property on her death. [p. 751, col. 2; p. 752, col. 1.]

Second appeal against the decree of the Additional Judge, Lucknow, dated the 30th May 1917, reversing that of the Munsif, South Lucknow, dated the 25th July 1916.

Mr. J. K. Banerji, for the Appellant.

Babus Daya Kishen Seth and Bisheshwar Nath Srivastava, for the Respondents.

JUDGMENT.—The subject-matter of the suit out of which this appeal has arisen is a house in the City of Lucknow, which was conveyed on the 20th December 1910 to a woman named *Musammatt Phulbasa* who died in January 1915.

It is an admitted fact that for about forty years before her death this woman had lived as a concubine with a Bengali named Jagannath Mukerji, who was the father of the present appellant Satish Chander.

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There can be no reasonable doubt that the house was purchased with money belonging to Jagannath, and that he bought the house for the benefit of the woman whom he had kept for so long. - Both the Courts below are agreed upon this point, and it is not possible to argue that Phulbasa was a mere *benamidar* for Jagannath, this being the case set up in the first Court by the defendant-appellant. It must be taken, therefore, that the house belonged to Phulbasa at the time she died and the question for consideration is really, "who were the heirs of Phulbasa?" The plaintiff in the suit, who is the principal respondent here, is the brother's son of Phulbasa and, therefore, her blood relation. - But he does not claim the property on the strength of his kinship with the deceased. His case was that Phulbasa before she took up with Mukerji was the wife of one Debi Din from whom she ran away. Debi Din thereafter married another woman *Musammal Jagdei*, a respondent in the case. When he died he left Jagdei and the respondent Kusehar Din, his nephew. The plaintiff has bought up the titles or assumed titles of these parties and claims the property as their transferee.

The first Court was of opinion that the plaintiff had failed to prove a marriage between Phulbasa and Debi Din and dismissed the suit. The lower Appellate Court on the other hand has found that the marriage is proved.

The finding has been attacked here on the ground that the Judge of the Court below misinterpreted the pleadings and assumed that the defendant Satish Chander had admitted that Phulbasa was a married woman when she began to live with Jagannath.

I am myself inclined to think that the learned Judge did construe the pleadings too literally. Satish Chander, in replying to the allegations in the plaint relating to Phulbasa's relations with Debi Din, stated that he had no knowledge of the facts and obviously he had not. I understand that there was a complete estrangement between Jagannath and his lawful wife who lived in Bengal, and Satish Chander seems to have lived with his mother and to have known nothing about his father or the woman Phulbasa. In the first of the additional pleas

contained in paragraph 10 of his written statement, Satish Chander said that while Phulbasa lived with Jagannath as his mistress she had severed all connection "with her husband and his relations." Bearing in mind the facts above stated I should not have interpreted this to mean that the defendant was admitting that Phulbasa was to his knowledge a married woman. The import of the plea appears to be that after Phulbasa took up with Jagannath she had no dealings with her relations, whoever they might be. And in any case there was no admission that the woman was the wife of Debi Din.

The matter, however, is of little importance, for the plaintiff produced evidence which satisfied the Judge that Phulbasa had been married to Debi Din and I think that the fact of this marriage is established.

To come then to the question of inheritance, the view of the Judge is that Debi Din's heirs are the heirs of Phulbasa, because the property in suit was "obviously" her *stridhan* and because the degradation of Phulbasa did not dissolve the ties of kinship.

With regard to these opinions I may say that the question whether the property was Phulbasa's *stridhan* is not quite so simple as the learned Judge thought. It is no doubt the case that according to the Bengal School of Hindu Law the term "*stridhan*" has no technical meaning and embraces all property which a woman has power to give, sell or use independently of her husband's control. But Phulbasa was subject not to the Dayabhaga but to the Mitakshara school of law, and it is by no means clear that property which a woman subject to the Mitakshara acquires from the wages of sin is her *stridhan* property as known to that school of law. There is authority of this Court for the view that it is not (*Makarana v. Thakur Pershad* (1).)

Again while there appears to be a general consensus of judicial opinion that immorality on the part of a Hindu woman does not sever the ties of blood relationship (indeed it is difficult to understand how a physical relation could be got rid of by mere immorality), it is by no means settled that the tie of affinity is not dissolved.

(1) 12 Ind. Cas. 778; 14 O. C. 234.

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And again there is authority for the view that even if the bond of marriage is not loosed by the misconduct of the wife, her status as an heir of her husband is forfeited so as to prevent the heirs of her husband inheriting to her. The question is one of great difficulty, as was said in the Full Bench ruling of the Calcutta High Court reported as *Hari Lal Singh v. Tripura Charan Roy* (2).

Fortunately it is not necessary for me to discuss this problem here. It is admitted that the plaintiff is the nearest blood relation of Phulbasa and if we take it that the tie of blood was not dissolved by the woman's immorality, the consequence seems to be that the plaintiff is entitled to the property by reason of his relationship with the deceased as there appears to be no definite rule of Hindu Law which would prevent inheritance in such a case.

If then it is uncertain whether the heirs of the woman's husband could lay a claim to the property, it is at any rate tolerably clear that her blood relations can. And in any event if we are driven to apply the principles of justice, equity and good conscience, it must be held that the plaintiff's right is superior to that of Satish Chander who in fact has no right at all, for he can claim no relationship with Phulbasa.

While I do not agree with all that has been said by the Judge of the Court below, I am satisfied that his decree is right and must be affirmed.

I dismiss the appeal with costs.

Appeal dismissed.

(2) 19 Ind. Cas. 129; 40 C. 650; 17 C. L. J. 438; 17 C. W. N. 679.

CALCUTTA HIGH COURT.

CIVIL RULE No. 367 OF 1918.

August 19, 1918.

Present:—Mr. Justice Fletcher and
Mr. Justice Walmsley.

PROTAP CHUNDRA DUTT—PETITIONER.

versus

ABHIMANINI SURINI AND ANOTHER

—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. XX, r. 4—

Judgment of Court of Small Causes, contents of—Judicial decision, whether can override Statute.

Where in accordance with the provisions of Order XX, rule 4 of the Civil Procedure Code, the judgment of a Court of Small Causes contains the points for determination and the Judge's decision thereon, but omits to give reasons for the decision, the High Court will not interfere with it. [p. 753, cols. 1 & 2.]

No decision of any Court can get over, add to or alter the clear words of a Statute. [p. 753, col. 1.]

Rule against the order of the Court of the Munsif, Bolpur, in Small Cause Court Suit No. 894 of 1917.

FACTS appear from the judgment.

Babu Manmothonath Roy, for the Petitioner.—This Rule arises out of an application under section 25 of the Provincial Small Causes Courts Act. The judgment of the Small Cause Court Judge is very short and it does not even set forth the plaintiff's case. It does not appear from the judgment that the learned Judge applied his judicial mind to the facts of the case. No doubt the learned Judge has technically complied with the provisions of the Code. But as the judgment is not self-contained and as it is not possible to know from it whether the learned Judge understood and judicially considered the plaintiff's case and the evidence adduced by him in support of his case, it is no judgment at all. Of course, a Small Cause Court Judge may deal with a case summarily, but this is not the way in which summary powers should be exercised. Refers to *Maik Rahmat v. Shiva Prasad* (1).

[FLETCHER, J.—Order XX, rule 4, lays down what the judgment should contain.]

But that rule does not do away with the necessity of writing an intelligible, complete and self-contained judgment. From the judgment a party to a suit must know that the Judge did apply his judicial mind to the facts of the case and considered the evidence adduced by the parties.

No one appeared for the Opposite Party.

JUDGMENT.

FLETCHER, J.—This is a Rule calling upon the opposite party to show cause why the judgment and decree complained of should not be set aside. What happened was this: the plaintiff brought a suit against the defendants in the Small Cause Court for the price of paddy with interest.

(1) 13 A. 533; A. W. N. (1891) 172; 7 Ind. Dec. (N. S.) 337.

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The learned Judge's judgment consists of the following:—

"The points for decision are:

(1) Whether defendants borrowed the paddy in question?

(2) Whether plaintiff is entitled to the interest claimed?

The first point is found in the negative. So, the second point does not arise for determination. Dismissed with costs." The plaintiff complained that he is entitled to a judgment setting forth the reasons which moved the learned Judge to come to the conclusion he arrived at. That turns purely on the construction of the Statute. Order XX, rule 4, sub-rule (1), says, "judgments of a Court of Small Causes need not contain more than the points for determination and the decision thereon." That there is a difference between "the decision thereon" and "the reasons for such decision" is obvious from the terms of sub-rule (2). The plaintiff has, therefore, got to establish that this judgment is not a judgment in accordance with Order XX, rule 4, sub-rule (1), Code of Civil Procedure. *Prima facie* it is, because the judgment sets out the points for determination and what was decided thereon. The case, however, the plaintiff says, is covered by the decision of the Allahabad High Court in *Malik Rahmat v. Shiva Prasad* (1). But no decision of any Court can get over the clear words of the section and, in so far as that decision purported to decide that in all cases the Small Cause Court must give its reasons for the decision, that was clearly in excess of what was stated in the Statute. One cannot add to or alter the clear words of the Act by judicial decisions. The Bombay case referred to, namely, the case of *Bai Jasoda v. Bamansha Mancherji* (2), is really an authority the other way, because the judgment of the Small Cause Court did not state, as pointed out by Mr. Justice Fulton, the points for determination and the decision thereon. In that view, of course, the judgment did not comply with the terms of section 203, Code of Civil Procedure, then in force. It seems to me that in this case we are not entitled to interfere,

having regard to the terms of Order XX, rule 4, sub-rule (1), the learned Small Cause Court Judge having properly set out the points for decision and his decision thereon. The present Rule, therefore, fails and is discharged. No one appearing on the other side, we make no order as to costs.

WALMSLEY, J.—I agree.

Rule discharged.

ODDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 111 OF 1917.

September 2, 1918.

Present:—Mr. Lindsay, J. C.

DARGAHI—PLAINTIFF—APPELLANT

versus

Chaudhri RAJESHWARI PERSHAD

—DEFENDANT—RESPONDENT.

Mortgage—Interest, excessive or exorbitant rate of—Debt contracted by Hindu father on credit of family property—Discretion of Court to reduce rate of interest, reasonable exercise of—Appellate Court, interference by.

In cases of debts contracted by Hindu fathers on the credit of the family property, Courts have a discretion to reduce the rate of interest if it is excessive or exorbitant. [p. 754, cols. 1 & 2.]

An Appellate Court will be slow to interfere where it can be shown that such discretion has been exercised in a reasonable manner. [p. 754, col. 1.]

Appeal against the decree of the Subordinate Judge, Gonda, dated the 6th July 1917.

Babu Bisheshwar Nath Srivastava, for the Appellant.

Munshi Aditya Prasad, for the Respondent.

JUDGMENT.—The only question for consideration in this case is, whether the Court below was justified in reducing the contract rate of interest in the mortgage bond upon which the suit of the plaintiff-appellant was based.

The facts may be briefly stated. The mortgage was executed by Chaudhri Jagdamka Prasad, the father of the defendant Rajeshri Prasad, on the 3rd of July 1911. The principal sum was Rs. 3,000 and there was an agreement that interest should be

(2) 23 B. 384; 12 Ind. Dec. (N. S.) 222.

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payable at the rate of 2 annas 3 pies per rupee per annum, which works out to just over Rs. 14 per cent. per annum. It was also agreed between the parties that interest should be payable yearly and that in case of default compound interest should be calculated at the stipulated rate with yearly rests. Nothing having been paid on account of the mortgage, the present suit for sale was brought, the amount of the claim being Rs. 6,167-10-8. The plaintiff asked for the sale of the mortgaged property consisting of a 2-annas share in a village called Rahmatpur.

Various pleas were put forward by the defendant, of which it is only necessary to consider one. He pleaded that the rate of interest was exorbitant and was not justified.

The Court below has found that there was legal necessity for the borrowing of this money. It seems that at the time the mortgage was made, certain ancestral family property of Jagdamka Prasad had been sold in execution of a decree. The judgment-debtor was anxious to have the sale set aside under the provisions of Order XXI, rule 89, and it is proved that on the day after this mortgage was executed Jagdamka Prasad deposited in Court a sum of Rs. 2,304 odd and had the sale of the property set aside.

Turning to the mortgage-deed in suit, it is to be noted that out of the principal sum of Rs. 3,000, a sum of Rs. 2,210 was advanced in cash to Jagdamka Prasad for the purpose of enabling him to deposit the money in Court. The balance was appropriated in discharge of a previous debt owing to the plaintiff. I think there can be no doubt on these facts that the finding of the Court below is correct, namely, that the legal necessity for the taking of the loan was established. The question then is, whether the Subordinate Judge was justified in holding that the contract rate of interest was liable to be reduced. It is no longer possible to argue that the Courts have no powers to interfere in cases of this kind with the rate of interest agreed upon. The principle has been sanctioned by their Lordships of the Privy Council in cases where a mortgagee has dealt with a Hindu widow, and such a principle can reasonably be applied also to the case of

a father who is the manager of a joint Hindu family and who has qualified powers of disposal over the family property for the purpose of meeting what is called legal necessities. I need only refer to two cases in this Court, in which it has been held that the Courts have a discretion to interfere with the rate of interest in cases of this kind [*Of. Sarabjit Singh v. Gur Bakhsh Singh* (1) and *Sadho Oharan Prasad v. Ram Ratan* (2)]. I may also refer to a judgment of a Bench of the Allahabad High Court which is reported as *Padam Singh v. Ram Rup* (3). It has been argued that the present case may be distinguished from these other cases on the facts and that here the rate of interest is not so exorbitant as it was in the cases to which I have referred. In the case reported as *Sarabjit Singh v. Gur Bakhsh Singh* (1), it appears from a perusal of the record that the rate of interest there was 24 per cent. per annum compoundable with 6-monthly rests. In the case reported as *Sadho Oharan Prasad v. Ram Ratan* (2), the interest was 24 per cent. compound with quarterly rests. In the Allahabad case the rate of interest was 18 per cent. compoundable with 6 monthly rests. It may, therefore, be taken that in the present case the contract rate of interest was substantially lower than it was in any of these reported cases. The Subordinate Judge allowed 12½ per cent. simple interest, thinking that that was a reasonable amount of compensation to the creditor. The reason why this rate was fixed on was that there had been a previous loan transaction between Jagdamka Prasad and the plaintiff in which the money had been borrowed on a simple bond at the rate of 12½ per cent. per annum. It is pointed out, however, and I think correctly, that the Subordinate Judge omitted to notice that the simple bond provided for compound interest; and so it has been argued here on behalf of the plaintiff-appellant that the Subordinate Judge, if he had noticed this fact, would have allowed at least 12½ per cent. compound interest in the present case. Whether this was so or not it is difficult to say. The law being that the Court has

(1) 36 Ind. Cas. 916; 19 O. C. 159.

(2) 40 Ind. Cas. 369; 4 O. L. J. 337.

(3) 36 Ind. Cas. 217; 14 A. L. J. 772.

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a discretion to interfere with the rate of interest in cases of this nature, an Appellate Court will be slow to interfere if it is shown that the discretion of the Court below has been exercised in a reasonable manner. One fact is worth consideration in the present case, and that is that when this mortgage was executed the only cash which was advanced was a sum of Rs. 2,210. The balance which went to make up the total of Rs. 3,000 was, as I have said, applied to the discharge of a previous debt. Interest, however, has been charged on the whole amount of Rs. 3,000, and from this point of view it may be said that the total amount of interest claimed in the present suit is excessive, having regard to the fact that the only money which the debtor got on the date of the mortgage was a sum of Rs. 2,210. The lower Court has given the plaintiff a decree for Rs. 5,047-15 0 together with proportionate costs and future interest at $12\frac{1}{2}$ per cent. up till the date fixed for payment. On the whole, therefore, I do not feel disposed to interfere with the decree. It seems to me that having regard to all the circumstances just referred to, the mortgagee has had substantial justice and that there is no occasion for me to interfere with the decision of the Court below for the purpose of increasing the amount of the decree by awarding compound interest. I dismiss the appeal with costs.

Appeal dismissed.

PATNA HIGH COURT.

FIRST CIVIL APPEAL NO. 193 OF 1916.

December 10, 1918.

Present:—Mr. Justice Roe and Mr. Justice Courts.

NARSING MISSEK—PLAINTIFF—APPELLANT
versus

BIRJU MISSEK AND OTHERS—DEFENDANTS
—RESPONDENTS.

Hindu Law—Joint family—Partition, suit for—Separation—Burden of proof.

In a suit for partition by a member of a joint Hindu family the initial onus is on the defendant to prove separation. [p. 755, col. 2.]

Appeal from a decision of the Subordinate Judge, Bhagalpur.

Mr. Rajendra Prosad, for the Appellant.

Mr. Rai Gurusaran Prosad, for the Respondents.

JUDGMENT.

COURTS, J.—This was a suit by one Narsing Misser for partition of joint family property, details of which are set out in schedule I of the plaint. The defendants are Birju Misser, brother of plaintiff's father Rajnath, the two sons of Birju Misser and the grandson of Birju Misser. The plaintiff's case, as made out in the plaint, is that his father Rajnath Misser died in 1310 F. S. while the family was joint and that after his death plaintiff and the defendants constituted a joint Hindu family of which Birju Misser, defendant No. 1 was the Karta. The plaintiff became major some time ago; he separated in mess from the defendants 4 years ago and now being dissatisfied with the management of the joint property by Birju Misser, he brought this suit for partition. The defendants on the other hand contend that plaintiff's father Rajnath died in 1309, that he had separated from the other defendants some years before, namely, in 1302, and that since then the defendants had been in separate possession of their respective shares, the share of Birju defendant No. 1 being larger on account of the custom of Jethangs which obtained in the family. The suit has been dismissed and the plaintiff has appealed.

The question is whether there was a partition or not, and the first point which is urged before us is that the family being a joint Hindu family, the onus was on the defendants to prove separation. The learned Subordinate Judge, after discussion, made the plaintiff produce his evidence first, and it is contended that he has been thereby seriously prejudiced and that the learned Subordinate Judge has, by, putting the onus on the wrong side, been led to a wrong conclusion. It is true that the family being a joint Hindu family, the onus was on the defendants to prove separation and it is also a fact that the learned Subordinate Judge made the plaintiff produce his evidence first. It is clear from his judgment, however, that he realised that the onus was on the defendants and although he did not in the first instance

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approach the case in the best way, it is clear from the evidence which is now all before us that the plaintiff has not in fact been in any way prejudiced.

The defendants rely principally on the Record of Rights, which shows the majority of the plots in the name of the plaintiff or of the defendants and some plots *shamilat*. The explanation of some plots being recorded as *shamilat* is that this was done in cases where the land was in the occupation of the tenants. The record also shows two *bighas* more in the possession of the defendant Birju than in the possession of the plaintiffs, and from this it has been argued that there can have been no partition. It is clear from the evidence, however, that the custom of Jethangs by which the elder brother got a larger share obtains in the family. The Record of Rights then is strong presumptive evidence of partition, particularly as it was prepared at a time when there was no enmity between the parties. Moreover the evidence of the record is corroborated by a large number of witnesses who have been examined on behalf of the defendants. The most important of these are the two Panches who made the partition. They state that the partition was made in 1302; their evidence was believed by the learned Subordinate Judge. The rest of the witnesses are all neighbours who certainly knew the state of the family. They depose that the plaintiff and defendants lived in separate houses and were separate both in mess and property. Several of the witnesses are tenants of the plaintiff and they depose that they pay rent to him separately. This evidence has all been carefully considered by the learned Subordinate Judge who has believed it, and no reason has been shown to us why it should not be accepted.

The plaintiff on the other hand relies principally on oral evidence and on the fact that there has been no mutation of names in the landlord's *sherista*. With regard to the latter point, Birju himself says that mutation was not made after partition because it involved payment of *salami* and because the parties were not on bad terms. This is a reasonable and very common explanation of non-mutation of names, and there is on the face of it

no reason why it should not be accepted. The oral evidence adduced by the plaintiff not only does not rebut the defendants' evidence, but goes far to support the stay of partition. The witnesses all admit that the parties lived in separate houses and that they were separate in mess and that their moveables have been partitioned. They also admit that there was disruption of the family in 1302 by which certain members became separate and that Birju actually has separate property. They say, however, that in spite of this the plaintiff and the defendants still remained joint. Their evidence, however, on this point is of an exceedingly doubtful character. In several instances it has been elicited by means of leading questions put by the plaintiff's Pleader, it has not been believed by the learned Subordinate Judge and it is, in my opinion, totally unworthy of credit.

In the result, then, I am satisfied that there was a partition in the time of Rajnath as alleged by the defendant and this being so, the plaintiff is not entitled to a partition. I would accordingly confirm the decision of the learned Subordinate Judge and would dismiss this appeal with costs.

ROE, J.—I agree.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 422 OF 1917.

— March 13, 1918.

Present :—Mr. Justice Oldfield and
Mr. Justice Sadasiva Aiyar.

V. R. M. RAMASAMI NAIDU—DEFENDANT
No. 1—APPELLANT

versus

T. M. MUTHUSAMIA PILLAI—

PLAINTIFF—RESPONDENT.

Provincial Insolvency Act (III of 1907), s. 16—Attachment of insolvent's property after adjudication, legality of—Vesting order, absence of, effect of—Action for money had and received, scope and, extent of—Assignment by creditor of debt due to him and his co-creditors—Collection of whole debt by assignee—Mistake

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—Suit against assignee by real owner, maintainability of.—Principal and agent.—Power-of-attorney to collect debt.—Right of agent to sell debt.

Defendants Nos. 2 to 4 and one R. were partners. R. was adjudicated an insolvent. The outstandings due to the partnership were sold in public auction by the Official Receiver, instead of R.'s share alone, which was a fourth, and were purchased by the 1st defendant. The 1st defendant, believing *bona fide* that he had purchased the whole debt due to the partnership, collected the debt. Plaintiff, who held a decree against defendants Nos. 2 to 4, attached the latter's shares in the debt. Before the attachment defendants Nos. 2 and 3 were adjudicated insolvents. The plaintiff, who was appointed Receiver in the suit in which the shares of defendants Nos. 2 to 4 were attached, brought the present suit for recovery of 3/4ths of the amount recovered by the 1st defendant from the partnership debtor as money had and received by the 1st defendant for the use of defendants Nos. 2 to 4:

Held, (1) that there being no privity between the plaintiff and the 1st defendant or between defendants Nos. 2 to 4 and the 1st defendant, the action was unsustainable; [p. 760, col. 1; p. 765, col. 2.]

Litt v. Martindale, (1856) 18 C. B. 314; 4 W. R. 465; 139 E. R. 1390; 27 L. T. (o.s.) 68; 107 R. R. 311, *Littlewood v. Williams*, (1815) 6 Taunt 277; 1 Marsh 589; 128 E. R. 1041, *Rogers v. Kelly*, (1809) 2 Camp. 123, *Chambers v. Miller*, (1862) 32 L. J. C. P. 30; 13 C. B. (n.s.) 125; 7 L. T. 856; 9 Jur. (n.s.) 626; 11 W. R. 236; 143 E. R. 50; 134 R. R. 479, *Aiken v. Short*, (1856) 1 H. & N. 210; 25 L. J. Ex. 321; 108 R. R. 526; 4 W. R. 645; 156 E. R. 1180; *Syud Loolf Ali Khan v. Musammat Afzuloonissa Begum*, 9 B. L. R. 348; 16 W. R. 20, *Tellis v. Saldanha*, 10 M. 69; 3 Ind. Dec. (n.s.) 799, *Vaidyanath Aiyar v. Aiyasamy Aiyar*, 1 Ind. Cas. 403; 32 M. 191; 19 M. L. J. 94; 5 M. L. T. 49, *Raghumoni Audhikary v. Nilmoni Singh Deo*, 2 C. 393; 1 Ind. Dec. (n.s.) 541, *Neate v. Harding*, (1851) 6 Ex. 349; 20 L. J. Ex. 250; 17 L. T. 80; 86 R. R. 328; 155 E. R. 577 and *Holt v. Ely*, (1853) 1 El. & Bl. 795; 17 Jur. 892; 118 E. R. 634; 93 R. R. 398, distinguished.

(2) that the attachment effected by the plaintiff was void and of no effect as the shares of defendants Nos. 2 to 4 had, by their adjudication, become vested in the Official Receiver [p. 758, col. 2; p. 763, col. 1.]

Official Receiver of Trichinopoly v. Somasundaram Chettiar, 34 Ind. Cas. 602; 20 M. L. J. 415, explained.

Per Oldfield, J.—Whether there is or is not a distinct order vesting an insolvent's properties in the Official Receiver, they become divisible among the creditors from the date of the adjudication in insolvency, which relates back to the petition. [p. 758, col. 2.]

An agent authorized by a power-of-attorney only to collect debts has no authority to realise their value or any part of it by selling them. [p. 759, col. 1.]

It may be permissible in India, as in England, to sue only the solvent members of a firm, when a decree is sought against the firm. [p. 759, cols. 1 & 2.]

The action for money had and received is still to be regarded, as it was originally, as based on an implied or fictional promise. The authorities, however, negative the possibility of such a promise being deduced from the *exquum et bonum*, as it may appeal to the sympathy of the Court in the particular case or from circumstances in which the defendant

having no privity with the plaintiff, when the money was received, need not be supposed to have given and had no duty to give any promise. [p. 760, col. 2; p. 761, col. 1.]

Per Sadasiva Aiyar, J.—While privity of contract between the parties is not necessary to sustain an action for money had and received, there must be what might be called some privity of a legally recognizable nature, such as some knowledge of particular facts in the man who received the money and some mistake or ignorance of fact on the part of the man who paid the money, or some relation of trust or confidence between the person who received the money and the person claiming the money or a portion thereof, on which the Court could fasten as creating the relation of principal and agent (though by fiction) between the plaintiff and the defendant. [p. 765, cols. 1 & 2.]

A co-sharer may, by a stretch of language, be treated as standing in a position of confidence towards his co-sharers, but a person who ignorantly purchases from a co-sharer the whole of the claim of all the co-sharers cannot be said to be in such a position. [p. 765, col. 2.]

Second appeal against the decree of the District Court, Tinnevely, in Appeal Suit No. 405 of 1916, preferred against the decree of the Court of the District Munsif, Tuticorin, in Original Suit No. 185 of 1915.

FACTS appear from the judgment.

Mr. M. D. Devadoss, for the Appellant. —Plaintiff's attachment was after defendants Nos. 2 and 3 were adjudicated insolvents, and plaintiff could not lay an exclusive claim to the shares of defendants Nos. 2 to 4. There was, no doubt, no order of the Insolvency Court distinctly vesting the insolvent's properties in the Official Receiver, but that is not necessary. Under section 16 of the Provincial Insolvency Act, the properties became vested in the Court from the date of adjudication and became available for *pro tanto* distribution among all the creditors.

The action is misconceived and unsustainable. Whether 1st defendant had a right or not to collect the whole debt, he did so under a *bona fide* mistake as to his right. The suit cannot be sustained on the basis of an action for money had and received, as there is no privity between the plaintiff and the defendants. There is no suggestion that plaintiff or the 2nd, 3rd or 4th defendants had any knowledge of, or connection with, the payments to 1st defendant. There is no allegation of fraud in the plaint. The decided cases where the action was allowed were mostly those in which

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a fiduciary relationship existed between the parties.

Mr. A. Krishnasawmy Aiyar, for the Respondent.—The insolvency of defendants Nos. 2 and 3 before plaintiff's attachment does not affect plaintiff's claim, as there was no order of Court at the date of attachment, vesting the insolvent's properties in the Official Receiver.

The plaintiff's suit is, in effect, one for money had and received by 1st defendant for the use and benefit of defendants Nos. 2 to 4. This form of action includes all claims arising *ex æquo et bono* and the justice of the case. *Sinclair v. Brougham* (1). In *Litt v. Martindale* (2) the action was sustained even where there was no fiduciary relation between the parties. See also *Sankunni Menon v. Govindan Menon* (3). The 1st defendant, when he collected the debt, must be deemed to have done so for the benefit of defendants Nos. 2 to 4. The scope of the action for money had and received extends to the facts of this case.

JUDGMENT.

OLDFIELD, J.—The main facts of this case can be stated shortly. Plaintiff obtained a decree against 2nd, 3rd and 4th defendants and after attaching money, alleged to belong to them and to be in 1st defendant's possession, was appointed Receiver in his own execution and in that capacity is now attempting to recover from 1st defendant, the other defendants being impleaded as persons interested. The defence of 1st defendant, the appellant before us, is that (1) the money is a sum due to 2nd, 3rd and 4th defendants and one Rajappa Mudali, the right to collect which he acquired in a legal manner; (2) if his own title is bad, some at least of the money has vested in persons other than plaintiff, those who are administering 2nd and 3rd defendants' estates in insolvency.

The lower Appellate Court's judgment is mainly occupied with the second of these contentions. The facts relied on are that 2nd defendant on 13th March 1911 and 3rd defendant on 7th October 1911 became insolvents, the one in Tinnevely and the other in Madura, and their assets, therefore, vested for the benefit of all their creditors, before plaintiff attached this portion of them on 15th July 1914. The District Munsif's finding that this was so in the case of 2nd defendant has not been attacked. He and the lower Appellate Court found otherwise in the case of 3rd defendant, because he was adjudicated insolvent by the Official Receiver, Madura, and no distinct vesting order, such as *Official Receiver of Trichinopoly v. Somasundaram Chettiar* (4) requires, having been passed, the debtor's estate is still available to satisfy individual claims. But this is unsustainable. The authority cited may entail that the estate did not in the absence of a distinct order vest in the Official Receiver. The fact, which the lower Courts overlooked, remains that in any case it vested under section 16 (1) of the Provincial Insolvency Act in the Court and became divisible among the creditors from the date of the petition and that under section 16 (2) after the date of the adjudication, which related back to that of the petition, no creditor had any remedy against it. The cases of 2nd and 3rd defendants are, therefore, similar. Plaintiff can execute his decree only by proving in their insolvencies; and on this ground at least his claim to what is alleged to be in part their money in 1st defendant's hands must fail.

The lower Appellate Court has next held against 1st defendant's right to that money on the special ground that he obtained it in proceedings, which could not bind them or 4th defendant. It consists in a debt, which he has collected in virtue of his purchase at a sale held by the Official Receiver, Tinnevely, in the administration of the estate of Rajappa Mudali above referred to and of an assignment to him, Exhibit I, by 2nd defendant. That sale is represented by 1st defendant as

(1) (1914) A. C. 398; 83 L. J. Ch. 435; 111 L. T. 1, 58 S. J. 302; 30 T. L. R. 315.

(2) (1856) 18 C. B. 314; 4 W. R. 465; 139 E. R. 1390; 27 L. T. (o. s.) 68; 107 R. R. 311.

(3) 14 Ind. Cas. 254; 37 M. 381; 22 M. L. J. 485; 11 M. L. T. 325; (1912) M. W. N. 516.

(4) 31 Ind. Cas. 602; 30 M. L. J. 415.

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being of the debts due to a firm composed of Rajappa and 2nd, 3rd and 4th defendants. But, as Exhibit B, the auction list, shows, what was sold was only "the right to arrears due to Rajappa Mudali, insolvent petitioner, as due under the day book and ledger of R. M. shop," R. M. N. being the firm above referred to. Exhibit K, the sale-deed by the Official Receiver to 1st defendant, is no doubt for "the debts due to the joint shop conducted under the style of R. M. by Rajappa Mudali." But the insolvency was, it is not disputed, that of Rajappa, not the firm; and it is sufficiently clear that only his share, not 2nd, 3rd and 4th defendants, purported to be or could have been sold. How the Official Receiver could sell one partner's share of the debts due to the firm, instead of following the normal course and selling his share in its assets, as it might be ascertained, is not clear; but this irregularity appears to have gone unnoticed until the hearing in this Court and on the view I take would not affect the conclusion. The sale in these circumstances giving no title to any portion of the debts except Rajappa's, 1st defendant has relied also on Exhibit I, the assignment of 2nd and 3rd defendants' shares, which he obtained shortly after. It is, I agree with the lower Court, ineffectual as regards 3rd defendant's share because Exhibit A, his power-of-attorney in 2nd defendant's favour, authorised the latter only to collect debts due to the shop, not to realise their value or any part of it by selling them. The result so far is that 1st defendant's right to the debts has been established only in respect of second defendant's and Rajappa's shares but that, as already found, plaintiff cannot be heard to deny it in respect of the former's. The question is next of the general objection, which has been made to his claim to the share of 4th defendant. That objection would, it may be observed, be available against his claim to the other shares also.

Before referring to this objection, I observe that plaintiff's decree, which has been shown us during the hearing, was obtained against 2nd, 3rd and 4th defendants, Rajappa not being a party. It may be permissible in India, as it is in England,

[*Hawkins v. Ramsbottom* (5)] to sue only the solvent members of a firm, when a decree is sought against it. But there is nothing in the decree, except the use of the Vilasam R. M. N. before each defendant's name, and that is insufficient, to indicate that relief was sought or given against the firm's assets, not the defendants individually, and on such a decree plaintiff's proper course was after exhausting their separate property to proceed against their shares in those assets after they had been ascertained in proper dissolution proceedings, if necessary at his instance in defendants' insolvencies or otherwise. Again, however, this point has not been taken at any stage and, I, therefore, turn to the general argument already referred to.

It may for the present purpose be considered only as regards 4th defendant, and it is that the suit will not lie, because plaintiff cannot recover from 1st defendant money which he received owing to a mistake from the debtors of 4th defendant, plaintiff's debtor. Certainly 1st defendant had no right to receive the money. But there is no finding that in doing so, he acted otherwise than honestly and in *bona fide* mistake as to his right. When or how he became aware of the invalidity of his title, as based on his purchase at the Official Receiver's sale or his assignment (in the case of 3rd defendant), if he did become aware before collecting the money, has not been ascertained; but, the plaint containing no suggestion of fraud or collusion between him and the Official Receiver or any person concerned, no presumption can be made against him. And then, as plaintiff's position can be no better than that of his debtors, the question simplified is, whether 4th defendant or either of the others could recover from 1st defendant what he has received mistakenly as due to them.

This question in terms of English Law is, whether in the circumstances an action would lie against 1st defendant for money had and received for their use; that is, for the use of plaintiff. The scope of this form of action and the considerations which led to its extension are discussed fully in *Sinclair v. Brougham* (1), although it is possible that the former has never been

(5) (1815) 6 Taunt 179; 128 E. R. 1002.

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defined exhaustively. Plaintiff's argument has accordingly been that it comprehends all claims arising, in the words of Blackstone's definition (Comm. III, 162), *ex sequo et bono* and "the justice of the case." First defendant contends, and I shall hold, that one test of its applicability to such facts, as those before us, is afforded by the existence of privity between the plaintiff and defendant, a test which those facts do not satisfy. For it is not suggested that plaintiff or 2nd, 3rd and 4th defendants had any knowledge of or connection with the payment to 1st defendant. No doubt there are, as is to be expected in the circumstances referred to in *Sinclair v. Brougham* (1), decisions, in which this test was not applied clearly. But, so far as they cannot be distinguished, they must be regarded as discredited by the mass of cases, in which the general rule was enunciated.

To refer to cases, in which the question arose, as it arises here, in connection with the recovery of payments mistakenly made to the defendant, not by the plaintiff directly, but by a third person alleged to be liable to the plaintiff, and in which there was no direct or obvious fiduciary relation between the parties, reliance has been placed first on *Litt v. Martindale* (2) and it is certainly in plaintiff's favour. But, although the objection taken by the defendant was that money had and received would not lie, the judgments (which are laconic) indicate that the action was treated as founded on fraud, of which there is no question in the case before us. In *Littlewood v. Williams* (6) the point of privity was not dealt with distinctly, but would appear to have been decided in the plaintiff's favour on the ground of their previous relation with the defendants and their servant and his, from whom he received the money, the conclusion being that it was the plaintiff's money in his hands. These English cases, therefore, the strongest on plaintiff's side, in no way detract from the insistence on the necessity for evidence of privity in others, to which I turn. In *Rogers v. Kelly* (7) the defendant received money due on plaintiff's bill from his bankers owing to a clerk confusing a bill

which had been provided for with one which had not been; and the action was dismissed on the ground that whatever plaintiff's position as against his bankers or theirs against defendant, there was no privity between the parties before the Court. And so also in *Chambers v. Miller* (8) and *Aiken v. Short* (9), in which it was regarded as material that the mistake owing to which the defendant received the money was one, with which he had nothing to do, since it was between the person who paid him, and the plaintiff. In these cases defendant was no doubt entitled to the money, though not from that person. But that was not so in *Rogers v. Ingham* (10), a suit between two persons claiming to be legatees of whom the defendant had been paid by the executor's mistake; and, though the action for money had and received was not in question, the principle now under discussion was applied, James, L. J., observing that relief against mistake had never been given in the case of a simple money demand between the parties, there being no fiduciary relation between them and no equity to supervene by reason of the conduct of either. So also in *Mackersy v. Ramsays* (11), where it was held that, because privity existed between plaintiff and defendant, his banker, who had undertaken to collect the amount of his bill and had agreed to credit him with the amount received, the latter was liable to him and that, because privity did not exist between him and the banker's agents, whose insolvency caused loss of the money, those agents were not. And in *Prince v. Oriental Bank Corporation* (12), in which *Mackersy v. Ramsays* (11) was approved, the absence of privity again afforded a ground of decision. It is to be observed that the language in *Sinclair v. Brougham* (1), on which plaintiff's claim to a liberal view of the action for money had and received mainly rests, was used rather of its early development than

(8) (1862) 32 L. J. O. P. 30; 13 C. B. (N. s.) 125; 7 L. T. 856; 9 Jur. (N. s.) 626; 11 W. R. 236; 143 E. R. 50; 134 R. R. 479.

(9) (1856) 1 H. & N. 210; 25 L. J. Ex. 321; 108 R. R. 526; 4 W. R. 645; 156 E. R. 1180.

(10) (1876) 3 Ch. D. 351; 35 L. T. 677; 25 W. R. 338.

(11) (1843) 9 Clark & Fennelly 818; 2 Bell 30; 8 E. R. 628; 57 R. R. 183.

(12) (1878) 3 A. C. 325; 47 L. J. P. C. 42; 38 L. T. 41; 26 W. R. 543.

(6) (1815) 6 Taunt 277; 1 Marsh. 589; 128 E. R. 1041.

(7) (1809) 2 Camp. 123.

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of its scope as settled at the present time by authority. It is no doubt still to be regarded, as it was originally, as based on an implied or fictional promise (see the judgments of Lords Haldane and Dunedin). But *Sinclair v. Brougham* (1) is completely in accordance with the great body of other authority in negating the possibility of such a promise being deduced, as plaintiff here would deduce it from the *requum et bonum*, as it may appeal to the sympathy of the Court in the particular case, or from circumstances, in which the defendant having no privity with the plaintiff, when the money was received, need not be supposed to have given and had no duty to give any promise. Here 1st defendant was clearly under no such duty. For he collected the debts due to 4th defendant and others without reference to them and was not enabled to do so by reason of any fiduciary relation with them or in consequence of any fact independent of the willingness of their debtors to pay him.

The conditions, on which a plaintiff can sue for money received to his use, have been discussed in India more often with reference to the applicability of Article No. 62, Schedule I, Limitation Act, than to the existence of a right of action; and, when the latter has been in question, the issue of privity has seldom arisen or been raised. The cases, therefore, are of little assistance. Plaintiff, however, relies on *Syud Looft Ali Khan v. Musammat Afzuloonissa Begum* (13) and *Tellis v. Saldanha* (14), the latter being explained in *Vaidyanath Aiyar v. Aiyasamy Aiyar* (15). But in all these the parties were in the relation of joint tenants or co-owners and the principle of section 90, Trusts Act, was applicable, the defendants having in each case received the money sued for as representing the plaintiffs and themselves; and a fiduciary relation was, therefore, in question. *Sankunni Menon v. Govindan Menon* (3) was no doubt decided with reference to Blackstone's definition of the action and a very general statement that the defendant's obligation arose *ex æquo et bono*. But the suit was to recover money, for which no

doubt defendant, a member of a Tarwad, and plaintiff had given a pro-note, apparently by way of acknowledgment, to the Karnavan; and, when the money was returned from the Government deposit, for which defendant originally received it, his receipt of it was apparently regarded as part of the transaction, into which he had entered with the Karnavan's concurrence for the Tarwad's benefit. The decision, therefore, might, it would seem, have been based on a ground narrower than the one adopted and consistent with the conclusion already reached on English authority. In it reference was made to *Mahomed Wahib v. Mahomed Ameer* (16), a case, in which the fiduciary relation between the parties, co-sharers, was clear and in which, therefore, nothing turned on the reference it contains to *Litt v. Martindale* (2), already cited, as an action for money had and received. This reference in fact merely reproduced that made in another case relied on by plaintiff, *Raghumoni Audhikary v. Nilmoni Singh Deo* (17), in which *Litt v. Martindale* (2), *Neate v. Harding* (18) and *Holt v. Ely* (19) were referred to. But the claim in the two last mentioned cases was for money taken wrongfully from the plaintiff, directly in the one and from his agent in the other; and the question of privity was, therefore, not raised in them. It has been pointed out that it was not discussed in the first mentioned; and in *Raghumoni Audhikary v. Nilmoni Singh Deo* (17), the claim being for money obtained fraudulently by the defendant from the Collector, who received it as plaintiff's deposit and apparently was holding it for him, it would probably have been useless to raise it. On the other hand, in *Ramaswami Aiyar v. Kanthayyan* (20), also a case of withdrawal of money from a collector, at but not one in which it was held as a deposit or withdrawn by fraud, although the relevancy of the reference to *Kendal v. Wood* (21) is not clear, the suit was held un-

(16) 32 O. 527; 1 C. L. J. 167.

(17) 2 C. 393; 1 Ind. Dec. (N. s.) 541.

(18) (1851) 6 Ex. 349; 20 L. J. Ex. 250; 17 L. T. 80; 86 R. R. 328, 155 E. R. 577.

(19) 1853) 1 El. & Bl. 795; 17 Jur. 892; 118 E. R. 614; 93 R. R. 598.

(20) 9 M. L. J. 57.

(21) (1871) 6 Ex. 243; 39 L. J. Ex. 167; 23 L. T. 309.

(13) 9 B. L. R. 348; 16 W. R. 20.

(14) 10 M. 69; 3 Ind. Dec. (N. s.) 799.

(15) 1 Ind. Cas. 408; 32 M. 191; 19 M. L. J. 94; 5 M. L. T. 49.

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sustainable, on the ground that the payment by the Collector and the receipt by defendants were *bona fide* and without notice of plaintiff's preferential right; and *Harihar Missir v. Syed Mohammad* (22) was a case, in which evidence of privity was insisted on and the suit was held to be governed by Article No. 62 only because that evidence was sufficient. There is accordingly no reason for holding that the principle accepted in England has been rejected in this country. We must, therefore, decide that plaintiff's suit does not lie for any of the money claimed.

This conclusion renders it unnecessary to deal with the argument of Mr. A. Krishnaswamy Aiyar for plaintiff relating to 4th defendant's share of the amount received by the 1st defendant and based on Lindley on Partnership, 6th Edition, page 692, or with the memorandum of objections. The result is that the appeal is allowed and the suit dismissed, plaintiff to pay the 1st defendant's costs throughout. The other defendants have not been made parties to the appeal. The memorandum of objections is dismissed with costs.

SADASIVA AIYAR, J.—The material facts may be shortly stated thus:—The Official Receiver of the Tinnevely District sold by public auction the debts due to a partnership of four persons who carried on business in Tuticorin. The principal partner, Rajappa Mudali, was adjudicated an insolvent with effect from the 5th December 1908. The partnership business itself had been closed in February 1908 (see Exhibit I). I think it may be taken that the partnership had become dissolved between February 1908 when the business was closed and December 1908 when Rajappa was declared insolvent, except, of course, that the rights and obligation of the partners continued in all things necessary for winding up the business of the partnership. (Section 263 of the Contract Act.) When Rajappa Mudali was adjudicated an insolvent, he was entitled only to $\frac{1}{4}$ th share in the assets of the partnership, which assets principally consisted of the outstandings due to the partnership by its debtors. The Official Receiver seems to have put up for auction

sale the whole of the outstandings due to the partnership and the 1st defendant became the purchaser thereof in October 1910 (see Exhibit K) for Rs. 250. I think it is clear that the 1st defendant (the appellant before us) never intended to purchase only Rajappa Mudali's $\frac{1}{4}$ th share in the outstandings and it follows that he never considered himself as a co-sharer with the other three partners of Rajappa Mudali, (namely, the defendants Nos. 2, 3 and 4) of the right to recover those outstandings. He never recognised the 4th defendant as having been a partner at all, and the 4th defendant himself always repudiated that he was a partner, though the finding of the lower Courts (which is binding on us in second appeal) is that he was a partner.

The 2nd defendant in November 1910 (within three weeks of the 1st defendant's purchase) admitted in Exhibit I that the whole of the outstandings belonged to the 1st defendant by his purchase at the Receiver's sale, and on receipt of a consideration released all his (2nd defendant's) right in, or connection with, the outstandings in favour of the 1st defendant. Thus the 1st defendant became legally entitled at least to half share in those outstandings, whether his claim to the whole of the outstandings was well founded or not.

The plaintiff got a decree for money against the defendants Nos. 2 to 4 in a Small Cause Suit of 1910. The 1st defendant persuaded a debtor of the firm to agree to pay about Rs. 1,650 to him in compromise of a suit brought by him against that debtor and afterwards received Rs. 450 more than three years before this suit and again Rs. 1,200 in 1912 within three years before this suit from that debtor. The plaintiff, in execution of his Small Cause decree against the defendants Nos. 2 to 4, attached $\frac{2}{3}$ ths of this amount of Rs. 1,650 in July 1914, though meanwhile the 2nd defendant had relinquished his rights to the 1st defendant in November 1910 and had even been declared insolvent in the Madura District Court with effect from March 1911. The 3rd defendant also had been adjudicated insolvent in the same Court with effect from October 1911. Thus it is clear that the plaintiff's attachment in 1914 (assuming that the 2nd and the 3rd defendants continued to

(22) 37 Ind. Cas. 30; 20 C. W. N. 983; 1 P. L. J. 374; 2 P. L. W. 401.

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have each $\frac{1}{4}$ th share in the outstandings of the firm notwithstanding the Tinnevely Receiver's auction sale of the whole to the 1st defendant in October 1910) was wholly ineffectual so far as the 2nd and the 3rd defendants' shares were concerned, as the said shares had become vested in the 1st defendant and the Official Receiver respectively or in the Official Receiver of Madura alone before the attachment of July 1914.

The plaintiff brought the present suit in April 1915 for recovery of $\frac{3}{4}$ ths of Rs. 1,650 (Rs. 1,237-8-0) recovered by the 1st defendant in 1911-12 from the partnership-debtor. (The plaintiff had been appointed Receiver in the suit in which the shares of the defendants Nos. 2 to 4 were attached in 1914.) The suit was brought on the allegation that $\frac{3}{4}$ ths share of the money so recovered by the 1st defendant was money had and received by the 1st defendant for the use of the defendants Nos. 2 to 4.

The lower Courts have given a decree in favour of the plaintiff for half of Rs. 1,200 (that is, Rs. 600) which the 1st defendant collected from the partnership-debtor in 1912 within three years of the suit, treating that Rs. 600 as the half share of the defendants Nos. 3 and 4 received by the 1st defendant for the use of the defendants Nos. 3 and 4. I shall at once dispose of one of the points that arise in the case by stating that the plaintiff's attachment of the 3rd defendant's alleged $\frac{1}{4}$ th share in the Rs. 1,200 is legally ineffective as that share, assuming it to have existed in 1911, had become vested in the Official Receiver of Madura who was not a party to the plaintiff's execution proceedings of 1914. The second appeal has, therefore, to be allowed in any event to the extent of half the amount decreed in plaintiff's (respondent's) favour by the lower Courts.

The only question, therefore, remaining is whether the 1st defendant received Rs. 300, being the $\frac{1}{4}$ th share (of the Rs. 1,200) due to the 4th defendant, for the use of the 4th defendant and whether the 1st defendant is, therefore, liable to pay over that Rs. 300 with interest from 23rd April 1915 to the plaintiff. The question of law involved must be admitted to be one of very great difficulty. Suppose A and B are joint creditors of C, who owes them Rs. 100. D, a stranger, purchases the whole debt from A,

believing that A was entitled to transfer the whole debt of Rs. 100 to D. D then is paid by C, the debtor, the whole of the Rs. 100. Can B, the co-creditor, treat Rs. 50 of the Rs. 100 as having been received by D for B's use and sue to recover it from D? (It will be seen that I have tried in the above illustration to eliminate as far as possible unnecessary incidents appearing in the facts of the present case but not bearing on the question of law.)

Now it is clear that if A himself received the whole of the Rs. 100 from the debtor C, B, his co-creditor, could treat Rs. 50 as money had and received by A for B and sue A for it. The question is whether when D got the transfer of the debt from A, believing that D got the title to it free from any claim to any portion of it on the part of anybody else, and when D recovered the whole of the money from the debtor C on that footing, D could be treated as having received half of it on behalf of B. In *Sinclair v. Brougham* (1). (House of Lords), Lord Chancellor Haldane, Lord Dunedin and Lord Sumner have considered the nature of the action for money had and received. The Lord Chancellor says (see pages 415 to 417*):—"Broadly speaking, so far as proceedings *in personam* are concerned, the common law of England recognises only actions of two classes, those founded on contract and those founded on tort. When it speaks of actions arising *quasi ex contractu*, it refers merely to a class of actions in theory based on a contract which is imputed to the defendant by a fiction of law..... The action (for money had and received) was in principle one which rested on a promise to pay, either actual or imputed by law..... Lord Mansfield explained..... 'If the defendant be under an obligation, from the ties of natural justice, to refund, the law implies a debt, and gives this action founded on the equity of the plaintiff's case, as it were upon a contract'..... The form of the common *indebitatus assumpsit* count... was a form of a claim which had been very gradually evolved. The researches of recent writers appear to me to have placed its origin in its true light. The basis of actions of this kind was originally tort, a writ having been framed in *consimili casu* under the provisions of Chapter 24 of the Statute of Westminster

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(13 Edw. 1). By degrees, out of this action on the case and as one of its forms, a new form which was soon to diverge wholly from tort, the action of *assumpsit* arose..... Holt, C. J., is reported to have said: 'That the notion of promises in law was a metaphysical notion for the law makes no promise, but where there is a promise of the party.' Yet the observation of Holt, C. J., notwithstanding, a little later on this 'metaphysical notion' became firmly established. For it was just the fiction of attributing a promise in a multitude of cases where in reality there was none, which finally gave the action its comprehensive range and made it available even where no fact importing or implying privity of contract could be proved. The history of the action of the *assumpsit* has been described by a writer to whom lawyers and historians alike owe much, the late Professor Ames of Harvard University, in language which shows how easily the fiction of a promise grew into part of the law. Speaking of the action of *assumpsit* generally he says:—'In its origin an action of tort, it was soon transformed into an action of contract, becoming afterwards a remedy where there was neither tort nor contract. Based at first only upon an express promise, it was afterwards supported upon an implied promise, and even upon a fictitious promise. Introduced as a special manifestation of the action on the case, it soon acquired the dignity of a distinct form of action, which superseded debt, became concurrent with account, with case upon a bailment, a warranty, and bills of exchange, and competed with equity in the case of the essentially equitable *quasi* contracts growing out of the principle of unjust enrichment.' " Lord Dunedin says at pages 431 to 433*:—"The familiar case is the paying of money by A to B under the mistaken impression in fact that a debt was due, when in truth there was no debt due. It was to fit cases of this sort that the common law evolved the action for money had and received. I think one cannot help feeling that this action was truly the putting of an equitable doctrine under a legal form. I am using the word equitable in a non-technical sense, for I am not suggesting for a moment that the

action was borrowed from technical equity. My noble and learned friend Lord Sumner in his opinion, which I have had the advantage of seeing, has conclusively shown that it was not. But being a legal form, it does not admit in spite of Lord Mansfield's dictum that such an action was very beneficial and to be encouraged, of being stretched beyond its capacity..... My Lords, I confess that for a person not bred to the common law to express an opinion as to the true meaning and extent of common law actions is to handle *periculosæ plenum opus alexi*." Lord Sumner, says at pages 453 to 456*: "The action for money had and received cannot now be extended beyond the principles illustrated in the decided cases, and although it is hard to reduce to one common formula the conditions under which the law will imply a promise to repay money received to the plaintiff's use, I think it is clear that no authority extends them far enough to help the appellants now." Then the noble Lord referred to the argument invoking Lord Mansfield's authority that: "Whenever it is *ex æquo et bono* for A to repay money which he has received from B and would be against conscience for A to keep it, then B has an equity to have A decreed to repay it," and proceeded: "My Lords, I cannot but think that Lord Mansfield's language has been completely misunderstood..... Even the decision in *Moses v. Macferlan* (23), which has since been dissented from, for some time unsettled the law [see Smith's Leading Cases, Notes to *Marriot v. Hampton* (24)], and this last-mentioned case is one which illustrates the proposition that money is not thus recoverable in all cases where it is unconscientious for the defendant to retain it, for no one could doubt that Hampton's retention of the money in that case was very like sharp practice... With whatever complacency the Court of King's Bench might regard the views expressed in *Moses v. Macferlan* (23), protests were very early made against it in the Common Pleas [*Johnson v. Johnson* (25)], and in *Miller v. Atlee* (26) Pollock, C. B., bluntly (23) (1780) 2 Burr. 1005; 97 E. R. 676. (24) (1797) 7 T. R. 269; 2 Sm. L. C. (11th Ed.) 421; 12th Ed. 403; 2 Esp. 546; 101 E. R. 969; 4 R. R. 439. (25) (1802) 3 Bos. & Pul. 163 at p. 169; 127 E. R. 89; 6 R. R. 736. (26) (1849) 3 Ex. 799; 13 Jar. 431; 77 R. R. 844; 154 E. R. 1068.

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declared the notion that the action for money had and received was an equitable action to be 'exploded' and Parke, B., sitting by him, did not say him nay. This episode is reported only in 13 Jurist, but it smacks of truth..... There is now no ground for suggesting as a recognizable 'equity' the right to recover money in personam merely because it would be the right and fair thing that it should be refunded to the payer." I have quoted thus at a length, which may be called wearisome, to show how dangerous it would be for an Indian Judge like myself to deal in my own language with the nature, scope and extent of the action for money had and received or to classify accurately and exhaustively the circumstances which would entitle a person to bring an action for money had and received against another, especially when Latin phrases like *ex æquo et bono* have to be freely used by Judges and Counsel to explain themselves fully. Lord Sumner at page 458* says: "Of equitable principles I hesitate to speak confidently." Lord Dunedin has in a passage which I have already quoted expressed himself even still more diffidently as "a person not bred to the common law" about his ability to express an opinion as to the true meaning and extent of common law actions. In *Sankunni Menon v. Govindan Menon* (3) Benson, J., and myself did quote Blackstone to indicate the wide nature of the common law action for money had and received in the olden days. But the scope of that action ought not to be extended beyond what would be covered by the principles governing the numerous decisions which have laid down what kinds of actions do come within it and what kinds of actions do not. In the case in *Sankunni Menon v. Govindan Menon* (3) the defendant who received the money knew from the beginning that the money belonged to his Tarwad and not to himself and the person who paid it did not know it. While privity of contract between the parties is, of course, not necessary to sustain such an action, I think there must be what might be called some privity of a legally recognizable nature, such as some knowledge of particular facts in the man who received the money, and some mistake or ignorance of fact on the part of the man who paid the money, or some relation

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of trust and confidence between the person who received the money and the person claiming the money or a portion thereof, on which the Court could fasten as creating the relation of principal and agent (though by fiction) between the plaintiff and the defendant. I shall try to illustrate what I mean by a simple example, *B* owes money to *A*. *A* dies. There is a dispute between *C* and *D*, each claiming to be the sole heir of *A*. *B* pays the money to *C*. Can *D* sustain an action for money had and received against *C* even if he establishes against *C* that he is the rightful heir and not *C*? I am clearly of opinion that he could not do so, his only remedy being against the debtor *B*. In the present case, it is not shown that when the partnership-debtor paid money to the 1st defendant, the 1st defendant knew that he had not a right to the whole of the money paid to him and it is also not shown that he was ever in a position of trust or confidence towards the 4th defendant and it is also not shown that the debtor had any fraudulent motive in paying the whole money to 1st defendant. A co-sharer may, by a stretch of language, be treated as standing in a position of confidence towards his co-sharers, but a person who ignorantly purchases from a co-sharer the whole of the claim of all the co-sharers cannot be said to be in such a position. I, therefore, agree that the plaintiff has no cause of action against the 1st defendant and I concur in the order proposed by my learned brother.

M. C. P.,

Appeal allowed.

PATNA HIGH COURT.

APPEAL FROM ORIGINAL ORDER No. 255 OF 1917.

December 3, 1918.

Present:—Justice Sir Dawson Miller, Kt., Chief Justice, and Mr. Justice Mullick.

Musammât SUKHDEI KUMRI—DECEED-HOLDER—APPELLANT

versus

Rai Bahadur MAHAMAYA PRASAD SINGH AND OTHERS—JUDGMENT DEBTORS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 2 (3)

SUKHDEI KUMRI v. MAHAMAYA PRASAD.

—Execution of decree—Payment out of Court not certified, effect of.

Where a judgment-debtor makes a payment out of Court to the decree-holder towards the satisfaction of the decree, he is nevertheless not entitled in execution proceedings under the decree to claim the benefit of the payment unless he has complied with the provisions of Order XXI, rule 2, sub-rule (3) of the Civil Procedure Code. [p. 767, col. 1.]

Appeal from the decision of the Subordinate Judge, Darbhanga.

FACTS.—The appellant obtained a decree for Rs. 2,000 against the respondents on the 2nd of December 1910. On the 24th of February she made an application for execution of the decree, in which she admitted payment of Rs. 750. The judgment-debtors entered an objection that the entire sum had been paid up, except Rs. 333-5-3 which they deposited in Court. They produced several receipts to prove the payments. The Sub-Judge believed the receipts and held that the decree had been paid up. The decree-holder appealed to the High Court.

Mr. Parmeshwar Dayal (with him Messrs. Jagannath Prasad and L. K. Jha), for the Appellant, contended that the payments alleged to have been made by the judgment-debtors but not admitted by the appellant were not certified payments in accordance with the provisions of Order XXI, rule 2 of the Civil Procedure Code. The execution Court was not competent to recognize such payments under the provisions of sub-rule 3 of rule 2 of Order XXI. He relied on *Ram Doyal Banerjee v. Ram Hari Pal* (1), *Ana Muna Veena Rana Veerappa Chettiar v. Ponnayya* (2), *Janki Prashad v. Thakur Das* (3), *Gokul Chand v. Brika* (4) and *Bhajan Lal v. Cheda Lal* (5).

Mr. Sudhansu Kumar Mitra (for Mr. Saroshi Charan Mitra), for the Respondents, contended that the payments had been held to be genuine payments and therefore substantial justice had been done in the case. The High Court should not interfere in such cases.

JUDGMENT.

MILLER, O. J.—This is an application for execution of a decree. The appellant Musammam Sukhdei Kumri obtained a decree

for a sum of Rs. 2,000 in respect of her maintenance and cost of certain ornaments against the respondents, who were members of the same family. On the 24th February 1917, she took out execution proceedings under the decree. A question then arose between the parties as to whether any and if so what part of the decree had already been satisfied. The appellant, plaintiff in the suit, admitted payment of the sum of Rs. 1,083-10-3, including two sums of Rs. 333-5-3 and Rs. 83 10 6 paid or deposited in Court pending the execution proceedings. The amount which the appellant now claims to be due is a sum of Rs. 916 and odd.

The figures are set out in the judgment of the Subordinate Judge now appealed against, and a question arose before him on behalf of the respondents, whether certain sums which are there referred to had been paid out of Court by the respondents to the appellant in satisfaction of the decree, leaving a balance due of about Rs. 100 only.

Now the learned Subordinate Judge, after apparently hearing the evidence on this point of both the parties, came to the conclusion that the sums had, in fact, been paid and deducted them from the amount claimed; but the learned Subordinate Judge has unfortunately omitted to take into consideration the effect of Order XXI, rule 2 of the Civil Procedure Code, which provides: "Where any money payable under a decree of any kind is paid out of Court or the decree is otherwise adjusted in whole or in part to the satisfaction of the decree-holder, the decree-holder shall certify such payment or adjustment to the Court whose duty it is to execute the decree and the Court shall record the same accordingly." It is further provided if the decree-holder fails to do so, "The judgment-debtor also may inform the Court of such payment or adjustment and apply to the Court to issue a notice to the decree-holder to show cause on a date to be fixed by the Court why such payment or adjustment should not be recorded as certified." And then follows sub-clause (3), which says "A payment or adjustment which has not been certified or recorded as aforesaid shall not be recognised by any Court executing the decree."

Now what happened in the present case was that the amount in dispute was accord-

(1) 20 C. 32; 10 Ind. Dec. (N. S.) 23.

(2) 17 M. L. J. 527.

(3) 13 Ind. Cas. 21.

(4) 23 Ind. Cas. 753; 12 A. L. J. 387.

(5) 24 Ind. Cas. 215; 12 A. L. J. 825.

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ing to the respondents paid to the appellant out of Court and the Subordinate Judge so found although the appellant denied it. If the sums were in fact paid by the respondents, judgment-debtors, as the Subordinate Judge finds they were, they nevertheless are not entitled in the execution proceedings under the decree to claim the benefit of the payment unless they have complied with the provisions of Order XXI, rule 2, sub-rule (3). It may possibly be a hardship in such cases if in fact the money has been paid or the decree otherwise adjusted. We have no doubt, however, that the rule was introduced with the very object of avoiding in execution proceedings disputes between the parties and frequently long enquiries as to what sums had or had not been paid out of Court in satisfaction of the decree. Unfortunately the Subordinate Judge has not adopted the right procedure as laid down in Order XXI, rule 2.

We are, therefore, of opinion that this appeal ought to be allowed and the judgment of the Subordinate Judge set aside and judgment should be entered for the appellant for the principal sum of Rs. 916-5-9. The interest falling due in respect of that amount, if any, should be calculated by the Subordinate Judge and added to the amount decreed. The appellant is entitled to costs of this appeal.

MULLICK, J.—I agree.

Appeal allowed.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEALS NOS. 10, 11 AND 15 OF 1916.

August 29, 1918.

Present:—Mr. Stuart, A. J. C., and Pandit Kanhaiya Lal, A. J. C.

Pandit IKBAL NARAIN AND OTHERS—
DEFENDANTS—APPELLANTS

versus

Pandit RAJENDRA NARAIN—PLAINTIFF AND
SURAJ NARAIN AND ANOTHER—DEFENDANTS
—RESPONDENTS.

Hindu law—Mitakshara—Adoption, rules of, modification of, by custom—Kashmiri Brahmans—Daughter's son, whether can be adopted—Custom, proof of—Proof, nature of—Evidence Act (I of 1872), ss. 32 (5), 49—Co-sharers—Joint property, entire, in possession of one co-sharer—Co-sharers, remedy of, nature of—Pro-

perty with one member of joint Hindu family—Joint family property—Presumption.

The rule of the Mitakshara which lays down that a boy whose mother the adoptive father could not have married in her maiden state cannot be lawfully adopted, is not recognised by Kashmiri Brahmans so that the adoption of a daughter's son is permissible according to the custom prevailing among them. [p. 769, col. 2.]

Where the custom of a community is in question and it is clear that direct evidence cannot be obtained of instances of such custom, which occurred before the memory of man, persons, having special means of knowledge, are, in view of the provisions of sections 32 (5) and 49 of the Evidence Act, permitted to testify to their existence from such knowledge as they might possess of what has been practised in their community or from what they might have heard from persons, having special means of knowledge of what was practised before. [p. 773, col. 1.]

Where a co-sharer is in possession of the entire joint property, the remedy of the other co-sharers as against the said co-sharer lies not by ejectment of the co-sharer but by partition of the joint property. [p. 775, col. 2.]

Property in the hands of and dealt with by one member of a joint Hindu family cannot be presumed to form part of the joint family property but it must be shown that it belonged to the joint family or was purchased out of joint family funds. [p. 775, col. 2.]

Appeals against the decree of the Subordinate Judge, Mohanlalganj (Lucknow), dated the 8th November 1915.

Mr. B. E. O'Connor, for the Appellants.

Messrs. J. N. Chak, and M. N. Chak, the Hon'ble Pandit Gokaran Nath Misra, Pandit Janki Nath and Pandit Chand Narain Har-kauli, for Respondent No. 1.

The Hon'ble Syed Wazir Hasan, for Respondents Nos. 2 and 3.

JUDGMENT—The parties to the suits out of which these appeals have arisen are Kashmiri Brahmans, settled in Oudh. The exact time when the family to which the parties belong migrated to these provinces is not ascertainable, but it is not disputed that during the period of Moghul rule, which extended to Kashmir, numerous families of Kashmiri Brahmans came and settled in the Punjab and in these provinces and elsewhere for the purpose of business or employment and that during the period of Pathan dominion, following the disruption of the Moghul empire, the atrocities committed by the Pathan rulers compelled a still larger number to leave their country and settle elsewhere to escape persecution and forcible conversion at their hands.

The number of Kashmiri Brahmans

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settled in British India does not, according to the evidence, exceed 5,000 souls, males, females and children all told. They comprise about 450 families. The use of the Kashmiri language is little known among them except to the elderly few, but they have preserved their religious and social practices and customs intact, and many of the ceremonies which they observe on the occasions of marriages, deaths and adoption are still recognised or known by their Kashmiri names.

The parties admit that they are governed by the Mitakshara Law, except in so far as it is inconsistent with or has been modified by the customs prevailing among them. According to the evidence of Pandit Bishambhar Nath (P. W. No. 27), the Mitakshara is little known in Kashmir and Apararka is more generally followed there. Dr. Buhler says that he found the Apararka in common use there (Dr. Jolly's Tagore Law Lectures, 1853, page 24). Apararka is a commentary on the Institutes of Yagnyavalkya by Aparaditya, the King of the Konkan, in Southern India. The Mitakshara was written by an ascetic who was at one time attached to the Court of King Vikram of Kalyan in Southern India and is similarly a commentary on the Institutes of Yagnyavalkya. On the question of adoption there is little or no difference between the Mitakshara and the Apararka.

The dispute between the parties arises out of the adoption of Rajendra Narain by his maternal grandfather Ram Narain. Bishun Narain, the head of the family to which the parties claim to belong, died in 1867, leaving four sons, Raj Narain, Ram Narain, Bakht Narain and Suraj Narain. He left considerable property, to which additions were made after his death. Raj Narain and Ram Narain were practising Pleaders. Bakht Narain was a member of the Provincial Judicial Service of Oudh. Suraj Narain was employed in the Amethi Estate. They lived jointly and carried on some joint family business at Lucknow. Raj Narain, the eldest of the four brothers, died in 1890, leaving a widow and a daughter. Ram Narain then became the head and manager of the family. He had a daughter Musammat Prano, who was married to Ratan Lal defendant No. 8. On or about the 1st May 1895 Ram Narain adopted Rajendra

Narain, one of the sons of Musammat Prano, as his son. He died on the 19th October 1900 while living jointly with his brothers and their sons. On his death Bakht Narain got his name entered in the Revenue papers in the place of Ram Narain as the head of the joint family. Rajendra Narain was a minor at the time. At the end of 1903 Suraj Narain applied to the Revenue Authorities to have his and Rajendra Narain's names entered in respect of two-thirds of the family property but was unsuccessful.

Suraj Narain and his son then filed a suit against Bakht Narain and his sons for the partition of a half share of the joint family property, alleging that they had separated in October 1901. They ignored the right of Rajendra Narain as an adopted son of Ram Narain and did not make him a party to the suit. The suit was decreed by the Additional Judge of Hardoi on the 27th August 1908 and Suraj Narain was awarded mesne profits with effect from October 1901. The latter portion of the decree was subsequently varied on appeal by this Court on the ground that the family had continued to be joint till the date of the suit, and a decree directing accounts to be taken from the date of the suit was substituted. That decision was confirmed by their Lordships of the Privy Council on the 10th December 1912 [*Suraj Narain v. Iqbal Narain* (1)].

On the 10th April 1911 Rajendra Narain filed the present suit, which has given rise to First Appeals Nos. 10 and 15 of 1916, claiming separate possession by partition of a one-third share of the family properties on the strength of his adoption by Ram Narain and exclusive possession of certain other properties which, he alleged, had been acquired by Ram Narain out of his personal income, with mesne profits from the date of his death. He asserted that he attained majority on the 20th August 1908, that is, within three years of the institution of the suit and that this adoption by Ram Narain was valid according to the custom prevailing among the Kashmiri

(1) 18 Ind. Cas. 30; 16 O. C. 123; 35 A. 80; 24 M. L. J. 345; 13 M. L. T. 194; 17 C. W. N. 333; 11 A. L. J. 173; (1913) M. W. N. 183; 17 C. L. J. 253; 15 Bom. L. R. 456; 40 I. A. 40 (P. C.).

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Brahmans. The defendants denied the existence of such a custom and pleaded, *inter alia*, that the claim of the plaintiff was barred by limitation. The learned Subordinate Judge found that the plaintiff was born on the 30th August 1890 and that his claim was within time from the date of his attaining majority. He also found that the custom set up by the plaintiff was established and that his adoption was valid in law. He decreed the claim accordingly for partition of a one-third share out of such properties as were proved to have belonged to the joint family and for mesne profits from the date the plaintiff was excluded. He held that Bakht Narain who succeeded Ram Narain as the manager of the family, and after his death his sons and grandsons, defendants Nos. 3 to 7, who have been in possession of the family property, were liable to account for the profits of the plaintiff's share.

On the 23rd October 1912 the sons and grandsons of Bakht Narain filed a cross-claim, which has given rise to First Appeal No. 11 of 1916, seeking to eject Rajendra Narain and his natural father, Ratan Lal, from a house situated in Hardoi, which was in the occupation of Ram Narain at the time of his death and has continued in the occupation of his son-in-law, Ratan Lal, and his adopted son, Rajendra Narain, since. Rajendra Narain pleaded that the house in question was built by Ram Narain and belonged to him as his adopted son and that his natural father, Ratan Lal, was living in it on his behalf. The defence of Ratan Lal was the same. The learned Subordinate Judge found that the house formed part of the joint family estate, and holding that Rajendra Narain was the lawfully adopted son of Ram Narain he allowed him and Ratan Lal to continue to live in the house till a partition was effected.

The first point for consideration in these appeals is whether the adoption of the son of a daughter is permissible according to the custom prevailing among the Kashmiri Brahmans. The ordinary rule, as recognised by their Lordships of the Privy Council in *Bhagwan Singh v. Bhagwan Singh* (2), is that the adoption of a daughter's

(2) 21 A. 412; 1 Bom. L. R. 311; 3 C. W. N. 454; 26 I. A. 153; 7 Sar. P. C. J. 474; 9 Ind. Dec. (N. S.) 971.

son by a Hindu of any of the three regenerate classes, Brahman, Kshatriya and Vaishya, is repugnant to the Hindu Law and is illegal and void; but as pointed out by Sir Arthur Wilson in *Rup Narain v. Gopal Devi* (3), the above general rule may be varied by a family custom and often is so varied. In the Punjab adoptions of a daughter's son are not uncommon (Tupper's Customary Law of the Punjab, Volume II, page 111, and Volume III, page 78, and Sarkar's Law of Adoption, Second Edition, page 341). In the Bombay Presidency they are similarly common (Mandlik's Vyavahara Mayukha, Volume II, page 478) and according to Mayne they are not uncommon elsewhere too (Mayne's Hindu Law, 8th Edition, page 174). In the Madras Presidency the existence of a custom recognising such an adoption among Nambudri Brahmans has been expressly upheld [*Eranjoli Illath Vishnu Nambudri v. Eranjoli Illath Krishnan Nambudri* (4), *Vayidinada v. Appu* (5) and *Appayya Bhattar v. Vengu Bhatta* (6).]

Among Kashmiri Brahmans the adoption of a daughter's son is similarly common and recognised by the community as valid. Some of the leading members of the community, residing in these provinces and the Punjab and Kashmir, have given evidence that the restriction regarding the possibility of a valid marriage between the adoptive father and the natural mother of the boy to be adopted before she was married is not recognised among them. The Hon'ble Pandit Moti Lal Nehru (P. W. No. 20), one of the leading Advocates of the Allahabad High Court, for instance, deposes: "Among Kashmiri Pandits daughter's sons and sister's sons are adopted as sons. That is my belief and conviction. I came to know of it among Kashmiri friends and relations. I have never heard of such an adoption being ever challenged in our community. I believe in it as a custom. I have heard and known such adoptions all along." On one occasion, he adds, when he was preparing for the law

(3) 3 Ind. Cas. 382; 36 C. 780 at p. 795; 6 A. L. J. 567; 10 C. L. J. 58; 13 C. W. N. 920; 5 M. L. T. 423; 11 Bom. L. R. 833; 19 M. L. J. 548; 93 P. R. 1909; 36 I. A. 103; 68 P. L. R. 1910; 146 P. W. R. 1909 (P. C.).

(4) 7 M. 3; 2 Ind. Dec. (N. S.) 588 (P. B.).

(5) 9 M. 44; 3 Ind. Dec. (N. S.) 427 (P. B.).

(6) 15 M. L. J. 211.

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examination he heard his mother, since deceased, talking to a Kashmiri lady visitor about the adoption of a daughter's son which had taken place at or about that time and on his saying that such an adoption was contrary to the Hindu Law, his mother remarked that whatever might have been the law such was the usage and a number of instances of such adoptions were given by her. The Hon'ble Dr. Tej Bahadur Sapru (P. W. No. 25), another prominent Advocate of the Allahabad High Court, similarly says: "In our community there exists no restriction against the adoption of a person whose mother is prohibited in marriage to the person adopting. Daughter's son, sister's son and younger brothers are adopted among us as sons. It is an old custom so far as I have heard. I heard from my grandfather who died in 1906 at the ripe age of 78 or 79 and from some other elders at Delhi and in Kashmir. So far as my informants are concerned, they are all dead." The Hon'ble Pandit Jagat Narain (P. W. No. 5), one of the leading Vakils of this Court, gives evidence to the same effect and says that the adoption of a daughter's son was considered valid by the community according to the custom prevailing among the Kashmiri Brahmans.

The Hon'ble Pandit Bishun Narain Dar (P. W. No. 10), a Barrister-at-law and a prominent member of the Kashmiri Brahman community, states: "In our community we do adopt persons whose mother is prohibited in marriage to the person adopting; a sister's son, a daughter's son and a brother are adopted by us according to custom. I have heard of this usage and seen it observed in our Kashmiri community. I heard of this usage from my father, uncles and mother; of these my mother alone is alive." Pandit Narender Nath, Deputy Commissioner of Multan (P. W. No. 13), also says: "Daughter's sons are adopted in our community. Our community is not restricted by the rule which prohibits the adoption of a boy, whose mother, if virgin, could not have been married by the adopter. I can cite instances which took place more than 40 years ago." Similar evidence is given by Pandit Shiam Sunder Nath, Taluqdar of Bethar, District Unao (P. W. No. 46), Pandit Sheo Nath Chak,

retired Deputy Collector (P. W. No. 23), and Rai Bahadur Pandit Prem Nath (P. W. No. 14), who retired as Examiner of Accounts, Punjab, in 1902.

Pandit Tribhuwan Nath Sheopori, Additional Judge of the Small Cause Court, Lucknow (P. W. No. 38), deposes: "There is no such restriction in our community against adoption as is asserted or claimed by the Benares School of the Hindu Law. The adoption of a sister's or daughter's son is recognised among the Kashmiri Pandits." He is supported by Pandit Suraj Narain (P. W. No. 1), a retired Subordinate Judge, and Pandit Suraj Narain Bahadur (P. W. No. 7), another Subordinate Judge now posted at Partabgarh. Pandit Radhe Nath (P. W. No. 9), a Kashmiri Brahman belonging to a respectable family residing at Lahore, testifies to his having heard of the adoptions of daughter's sons at several places and to their being treated as the sons of their adoptive fathers by the community. He gives three instances of such adoptions. Pandit Shiam Manohar Nath Sharga (P. W. No. 23), Munsif of Bara Banki, Pandit Jai Narain (P. W. No. 6), a retired Engineer and an Honorary Magistrate and a Municipal Commissioner of Meerut, and Pandit Iqbal Narain Masaldan (P. W. No. 11), a Barrister-at-law, practising at Lucknow, since deceased, similarly testify to the existence of a custom recognising the adoption of a daughter's son among Kashmiri Brahmans. Rai Brij Narain Gurtu (P. W. No. 34), a Vakil of the High Court at Allahabad and a Zemindar paying land revenue exceeding Rs. 8,000 per annum, Pandit Shanker Nath (P. W. No. 22), a Pleader of Hardoi, Pandit Jagmohan Nath Raina (P. W. No. 25, examined on commission), a Deputy Collector, and Pandit Sahab Ram (P. W. No. 18), a retired Mir Munshi, are equally positive as to the existence of the said custom. Pandit Pran Nath Namju (P. W. No. 44) says that the custom recognising the adoption of a daughter's son or of a sister's son was old and that he came to know of it from Pandit Baijnath Kunzru, who was the husband of his sister and the elder brother of the late Pandit Ajudhia Nath of Allahabad.

Three ladies, *Musammatt Mohan Rani* (P. W. No. 21) aged 40 years, *Musammatt*

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Maharaj Rani (P. W. No. 36) aged 55 years and Musammat Bhavneshwari (P. W. No. 24) aged 83 years (all examined on commission) support the existence of the said custom from what they heard from their elders and from the instances which occurred in their community.

The evidence of Pandit Hargopal Kaul (P. W. No. 7), a Pleader of Srinagar, paying a land-revenue of Rs. 7,500 per annum, who is admitted by one of the defendants' own witnesses (D. W. No. 26) to be a leading member of the Kashmiri Brahman community of Srinagar, and Pandit Vid Lal Dar (P. W. No. 8), a Jagirdar of Kashmir and the representative of another leading family of Kashmir, known as the family of King Makers (*vide* P. W. No. 17), presumably on account of one of his ancestors having brought the Sikhs from the Punjab to eject the Pathan rulers, and that of the other witnesses examined in Kashmir similarly establishes that the validity of the adoption of a daughter's son is recognised in Kashmir and that a custom to that effect prevails among the Kashmiri Brahmans there.

The defendants' own witnesses have, moreover, admitted that the restrictions introduced into the Mitakshara Law by the Dattaka Mimansa and Dattaka Chandrika in regard to the invalidity of the adoption of a person, whose mother the adoptive father could not have lawfully married in her maiden state, is not recognised by the Kashmiri Brahmans either in Kashmir or in the provinces to which they migrated in search of livelihood or for other cause. Kesho Bayu Ganzoo (D. W. No. 3), for instance, admits that a brother can be taken in adoption and that his adoption would be valid according to the custom prevailing there. Durga Shankar (D. W. No. 2), who was examined in Court, goes further and says that in this community, that is, in the community of Kashmiri Brahmans, there is no prohibition against the adoption of a daughter's or a sister's son. Pandit Kamta Prasad (D. W. No. 23), who is a Judicial Officer at Gwalior, similarly admits that among the Kashmiri Brahmans the adoption of a daughter's son or of a younger brother is sanctioned by custom and that no objection is taken

thereto by the caste. Pandit Janki Nath Kaul (D. W. No. 2), who was examined on commission at Delhi, acknowledges that among Kashmiri Brahmans every boy who is full born can be adopted without any regard to his Gotra, though he subsequently qualifies his statement by saying that if there is anything in the Institutes of Manu prohibiting the adoption of a daughter's son, he would not take such an adoption as valid. It may be noted, however, that the Institutes of Manu contain no such prohibition and that the Institutes of Yagnyavalkya, which are treated as of paramount authority, commentators like the authors of the Mitakshara and the Apararka, also do not refer to it. It is significant that the Mitakshara and the Apararka, the latter being a work supposed to be of great authority in Kashmir, similarly nowhere state that a boy whose mother the adoptive father could not have married in her maiden state cannot be lawfully adopted. The restriction is mentioned by the Dattaka Mimansa and the Dattaka Chandrika and some other minor works. The Dattaka Mimansa was written by Nanda Pandit of Benares in the 17th century. Nanda Pandit takes pains in the Dattaka Mimansa to point out that a daughter can be validly adopted, a practice which is no longer recognised or sanctioned by law except perhaps by force of custom, where it may exist, among the persons following the profession of dancing or prostitution. His views in regard to the impropriety of adopting an only son, or a wife's brother's son, or a son more than five years old, or whose tonsure has been performed, have not been treated as binding [*Sri Balusu Gurulingaswami v. Sri Balusu Ramalakshamma* (7), *Puttu Lal v. Parbati Kunwar* (8) and *Ganga Sahai v. Lekhraj Singh* (9)]. The appointment of a daughter by a previous compact with the proposed bridegroom with the object of taking the first male child,

(7) 26 I. A. 113; 22 M. 398; 21 A. 460; 1 Bom. L. R. 226; 3 O. W. N. 427; 9 M. L. J. 67; 7 Sur. P. O. J. 330; 8 Ind. Dec. (N. s.) Mad. 286; 9 Ind. Dec. (N. s.) All. 1001 (P. C.).

(8) 29 Ind. Cas. 617; 42 I. A. 155; 37 A. 359; 19 C. W. N. 841; 13 A. L. J. 721; 22 C. L. J. 190; 17 Bom. L. R. 549; 29 M. L. J. 63; 2 L. W. 881; (1915) M. W. N. 514; 18 M. L. T. 61 (P. C.).

(9) 9 A. 253; 5 Ind. Dec. (N. s.) 604.

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which may be born of her, is expressly sanctioned by Manu, Yagnyavalkya and all text-writers and commentators, Dattaka Mimansa and Dattaka Chandrika included; and if the son born of an appointed daughter can be the son of the person who stood in the relation of a maternal grandfather to him, the adoption of a daughter's son in the Dattaka form cannot offend either the ideas or notions of the people or the spirit which underlies the rules which sanction such affiliations. The Dattaka Chandrika starts by saying that the author there propounds what he had left unwritten in the "Chandrika." It was supposed that the Chandrika therein referred to was the Smiriti Chandrika of Devanda Bhatt, who belonged to the southern country, but as the last verse of the Dattaka Chandrika shows, it purports to have been written by Kuvera and not by Devanda Bhatt. If Kuvera had written a treatise called the "Chandrika", dealing with questions of inheritance or succession, it is surprising that he should have left unwritten there what he now seeks to propound in the Dattaka Chandrika. Writing as far back as in 1855, Pandit Ishwar Chandra Vidya Sagar stated that the Dattaka Chandrika was written under the *nom de plume* of Kuvera by a person named Raghumani Vidya Bhushan (Vidyasagar's Disquisitions on Widow Re-marriage, page 182), and Pandit Bharat Chandra Shiromani, who published a Bengali edition of the Dattaka Mimansa and Dattaka Chandrika, also suggested the same. In a footnote to the preface to the Vyavastha Chandrika, Babu Shyama Charan Sircar, a scholar of considerable repute, writing in 1878 observed that many of the Pandits of Bengal attributed the Dattaka Chandrika to the late Raghumani Vidya Bhushan, the spiritual adviser of the Raja of Nadia and a distinguished Pandit, who flourished in the latter part of Jagannath's life and is said to have assisted Colebrooke in the preparation of his translation of Dayabhaga and Mitakshara (Vyavastha Chandrika, preface, page 21). In fact it has been suggested that the book was forged in order to support a claim which was pending at that time, though no occasion arose for its use, as the case was compromised

(Shastri's Hindu Law, 4th Edition, page 136, Sarkar's Hindu Law of Adoption, Second Edition, page 124). Dr. Jolly, another writer on Hindu Law, also questions the value of the book as a general authority (Dr. Jolly's Tagore Law Lectures, 1883, page 22).

They were the earliest books dealing exclusively with the subject of adoption to be translated into English; and as suggested by Mayne, a statement by Macnaghten that they were equally respected all over India brought them into easy prominence (Mayne's Hindu Law, 8th Edition, page 30). In certain decisions referred to in *Bhagwan Singh v. Bhagwan Singh* (2), their Lordships of the Privy Council treated them as works of high authority; but in *Sri Balusu Gurulingaswami v. Sri Balusu Ramalakshamma* (7) Lord Hobhouse pointed out that the Dattaka Mimansa was written during Muhammadan rule and could not be the work of a lawgiver or judge, while the date of the Dattaka Chandrika was uncertain and it stood only on the footing of a work of a learned man. In *Puttu Lal v. Parbati Kunwar* (8) a caution was expressed against accepting the glosses of Nanda Pandit, where they deviated from or added to the Smiritis.

Whatever the value of these works may be in Bengal and these provinces as a part of the general law, there is nothing to show that their reputation had at any rate reached Kashmir, or that they were known or recognised as infallible guides in the administration of the law of adoption in that part of the country.

It is contended that the opinion of persons, belonging to the Kashmiri Brahman community, is by itself not entitled to any weight, unless it is corroborated by instances, showing a uniform course of practice, recognised by all the members of that community. Section 48 of the Indian Evidence Act provides that when the Court has to form an opinion as to the existence of any general custom, the opinions as to the existence of such custom of persons who would be likely to know of its existence, if it existed, are relevant. The explanation to that section shows that the expression "general custom" includes customs common to any considerable class of persons. Section 49 of the

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Act similarly provides that where the Court has to form an opinion as to the usages and tenets of any body of men or family, the opinions of persons, having special means of knowledge thereon, are relevant. An immemorial custom, says Manu, is transcendent law and clear proof of it outweighs the written text of the law. But direct evidence cannot be obtained of things which occurred before the memory of man, and persons having special means of knowledge are, therefore, permitted to testify to their existence from such knowledge as they might possess of what has been practised in their community or from what they might have heard from persons having special means of knowledge of what was practised before. In *Lekraj Kuar v. Mahpal Singh* (10) their Lordships of the Privy Council, referring to certain entries in a *wajib ul-arz*, stated that even if those entries were not to be treated as records describing the custom, they could at all events be treated as recording the opinions of persons likely to know it, and as such the record of those opinions could be admitted in evidence. In *Garuradhwaja Prasad v. Superundhwaja Prasad* (11) evidence based on a tradition about a custom of the family was admitted under section 32, clause (5), and section 49 of the Indian Evidence Act, on the ground that the tradition was derived from persons who were dead and that the persons who gave the evidence had special means of knowledge about them.

The witnesses adduced by the plaintiff have, moreover, cited in support of their statements instances of the adoption of a son of a sister or of a daughter which took place in their community.

[After discussing certain instances, the learned Additional Judicial Commissioners proceeded as under:—*Ed.*]

The adoptions proved in the case cover a period of nearly one hundred years. They were obviously made with due publicity, for they are well known to the members of the brotherhood. In some cases the property affected was of considerable value. In the case of Iqbal Kishen (19) 5 C. 744 at p. 754; 6 C. L. R. 593; 7 I. A. 63; 4 Sar. P. C. J. 93; 3 Suth. P. C. J. 704; Rafique & Jackson's P. C. No. 61; 4 Ind. Jur. 423; 2 Ind. Dec. (N. S.) 1081.

(11) 23 A. 37; 10 M. L. J. 267; 5 C. W. N. 33; 27 I. A. 238; 2 Bom. L. R. 831; 7 Sar. P. C. J. 724 (P. C.).

who was adopted by Daya Nidhan, the property affected was worth five or six lacs (D. W. No. 5, examined in Court). In the case of Kunwar Kishen adopted by Sri Kishen, the property involved was similarly worth over two lacs (P. W. No. 28, examined by commission). Kameshwar Nath (P. W. No. 36) lost by adoption a share in the property left by his natural father, which was worth over Rs. 10,000, his natural brother, Raj Kishen, getting the whole of it (Exhibit Y-2). The property inherited by Gauri Prasad from Shiam Prasad by virtue of his adoption has already been referred to. Shiam Narain inherited property worth Rs. 9,000 by virtue of his adoption by his maternal uncle, Ram Narain, to the exclusion of the brother and nephew of the latter (P. W. No. 3, examined by commission). Kirpa Shanker similarly inherited the property of his maternal uncle, Daya Shanker, by reason of his adoption to the exclusion of his natural brother (P. W. No. 50, examined in Court). It is reasonable to assume that these adoptions would have been challenged, had there been no such custom.

The evidence produced by the defendants is of no value and the learned Counsel who appears for them has not chosen to refer to it. What he has strenuously urged is that in most of the instances cited, the existence of collaterals living jointly, or persons who could have legitimately challenged the adoptions, was not established, that where the adoptions were made by widows, it was not proved that they had any authority to adopt from their husbands, and that some of the so-called adoptions were cases of nomination merely for the performance of funeral ceremonies. In many instances, however, there were more daughters than one and several daughters' sons besides the one adopted. The evidence of the defendants' own witness Madhu Sudan Shastri (D. W. No. 23) shows that the nomination for the performance of funeral ceremonies is more or less a euphemism for adoption, for it carries with it a right to succeed. It appears from the evidence of Janki Nath Ganzu (P. W. No. 1), Janki Prasad Sharga (P. W. No. 15) and Brij Mohan Nath (D. W. No. 22) that a widow is allowed by custom to make an adoption without

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the permission of her husband. In fact as the Hon'ble Pandit Moti Lal Nehru (P. W. No. 20) explains, an adoption does not depend among the Kashmiri Brahmans upon the adoptive father having property. On the contrary adoptions are more frequent in the case of widows, particularly if they are young, when the husband leaves no property at all, and the widow herself is dependent for her maintenance upon her relations. The validity of adoptions made by widows was, moreover, never questioned during the hearing of the suit in the Court below. On the other hand, when questions were put to elicit whether such a custom existed, objections were taken on behalf of the defendants to their relevancy. In *Maharaj Narain v. Banaji* (12) it was held that the Kashmiri Pandits of the Delhi district were governed in matters of adoption by custom and not by the principles of the Mitakshara form of the Hindu Law and that amongst them a widow had full power, after the death of her husband and without his express permission in that behalf, to adopt any boy whom she might select, provided he was of the same tribe. The evidence adduced in that case in support of the custom included witnesses who belonged to the United Provinces.

Dealing with the customs and ceremonies of the Kashmiri Hindus, Mr. Walter Lawrence, at one time the Settlement Officer of Kashmir and Jammu State, writes: "Before concluding this account of the ceremonies of the Kashmiri Hindus, it is necessary to allude to their customs of adoption and re marriage. Every Hindu can adopt a son either from his own Gotra or from another Gotra, and the only restriction on adoption is that the adopted son must not have been invested with the sacred thread." (The Valley of Kashmir by Lawrence, page 266.)

In regard to the change of the family surname, the practice appears to be somewhat loose. But except where a person is brought up from infancy for love or affection, the change of the family surname generally corroborates or implies an adoption.

The witnesses are generally agreed that the performance of ceremonies is not essential to validate an adoption. Some witnesses

(12) 34 P. R. 1907.

state that the Datta Home or the Jatkarm or Namkarm ceremonies are usually performed, while others say that sweets are distributed and some worship is done by the priest. But it appears from the evidence of the Hon'ble Pandit Jagat Narain (P. W. No. 5) that the practice is not uniform and that beyond giving and taking no rituals are actually necessary. Pandit Ram Nath Shastri (P. W. No. 8), Pandit Iqbal Narain Masaldan (P. W. No. 11), Sahab Ram (P. W. No. 18) and *Musammatt Lalta Shuri* (P. W. No. 19) say the same. So far as the adoption of plaintiff is concerned, it was accompanied by the usual ritual and formalities (P. W. No. 8). On hearing of it Pandit Bakht Narain, the father of defendants Nos. 3, 4 and 5 and the grandfather of defendants Nos. 6 and 7, is said to have observed that by doing so Ram Narain had sown that day the seed of poison in his family. That seed has apparently borne fruit in the shape of the litigation in which the property of Ram Narain is now involved. It is noticeable, however, that in the mutation proceedings which took place consequent on the death of Ram Narain, Bakht Narain did not raise any question as to the validity of the said adoption (Exhibits 346 to 402, 520 and 586) and in regard to the license for arms kept by the deceased, he allowed the same to be renewed in favour of the plaintiff (Exhibits 579, 580, 582, 589 and 590).

As regards Pandit Suraj Narain, it is sufficient to refer to his application of the 8th December 1900 to the officer-in-charge of Tahsil Hardoi (Exhibit 588), opposing the application of Pandit Bakht Narain to the entry of his name as the manager of the family and entreating that the names of each of the three branches, including that of the present plaintiff, whom he described as the adopted son of Pandit Ram Narain, should be entered in the revenue papers. Similar admissions were made by him in other applications (Exhibits 579, 580, 590 and 616). There was no lack of similar recognition by defendant No. 3, the eldest son of Pandit Bakht Narain. The Court below has referred to documents, in which the status of the plaintiff as the adopted son of Ram Narain was admitted by each of the above persons.

No question of estoppel can, however, arise, as the position of the plaintiff was

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in no way influenced or altered by the said admissions. They are all the same valuable as indicating that had no such custom, as is set up by the plaintiff, been in vogue, Pandit Bakht Narain, who was a Judicial Officer of considerable standing, and his eldest son, who is a Pleader, would have been the last persons to refrain from challenging the validity of the adoption forthwith.

The validity of the adoption was for the first time questioned in September 1903 (Exhibit 488). In June 1905 Suraj Narain and his son filed a suit for partition of the family property, ignoring the adoption. They alleged that they had separated in October 1901 and were excluded from the profits. The Court of first instance accepted their contention and allowed them a decree for partition of a half share and for mesne profits with effect from October 1901. On appeal this Court directed accounts of profits to be taken from the date of the suit, and that decision was confirmed by their Lordships of the Privy Council. In pursuance of that decree, Suraj Narain and his son got possession on the 9th March 1909. The plaintiff has been excluded from the profits from the time of the death of Pandit Ram Narain, and he is entitled to obtain possession of a one third share of the family property by a partition of the same with mesne profits for the period during which he has been and remains out of possession. He was a minor on the date of the death of Pandit Ram Narain and did not attain majority till the 30th August 1908.

The next question relates to certain properties which the Court below has included in the decree for partition. Following the decision in the suits filed by Suraj Narain and his son against Bakht Narain and his sons and grandsons and against Ratan Lal, the Court below has included certain properties, specified in its judgment, as belonging to the joint family and excluded others as belonging exclusively to Ratan Lal. The dispute in the appeal filed by the sons and grandsons of Bakht Narain, who died during the pendency of the suit for partition, is confined to 40 items of property, but no argument has been addressed to us except in regard to items Nos. 2 and 4 of List 5, relating to the properties said

to have been held under mortgages. It is stated that the mortgages were redeemed in the lifetime of Ram Narain, but no evidence has been adduced on the point. If the mortgages were redeemed after the death of Ram Narain or during the pendency of the suit for partition brought by Suraj Narain and his son, the plaintiff shall get his share of the moneys which may have been realized, when those mortgages were redeemed.

In regard to the house in Hardoi, which is occupied by Rajendra Narain and his natural father, Ratan Lal, the finding of the Court below is that it forms part of the joint family property and that Rajendra Narain and his father cannot be ejected because the former holds a one-third share in the said property. As Rajendra Narain has been found to have been validly adopted by Ram Narain, the Court below rightly refused to eject him, leaving the other co-sharers their remedy by partition. Ratan Lal is living on behalf of Rajendra Narain and he too cannot be ejected.

The only other point remaining is that arising out of the appeal filed by Suraj Narain and his son, claiming that Rajendra Narain should be asked to make good out of his share the value of the properties which, by reason of the misconduct of Ram Narain, his adoptive father, have now gone to Ratan Lal. There is nothing, however, to show that the property, given to Ratan Lal, belonged to the joint family or that it was purchased out of joint family funds; and as held in *Suraj Narain v. Ratan Lal* (13), Ratan Lal would be treated as the owner of the said properties, and no question of compensation, therefore, arises.

On behalf of Suraj Narain and his son, it is suggested that the extent of their liability for mesne profits should be specifically determined. Having been excluded from the enjoyment of the family property from the time of the death of Ram Narain, the plaintiff is entitled to recover mesne profits for such period as he has been out of possession from the person or persons in possession. Suraj Narain and his son have obtained a decree for a half share (13) 40 Ind. Cas. 988; 20 O. C. 211; 21 C. W. N. 1035; 2 P. L. W. 160; 33 M. L. J. 180; 15 A. L. J. 634; 19 Bom. L. R. 737; 22 M. L. T. 121; 26 O. L. J. 267; 6 L. W. 503; (1917) M. W. N. 477; 4 O. L. J. 762; 40 A. 159; 44 I. A. 201 (P. C.),

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of the profits for the period extending from the 20th June 1905 to the 9th March 1909. Out of the profits or share of the income which may be awarded to them, the plaintiff is entitled to recover one-third, leaving Suraj Narain and his son in the enjoyment of the remainder. Out of the profits for the period preceding the 20th June 1905 the plaintiff is not entitled to claim any profits from Suraj Narain and his son except to the extent, if any, they may be shown by defendants Nos. 3 to 7 to have realized in excess of their one-third share. In regard to the period subsequent to the 9th March 1909, Suraj Narain and his son will similarly be liable for one-third of the profits of the half share over which they have obtained possession. The balance of the plaintiff's entire share of the mesne profits from 19th October 1900 to the date on which he gets possession will be recoverable from defendants Nos. 3 to 7 and the estate of Pandit Bakht Narain deceased. After the death of Ram Narain, Bakht Narain was the manager of the family and his liability and that of his sons and grandsons, who succeeded him, is, of course, unquestionable. The exact extent of the liability can be determined by the Court below under Order XX, rule 12, of the Code of Civil Procedure, when the accounts are gone into in the manner above stated. No other pleas are pressed.

These appeals fail and are dismissed with costs.

Appeals dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 99 OF 1915.

May 9, 1918.

Present:—Mr. Justice LeRossignol and Mr. Justice Wilberforce.

Musammatt RATTAN DEVI—PLAINTIFF—
APPELLANT

versus

MUNO—DEFENDANT—RESPONDENT.

Hindu Law—Custom—Adoption—Ceremonies, performance of, whether necessary.

In the Punjab the performance of an elaborate ritual or religious ceremony is quite unnecessary to the validity of an adoption, but there is no authority for the view that mere treatment, unaccompanied by a formal giving and taking of the child to be

adopted, satisfies the conditions necessary to a legal adoption. Adoption may be of two kinds, formal and informal, but it is only the adoption of the first description which is recognized by law and which confers upon the adoptee the status of son to his adoptive father. In other words, the law requires from the adoptor a manifestation of his unequivocal intention to clothe the adoptee with the legal status of his son. Such a manifestation of the adoptor's intention can be made either by a formal document combined with a proper treatment or by a formal giving and taking of the child, [p. 777, col. 1.]

Second appeal from the decree of the Additional District Judge, New Delhi, dated the 5th October 1914.

Dr. Gokal Chand Narang, for the Appellant.

Lala Moti Sagar, R. S., for the Respondent.

JUDGMENT.—The suit is one for possession of property left by Bishambar Nath who died on the 30th April 1912, and the plaintiff, his widow, is opposed by the deceased's sister's son, who alleges that he was adopted by the deceased. The parties are Sarsut Brahmans of Delhi, and the questions for decision were, *firstly*, the *factum* of the adoption, *secondly*, its validity. The Courts below found for the defendant, but the learned Additional Divisional Judge has given the plaintiff-appellant a certificate purporting to be a certificate under section 41 (3) of the Punjab Courts Act.

On behalf of the defendant-respondent a preliminary objection is raised that this Court should not proceed upon the certificate, inasmuch as it does not set forth in so many words that the question of custom involved is of importance and that the evidence concerning it is conflicting or uncertain, so that there is substantial doubt regarding its validity or existence. The certificate was issued in 1914 and its language is not in strict conformity with the language of the section; but prior to the issue of instructions from this Court it was not the practice of the District Courts to issue certificates in a strictly correct form, but, having regard to the fact that the learned Additional Judge in his certificate states that it is a certificate issued under section 41 (3) of the Punjab Courts Act, we must take it that he had considered the conditions laid down by that section and had come to the conclusion that this was a fitting case for the grant of a certificate, and we accordingly overrule the objection,

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Now, the theory which has been accepted by the learned Additional Judge is that Bishambar Nath did not adopt the defendant Muno by any formal act, but that he took him into his house, performed his *mundan* and *janeo* ceremonies and had him married and that the pedigree table recited at the marriage was the pedigree table reciting the defendant as his son, and he has held that among the Sarsut Brahmins of Delhi such an adoption is valid by custom. He has based this conclusion upon statements by witnesses on either side that no ceremonies are essential to an adoption, but we doubt whether he has interpreted the evidence of the witnesses correctly. No doubt in the Punjab the performance of an elaborate ritual or religious ceremony is quite unnecessary to the validity of an adoption, but we know of no authority for the view that mere treatment, unaccompanied by a formal giving and taking of the child to be adopted, satisfies the conditions necessary to a legal adoption. Adoption may be of two kinds, formal and informal, but it is only the adoption of the first description which is recognized by law and which confers upon the adoptee the status of son to his adoptive father. In other words, the law requires from the adoptor a manifestation of his unequivocal intention to clothe the adoptee with the legal status of his son. Such a manifestation of the adoptor's intention can be made either by a formal document combined with a proper treatment or by a formal giving and taking of the child. Now, in the case before us there can be no doubt that Bishambar Nath regarded the defendant with affection and treated him with kindness, and the decision of the learned Additional Judge really amounts to this, that he holds the adoption proved by reason of the statements of two witnesses that at the marriage of the defendant a pedigree-table was recited in which Bishambar Nath was declared to be the father of the defendant. Now, the defendant was married in 1890 and the statements made by these two witnesses were made nearly 25 years later, so that the learned Additional Judge's decision is based upon very precarious evidence. Before this Court the learned Counsel for the defendant has supported the theory that it is impossible to say at what time before

the defendant's marriage Bishambar Nath really adopted him, but he contends that the critical period was the marriage of the defendant when the adoption was completed by the recital in Sanskrit of the pedigree-table aforesaid. The defendant's natural father, however, who was not produced as a witness before the first Court and was especially called by the Appellate Court, tells quite a different story. He states that as soon as defendant was born Bishambar Nath claimed him as his son and then and there adopted him. Now, who should know better the details of the adoption than the natural father of the defendant? Yet the learned Additional Judge has brushed aside his evidence as merely incorrect. This seems to us to be an incorrect way of dealing with the evidence of such a witness. It is not sufficient to treat it as evidence which merely fails to support the case for the defendant, it is clear evidence against the case set forth by the defendant; and this appears to us to justify our considering the case on the merits even on second appeal.

On the facts as a whole, we are bound to say that we consider the conclusion of the learned Additional Judge to be against the weight of evidence; for while in favour of the adoption we have only oral evidence of a doubtful description, against it we have documentary evidence and the very significant conduct of the defendant. The defendant was the first born son of his natural father and it is highly improbable that the latter would have surrendered his first, and, at the time of the adoption as alleged by him, his only son to be adopted by Bishambar Nath. Again, at the time of the defendant's birth Bishambar Nath himself was only about 20—25 years of age whilst his wife was only 18—20 years old, so that at that time Bishambar Nath had every reason to expect offspring of his own. Indeed, at the time of the defendant's birth Bishambar Nath had a son of his own, who was born in April 1878 and died in August 1879. These considerations are quite sufficient of themselves to refute the story as told by the defendant's natural father. Again, much capital has been made of the fact that defendant was born in Bisham-

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bar Nath's house; but defendant had two sisters both of whom were also born at Bishambar Nath's house. Again, defendant, when he married, resided in Gandi Gali and his children were born in Gandi Gali and when his son was born in 1899, the defendant was recorded in the Municipal Birth Register as the son of his natural father and not as the son of Bishambar Nath. If he had been adopted by Bishambar Nath, it is extraordinary that the fact was not generally known so that the suggested explanation is unsatisfactory, even if we admit that the report of birth may have been made by somebody other than defendant. It is also a matter for surprise that after his marriage he lived in Gandi Gali with his wife's relatives and gave up his abode in Niabans, where his alleged father Bishambar Nath resided. It is also in evidence that Bishambar Nath gave shelter not only to defendant's family but also to the son of his wife's sister, so that he seems to have extended his kindly treatment to more than one member of his family. Again, there is the post-card, dated 1894 which has been proved by Sukhdeo Das to be in the handwriting of Bishambar Nath, wherein Bishambar Nath writes that his daughter is with child and that if she be safely delivered the child will be his. Further, there is evidence that relations, who would have been in duty bound to present marriage gifts to the defendant had he been the adopted son of Bishambar Nath, did not present such gifts on that occasion. But the most damning piece of evidence against the adoption is the admitted fact that the defendant did not perform the *kirya karm* of Bishambar Nath. The excuse given is that he was unwell and in fear of infection; but the *kirya karm* is performed 11 days after the death and consequently the excuse is a worthless one. A still more striking circumstance is that on the death of Bishambar Nath the defendant did not shave his head. Finally the learned Additional Judge does not appear to have understood correctly the evidence of Sukhdeo Das. He says that Sukhdeo Das would not have directed the defendant to perform the *kirya karm* if he had not known that the defendant was the adopted son of Bishambar Nath. But Sukhdeo

Das' evidence appears to be that he told the defendant to perform this ceremony because he considered it unfitting that that burden should be thrown upon women.

All the foregoing facts tell very strongly against the theory that the defendant was, in fact, adopted by Bishambar Nath and it is most remarkable that the defendant, who is a man approaching 40 years of age, should not be able to produce one single document to show that he was ever recognized, or described himself, as the adopted son of Bishambar Nath. Finally, there is the oral evidence of some influential Yajmans of Bishambar Nath, who state that they never heard that defendant had been adopted by Bishambar Nath. On the facts we have no hesitation whatever in holding that the adoption of defendant by Bishambar Nath entirely fails of proof.

With regard to the custom, we note that though some names have been mentioned, no details have been given in regard, to any one single case to shew that the adoptions referred to conferred upon the adoptees a legal status as such and that, in fact, in the presence of other heirs they were by reason of that legal status able to inherit the property of their adoptive fathers. Even if it be conceded for the sake of argument that a daughter's son may be adopted among these Sarsut Brahmans of Delhi—and it is strange, if this is so, that no such adoptor or at any rate adoptee or his descendants have been called to give evidence—still we hold that there is no proof whatever that an adoption can be made without a formal giving and taking of the child or some other unequivocal manifestation of the adoptor's intention to confer upon the adoptee the legal status of son.

For these reasons we accept the appeal and decree for plaintiff with costs throughout.

Appeal accepted.

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PATNA HIGH COURT.

CIVIL REVISIONS NOS. 75 AND 138 OF 1918.

November 7, 1918.

Present:—Sir Dawson Miller, Kt., Chief Justice,
and Mr. Justice Mullick.

Musammât DULHIN SONA KUER AND
OTHERS—APPELLANTS

versus

Maulvi JAMIL AHMAD—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 151, O. XL, r. 1, O. XLIII, r. 1 (s)—Revision—Inherent power of Court to treat revision as appeal—Receiver, appointment of—Possession, resistance to—Court, order by—Appeal, whether lies—Mortgage—Subrogation, right of, when arises.

The High Court has jurisdiction, in the exercise of its inherent powers under section 151 of the Civil Procedure Code, to condone in special cases the misapplication of the provisions of the Code, if the provisions of the law as regards limitation and Court-fees are complied with [p. 782, col. 2; p. 783, col. 1.]

The High Court has authority to convert an application for revision into a memorandum of appeal. [p. 782, col. 2.]

The powers of a Receiver are regulated by Order XL of the Civil Procedure Code and the only ground upon which his possession can be resisted is sub-clause (2) of rule 1 of Order XL of the Code. [p. 781, col. 1.]

Where a person who refuses to deliver possession to a Receiver is ordered by the Court to do so, his remedy is by appeal under Order XLIII, rule 1 (s), of the Civil Procedure Code. [p. 782, col. 2.]

Before a person can claim to be subrogated to the position of a prior mortgagee, there must be a satisfaction of the whole of the prior mortgage. [p. 782, col. 1.]

Appeal from a decision of the Subordinate Judge, Patna.

Mr. Kulwant Sahay, for the Appellants.

Mr. Khurshed Husain, for the Respondent.
JUDGMENT.

MULLICK, J.—This application for revision arises out of a dispute as to the possession of a portion of the property of Musammât Fasihân, a Muhammadan lady, who died on the 2nd July 1909, leaving her surviving two sons Muhammad Umar and Kalimuzaffar, and four daughters named Habiba, Fatima, Saira and Salima. Shortly before her death the lady had executed various deeds of gift in respect of certain properties in favour of Habiba and her two sons and on the 26th March 1912 Fatima and Saira brought a suit in the Court of the Subordinate Judge of Patna seeking to set aside these transactions and praying for the administration of the estate of the deceased. Four separate and somewhat similar suits were lodged by Salima

but with these we are not concerned. The suit lodged by Fatima and Saira was transferred to the Court of the District Judge of Patna and numbered 6 of 1913. Salima's suits were numbered 9, 10, 11 and 12 of 1913.

In Suit No. 6 of 1913, the District Judge held that all the deeds of gift, except that in favour of Kalimuzaffar dated the 7th May 1909, were invalid and he directed a partition of all the lands of the estate with the exception of those covered by the said deed of gift.

There was then an appeal to this Court which was disposed of on the 18th July 1917* by Chamier, C. J., and Jawala Prasad, J. The learned Judges held that the deed of gift in favour of Kalimuzaffar was also invalid having been made without the consent of other heirs and contrary to the intention of the donor. The following passages from the judgment of Jawala Prasad, J., shew the reliefs which were granted to the plaintiffs:—

"All the deeds of gift including the Hiba of the 7th May must be set aside and declared invalid and inoperative. The deeds of gift, therefore, do not stand in the way of the heirs of Bibi Fasihân taking their shares under the Muhammadan Law. Her husband Sobhan inherited one fourth share of the lady's properties: her two sons Muhammad Umar and Kalimuzaffar each took 6/32 and each of her four daughters, Habiba, Fatima, Saira and Salima took 3/32 of the properties left by her. The heirs of such of the aforesaid persons as have died since the death of the lady have succeeded to the shares inherited by their predecessors. The properties left by Musammât Fasihân are, therefore, liable to be distributed among her heirs and heirs of her heirs, unaffected by dealings or transfers of interests in excess of their legal shares. As the donees and the heirs have been dealing with the properties since 1909 and the matter is complicated by the claims of creditors and others and thus the appeal gives each of the heirs a decree for his or her share in the ordinary way. The result of passing such a decree would be endless litigation. The proper course appears to be to direct a general administration of the property of

*See *Fazlur Rahman v. Muhammad Umar*, 43 Ind. Cas. 196—Ed.

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Musammât Fasihan under the orders of the Court.

"I would dismiss with costs Appeals Nos. 73, and 219 arising out of Suit No. 6, Appeal No. 42 arising out of Suit No. 9 and Appeal No. 339 arising out of Suit No. 11. I would allow with costs Appeal No. 112 arising out of Suit No. 6 and Appeal No. 581 arising out of Suit No. 6 and set aside the deed of May 7th, 1909. I would declare that the heirs of the deceased are entitled to the shares specified above in the properties of *Musammât Fasihan*. I would remand Suits Nos. 6 and 9 of 1913 to the Court below, in order that in the presence of parties a preliminary decree may be passed with reference to Order XX, rule 13, ordering such accounts and enquiries to be taken and made and giving such directions as may appear to be necessary. It would probably be necessary to appoint a Receiver or Commissioner to carry out the administration. Arrangements must be made to pay off the debts of the deceased as soon as possible. Those heirs or representatives of heirs who have been in possession of parts of the property should be debited with what they or their heirs claiming under them have received."

In consequence of the above decree the District Judge on the 22nd September 1917 made a preliminary decree for administration and on the 25th January 1918, after notice upon the various mortgages and creditors, appointed a Receiver to carry out the same.

It appears that on the 4th February 1913, that is about a year after *Saira* and *Fatima's* suit was instituted, *Muhammad Umar* mortgaged the proprietary interest in certain *Mauzas* to *Musammât Dulhin Sona Kuer*. The consideration at first was fixed at Rs. 85,000, out of which Rs. 60,000 were to be paid by *Musammât Sona Kuer* to the creditors of *Muhammad Umar* and Rs. 25,000 to one *Kesho Das*, who held a mortgage from *Musammât Fasihan* of certain properties which included the properties covered by *Muhammad Umar's* mortgage. *Kesho Das* refused to take the amount tendered to him, and, therefore, for all intents and purposes the consideration of *Umar's* mortgage must be regarded to have been the sum of Rs. 60,000 which was due to be paid and was paid by *Dulhin Sona Kuer*

to his creditors. *Sona Kuer* sued upon her mortgage and on the 25th February 1915 obtained a decree for Rs. 72,958.

On the 20th June 1916 she brought the mortgaged properties to sale and purchased them herself. It is alleged that a sum of Rs. 37,000 is still due to her under her decree.

In September 1916 she got possession of all the mortgaged properties except three, which had subsequently to her mortgage been sold for arrears of Government revenue and had passed out of the possession of the mortgagor. It is not disputed that her possession in consequence of her auction-purchase still continues.

When the Receiver was appointed, *Sona Kuer* refused to deliver up possession to him, and upon the matter being referred to the District Judge, he on the 22nd March 1918 decided in favour of the Receiver. It is against that order that *Musammât Sona Kuer* prefers the present application for revision, namely, No. 75 of 1918.

Revision No. 138 of 1918 has been preferred by another set of transferees, namely, *Ram Prasad Singh* and others, and against whom a similar order has been made directing delivery of possession to the Receiver.

I will deal first of all with Case No. 75 of 1918 which relates to *Sona Kuer's* properties.

It is unnecessary to consider what would have been the position if the transfer by *Muhammad Umar* had been made before the institution of the administration suit. Clearly the transfer is affected by the provisions of section 52 of the Transfer of Property Act regarding *lis pendens*. I agree with the appellant that the transfer does not become *ipso facto* void, but if the provisions of section 52 have any meaning at all, then as soon as the Receiver was appointed to carry out the administration, the Court was entitled, if it so chose, to consider the transfer a nullity and to regard the property as still in the hands of *Muhammad Umar* and I do not think there can be any doubt that the Court had full authority to direct the Receiver to take possession.

It is contended that under Order XL, rule 1, sub-clause 2, the Court is not authorised to remove from the possession

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or custody of property any person whom any party to the suit has not a right so to remove; that Muhammad Umar as one of the heirs of *Musammāt Fasihan* was a co-owner who had full power to give a mortgage to the extent of his share in the estate and that the other co-owners could only eject him if it was shown that he had taken possession of more than his proportionate share. That is an argument which might have had some force if the transfer had been one before the suit, but it being *pendente lite* I do not think there can be any doubt that the plaintiffs in the administration suit were competent to ask the Court to take possession of all the properties in the custody not only of the co-owners but also of transferees who had obtained possession by transfers subsequent to the institution of the suit. Muhammad Umar has died since the suit was instituted and it is urged that in the absence of a specific order in the preliminary decree of the 22nd September 1917 directing his co-owners to deliver up the properties in their possession, the present order of the Court is *ultra vires*. I am unable to appreciate this argument. The preliminary decree read with the appellate decree of the 18th July 1917 gives power to administer the property generally and to appoint a Receiver. The Receiver's powers are regulated by Order XL of the Civil Procedure Code and I am of opinion, the only ground upon which his possession can be resisted is sub-clause 2, which has already been considered and held to operate in favour of the Receiver and not the appellant.

The learned Vakil for the appellants next relies upon the judgment of this Court, dated the 15th July 1917, and contends that it was the intention of the learned Judges, when directing a general administration, to preserve the possession of the various transferees, as far as possible, to the extent of the shares of their transferors.

It is admitted that Muhammad Umar had no right to transfer the specific properties in question and that he had merely an inchoate right to the residue after the estate was fully administered by reason of his joint undivided share in the estate. But it is contended that the intention of this Court was that the administration

should be carried on and accounts taken leaving Sona Kuer in possession till it was ascertained that she was holding more than Muhammad Umar's share. I have in vain examined the appellate judgment of this Court for an indication of this intention. The passages I have cited certainly do not support this interpretation and I can find no others which give us any assistance in the matter. Clearly the administering Court will be put to the gravest inconvenience if it cannot take possession of the properties in the custody of the co-owners, and it is conceivable that under certain circumstances further proceedings may be reduced to a standstill if this procedure were adopted. It may be the Court's management would be more beneficial and more efficient than that of the mortgagee or that the sale of the *zerait* lands might save the rest of the property. There may be many reasons to support the decision of the learned District Judge to take the property into his own custody and I do not think that the appellant has any cause for complaint, seeing that she took the mortgage with full notice after the institution of the suit and knowing that she would be bound by whatever orders the Court thought fit to pass in the suit.

Mr. Kulwant Sahay on behalf of the appellant has offered to deposit a year's rent in Court as security against the risk of the property being sold for arrears of Government revenue, but I do not think that any arrangement of this kind can be accepted in view of the fact that unless all the properties are brought under the custody of the Court, the Court cannot come to a satisfactory conclusion as to the real value of the assets. Other transferees may make the same claim and the appellant is, in my opinion, not entitled to and ought not to be allowed any special preference as against them. The appellant might perhaps resist the Receiver if she could shew that she had a right to suppose that her vendor was mortgaging for the purpose of paying *Musammāt Fasihan's* debts. She would then be competent to invoke the equitable principle which was recognised in *Price v. Price* (1). But in the case before us, although

(1) (1887) 35 Ch. D. 297; 56 L. J. Ch. 530; 56 L. T. 842; 35 W. R. 386

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an attempt has been made to shew that a sum of Rs. 25,000 out of the consideration money was intended to pay off *Musammât Fasihân's* mortgage to Kesho Das, it is quite clear that no part of this money was in fact the consideration for Sona Kuer's mortgage and that the true consideration was the sum of Rs. 60,000 only. This sum of Rs. 25,000 is said to have been, after Kesho Das refused to accept it, deposited in the Bank of Bengal and subsequently withdrawn by the appellant herself.

It is next contended that on the 2nd January 1917 *Musammât Sona Kuer* paid a sum of Rs. 36,000 to Kesho Das to discharge the incumbrance created by *Musammât Fasihân* on two Mauzas. This payment is said to have come about in the following way. Kesho Das sued upon his prior mortgage from Fasihân, which covers not only the properties now in suit but other properties, and on the 26th February 1916 brought the mortgaged properties to sale. On the 15th December 1916, the Subordinate Judge set aside the sales on the ground of fraud and dismissed the execution case. Against that order there was an appeal by the auction-purchasers to the High Court, which affirmed the Subordinate Judge's order setting aside the sale upon the judgment-debtor paying to the auction-purchasers a certain sum as compensation. On the 2nd January 1917, Sona Kuer came in and paid to Kesho Das the sum of Rs. 36,000 for the purposes of freeing from his charge the properties covered by her mortgage. I fail to see how this payment can be considered sufficient to subrogate Sona Kuer to the rights of Kesho Das. It seems settled that there must be a satisfaction of the whole mortgage before a person interested can claim to be subrogated to the position of a prior mortgagee [*Gurdeo Singh v. Ohandrika Singh* (2)]. Here according to the appellant's own case there was no satisfaction of Kesho Das' full decree but only that portion of it which fell upon the properties covered by the present proceedings. The principle of subrogation, therefore, does not assist the appellant in respect of the mortgage of Kesho Das.

It is, however, said that Kesho Das agreed to a splitting up of his mortgage. Of this there is no evidence. It is said the point was taken before the learned District Judge, but the petition of the appellant before him does not disclose any such contention in clear and unequivocal terms. There was certainly no evidence tendered by the appellant on this question of fact. The truth is that a case is now being made in this Court which, even if indicated, was never developed in the Court below. The appellant is not entitled to raise a point of this kind in appeal and much less in revision. Indeed Mr. Kulwant Sahay's argument on this part of the case convinces me that complicated questions as to the rights of transferees are certain to arise and that they can only be satisfactorily decided if the Court is in custody of the whole estate. Mr. Khurshed Husnain agrees that if it is found by the Receiver that Kesho Das has in fact split up his mortgage, the sum paid by the appellant for the two Mauzas will be refunded to her.

In the view I take of the merits it becomes unnecessary to consider whether an appeal lies in this case or not. As the point, however, has been argued I will deal with it shortly. Sona Kuer objects to deliver possession to the Receiver appointed by the Court under Order XL, Civil Procedure Code, and in my opinion an appeal lies under Order XLIII against the order of the learned District Judge. The appellant, following a decision of this Court which laid down that no appeal lay if the person aggrieved was not a party to the suit, has filed an application for revision. But in a recent case we considered all the authorities and held that the proper remedy of a person in the position of the appellant was by appeal. We have, therefore, no power to interfere unless we accept the application for revision as a memorandum of appeal.

Now there is ample authority for accepting an appeal which is found incompetent as an application for revision, and there is also some authority for the converse process of converting an application for revision into a memorandum of appeal. In my opinion this Court has ample jurisdiction,

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in exercise of its inherent powers under section 151, to condone in special cases the misapplication of the Civil Procedure Code, if the provisions of the law as regards limitation and Court-fees are complied with.

Here the applicant's fault was that she misconceived her remedy by reason of a judgment of this Court and if she had, instead of describing her application as an application for revision, described it as a memorandum of appeal she would have been competent to invoke the assistance of the Court. It is admitted that there is no defect as regards Court-fees and limitation and having regard to the special circumstances of this case, I think the interests of justice require that we should accept the application as a memorandum of appeal. The appellant, however, must be confined to the grounds taken in her application and she cannot be allowed to urge any ground which she had not taken in it in support of her appeal.

The result is that in the view that I take the appeal must be dismissed with costs.

This judgment disposes of Revision No. 138 of 1918 also. That application must also be treated as an appeal. The facts in this case are simpler than in Case No. 75. The mortgage of Muhammad Umar in this case was in favour of Ram Prasad and others. It was executed on the 3rd November 1913 for Rs. 9,000 and was followed on the 21st January 1917 by a sale in favour of the mortgagees by Umar for Rs. 16,000 and the appellants, after satisfying the mortgage charge, are alleged to have paid the balance to Umar in cash. The sale-deed mentions the fact that an appeal against the decision of the District Judge is pending in the High Court and it appears that in order to indemnify himself against the risk of Umar's title under the *hiba* being declared invalid, the mortgagees took a security bond by way of indemnity. So there can be no doubt that the principle of *les pendens* is fully applicable in this case and if that is so, the transfer is invalid for the purpose of affecting the rights of the plaintiff and the Receiver is clearly entitled to take possession.

The application for revision treated as an appeal as in the last-mentioned case

is dismissed with costs. The costs in both appeals will be calculated on the assumption that the value of the appeals is above Rs. 5,000 in each case.

MILLER, C. J.—I agree.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No 328-B OF 1917.

July 22, 1918.

Present:—Mr. Mittra, A. J. C.

RAMSA HARANSA—DEFENDANT No. 1—

APPELLANT

versus

RATANSA AND ANOTHER—PLAINTIFF AND
DEFENDANT No. 2—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 53—Sale—Preference shown to some creditors—Transaction, whether voidable.

Preference shown to some creditors is not a ground for holding that a transaction comes within the scope of section 53 of the Transfer of Property Act. [p. 784, col. 1.]

Musahar Sahu v. Hakim Lal, 32 Ind. Cas. 343; 43 O. 521; 37 M. L. J. 116; 3 L. W. 207; 20 C. W. N. 393; 14 A. L. J. 198; (1916) 1 M. W. N. 198; 19 M. L. T. 203; 23 C. L. J. 406; 18 Bom. L. R. 378; 43 I. A. 104 (P. C.), followed.

Appeal against the decree of the Special Additional District Judge, Akola, in Civil Appeal No. 268 of 1916, dated the 30th April 1917, arising out of Civil Suit No. 157 of 1915, decided by the Sub-Judge, Basim, on the 22nd September 1916.

The Hon'ble Mr. G. P. Dick, for the Appellant.

Mr. M. V. Joshi, for Respondent No. 1.

JUDGMENT.—The appellant obtained a decree against the husband of the second defendant and attached the house in suit. The plaintiff, who is the father of the first defendant, filed an objection to the attachment on the basis of a sale-deed dated the 27th August 1914 executed by the daughter in favour of the father. The objection was unsuccessful, and the present suit has been brought for a declaration that the sale was valid and that the house in suit is not liable to attachment. The defence of the appellant was that

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the sale was a nominal transaction intended to defeat and defraud the decree-holder. Both the Courts below have found that there was consideration for the sale-deed and that the transfer was a real transfer not intended to defeat the decree of the decree-holder.

It is first contended that as the consideration money, Rs. 700, was not paid to the vendor but to the creditors of the deceased husband of the vendor, the transaction was not a sale but one creating a security. I cannot agree with this. There was a sale for Rs. 700 and the purchaser, instead of paying the money to the vendor, paid off her husband's creditors. The suggestion is a novel one, and it is inconsistent with the main defence put forward in the Court below.

It is contended that the vendor is in possession and hence the sale is nominal. This argument is based upon a misapprehension. The house itself has been leased but the plaintiff and his daughter are, however, living in another house. This is a fact which has been noticed by the Courts below as one giving rise to no suspicion. It certainly does not justify my holding that the house in suit is not in the possession of the vendee.

The appellant's decree has not been paid off, but the vendee made himself responsible only to the extent of Rs. 700 and he has proved to the satisfaction of the lower Court that he has paid the amount. No question was raised as to the adequacy of the consideration.

Preference shown to other creditors is not a ground for holding that the transaction comes within the scope of section 53 of the Transfer of Property Act. The case cited in the lower Courts [*Musahar Sahu v. Hakim Lal* (1)] fully supports this view.

The appeal fails and is dismissed with costs.

Appeal dismissed.

(1) 32 Ind. Cas. 343; 43 C. 521; 30 M. L. J. 116; 3 L. W. 207; 20 C. W. N. 893; 14 A. L. J. 198; (1916) 1 M. W. N. 198; 19 M. L. T. 203; 23 C. L. J. 406; 18 Bom. L. R. 378; 43 I. A. 104 (P. C.).

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 1911 OF 1917.

May 22, 1918.

Present:—Mr. Justice Scott-Smith and Mr. Justice Martineau.

Musammât BHOLA DEVI—DEFENDANT—
APPELLANT

versus

MOHKAM CHAND AND OTHERS—PLAINTIFFS
—RESPONDENTS.

Hindu Law—Partition, partial, effect of—Presumption—Co-parcenary right, whether retained in properties left undivided.

Where a partition takes place between the members of a joint Hindu family, the presumption is that there is a complete partition in status and of all the properties, and if certain properties are left undivided there is no presumption that the co-parcenary right is retained in those properties. [p. 785, col. 1.]

Second appeal from the decree of the District Judge, Gujranwala, dated the 21st May 1917.

The Hon'ble Pandit Sheo Narain, for the Appellant.

Mr. Duni Chand, for the Respondents.

JUDGMENT.—The land in suit was the joint property of Harnam Das, father of the plaintiffs, and his brother Dhanpat Rai, the husband of the defendant.

In 1900, Harnam Das and Dhanpat Rai separated from one another, as the plaintiffs have admitted. They divided the outstandings and moveable property, but the immoveable property was left undivided.

In 1902 Dhanpat Rai died, and his share in the land was mutated in favour of the defendant.

The latter having applied to the Revenue Authorities for partition of her share, the plaintiffs have brought the present suit for a declaration that they are the sole owners of the land, contending that on the death of Dhanpat Rai their father became the owner of the whole land by survivorship, the defendant being entitled only to maintenance.

The first Court dismissed the suit, but on appeal the learned District Judge has passed a decree in the plaintiffs' favour, finding that at the time of Dhanpat Rai's death he and his brother were joint so far as the land in suit was concerned; that there was a co-parcenary in existence; and that, therefore, the widow is only entitled to maintenance.

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The defendant has preferred a second appeal to this Court.

The question in dispute is, whether the land continued to be held by Dhanpat Rai and Harnam Das as members of a joint Hindu family after the partition of 1900.

In Mayne's Hindu Law, 8th Edition, on page 689, it is stated that there may be a partial division of the family property of such a nature that the co-parcenary ceases as to some of the property and continues as to the rest.

Of the authorities quoted in the foot-note in support of this proposition the first two, namely, *Kandisami v. Doraisami Ayyar* (1) and *Rewun Persid v. Musammal Radha Beeby* (2), lay down only that a partition may be partial, and not that the co-parcenary will continue in regard to the property left undivided. In two other cases mentioned in the foot-note, *Muthusami Mudaliar v. Nallakulantha* (3) and *Gavri Shankar Parabhuram v. Atmaram Rajaram* (4), the property left undivided was held to be co-parcenary property. Counsel for the respondents, however, has not relied on those cases, and Mr. Sheo Narain has referred us to two more recent rulings, *Vaidyanatha Aiyar v. Aiyasamy Aiyar* (5) and *Sunilaram v. Kamakotiah* (6), in support of his contention that the partial partition of 1900 effected a division in status. In the latter case it has been held that where there is a partition, the presumption is that there is a complete partition in status and of all the properties and that if certain properties have been left undivided, there is no presumption that the co-parcenary right is retained in those properties.

Against this no authority has been cited on the other side. Mr. Dani Chand has referred to some rulings, but they do not touch the point in issue.

The partition between the brothers in 1900 was complete in all respects except in regard to the land and houses. As to the land, the fact that after Dhanpat

Rai's death in 1902 mutation took place in favour of his widow and that Harnam Das or his sons never objected, raises rather a strong inference that the land was not co-parcenary property and that the defendant succeeded to her husband's share as his heir.

The Exhibits E1, F1 and G1 relied upon by the plaintiffs, to which reference has been made in the judgments of the lower Courts, do not, in our opinion, help the plaintiffs' case. They are produced with the object of showing that the defendant had been receiving Rs. 4-8-0 a month from Harnam Das for her maintenance. Atma Ram, a relation of both parties, was managing the land and it may well have been that the defendant, being unable to manage it herself, was content for some time to let him manage it for her and to receive a sum of Rs. 4-8-0 a month. But from her receiving this allowance it would not follow that she had no rights of ownership in the land, nor can we agree with the contention that she gave up her rights in the land in consideration of being paid a monthly sum for her maintenance.

The learned District Judge has remarked in his judgment that Counsel on both sides are agreed that if the land was joint as between Harnam Das and Dhanpat Rai at the time of the latter's death, the widow is only entitled to maintenance. We think there must have been a mistake here as there was no dispute that the land was joint, probably what Counsel for the defendant meant was that if the joint Hindu family subsisted his client could only get maintenance.

We are of opinion that the partition of 1900 effected a disruption of the joint family, with the result that the land was held by Harnam Das and Dhanpat Rai from that time as tenants in common and not as joint tenants.

Consequently on the death of Dhanpat Rai his widow was entitled to succeed to his share, and the land would not pass by survivorship to Harnam Das.

We accept the appeal, set aside the decree of the lower Appellate Court, and restore that of the first Court dismissing the suit. The respondents will pay the appellant's costs throughout.

Appeal accepted.

(1) 2 M. 317 at p. 324; 5 Ind. Jur. 352; 1 Ind. Dec. (N. S.) 491.

(2) 4 M. L. J. 137 at p. 163; 7 W. B. P. C. 35; 1 Suth. P. O. J. 172; 1 Sar. P. O. J. 327; 18 E. B. 651.

(3) 18 M. 418; 6 Ind. Dec. (N. S.) 640.

(4) 18 B. 611; 9 Ind. Dec. (N. S.) 916.

(5) 1 Ind. Cas. 403; 32 M. 191; 19 M. L. J. 91; 5 M. L. T. 49.

(6) 26 Ind. Cas. 514.

MUHAMMAD AMIRUL HASAN v. WAZIR BIBI.

PATNA HIGH COURT.

MISCELLANEOUS CIVIL APPEALS NOS. 283
AND 287 OF 1917

AND

CIVIL REVISIONS NOS. 333 AND 334 OF 1917.
October 31, 1918.

Present:—Sir Dawson Miller, Kt., Chief
Justice, and Mr. Justice Mullick.

Syed. MUHAMMAD AMIRUL HASAN—

APPELLANT

versus

Musammat WAZIR BIBI AND OTHERS—
RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 57—Execution of decree—Attachment of decree—Execution case dismissed for default, effect of—Attachment, whether raised—Purchaser of attached decree, position of.

A decree-holder applied for the attachment of a decree belonging to his judgment-debtor. The executing Court ordered the decree to be attached, but on the date fixed for orders dismissed the execution case for default. After the order for dismissal the judgment-debtor sold the attached decree to one A:

Held, (1) that until the attached decree had been realised by the decree-holder there was nothing further to be done by him in the execution case, so that the executing Court had no jurisdiction to dismiss the case for default; [p. 788, col. 1.]

(2) that notwithstanding the order for dismissal of the case, the attachment of the decree continued to subsist; [p. 788, col. 1.]

(3) that, therefore, A acquired no title to the decree by his purchase as against the attaching decree-holder, and had no right to execute it. [p. 788, col. 2.]

So long as an attachment of a decree remains in force, any dealings by the original decree-holder or any transfer or delivery of property comprised in the decree is void as against the claims enforceable under the attachment. [p. 788, cols. 1 & 2.]

Appeal against an order of the Subordinate Judge, 1st Court, Gaya, dated the 10th November 1917.

Messrs. Lachmi Narain Sinha and Panchanan Banerji, for the Appellant.

Messrs. Abani Bhusan Mukherji and Kailaspati, for the Respondents.

JUDGMENT.

MILLER, C. J.—This appeal raises the question of the rights of rival claimants to take out execution of a decree. One claims to execute the decree by reason of an attachment obtained by him in execution proceedings in another suit and the other claims to execute the decree as purchaser from the original decree-holders. The facts which are necessary to be stated in order to appreciate the points which have been raised and argued are as follows:—

On the 2nd April 1910 Asfandiar Khan and Janoo Bibi, his mother, obtained a decree against Wazir Bibi and others in a contribution suit. That suit was entitled Contribution Suit No. 118 of 1910 and was tried before the Subordinate Judge of Gaya. The decree in that suit was apparently amended by inserting some costs on the 27th June 1914. I merely mention this fact because I find in the evidence that that decree is on some occasions referred to as the decree of the 27th June 1914. On the 12th August 1911 one Bhawani Kuer obtained a decree in a Title Suit No. 76 of 1911 in the same Court against Asfandiar Khan, the first of the decree-holders, in the suit just mentioned. That was a suit for delivery of possession and mesne profits in a village. Between 1911 and the beginning of 1917 there were some attempts made by Bhawani Kuer to execute that decree, which proved infructuous. Then on the 12th February 1917 Gauri Shanker, who is one of the respondents in the present appeal, purchased from Bhawani Kuer the decree which she had obtained against Asfandiar, and he thereupon made an application for execution of that decree and prayed for attachment of Asfandiar's decree against Wazir Bibi. His petition was dated the 25th May 1917, and the mode in which he sought to get the assistance of the Court in execution of the decree he had purchased from Bhawani Kuer was by praying that Asfandiar's decree against Wazir Bibi might be attached and that he, Gauri Shanker, should be authorised to execute that decree and realise the decretal amount. In the course of that execution case taken out by Gauri Shanker an order was made on the 9th July 1917; which was to this effect:—

"Let Gauri Shanker, the present decree-holder, be substituted in the place of Musammat Bhawani Kuer. Process-fee worth Rs. 2 filed. Issue attachment of decree fixing 19th July 1917 for orders."

The decree which is attached by that order is the decree obtained by Asfandiar Khan and Janoo Bibi against Wazir Bibi. Perhaps I ought to add that the only interest in that decree which Gauri Shanker could have was the interest of Asfandiar Khan. There was an interest

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of Janoo Bibi which had not passed to him under the attachment and no claim is made by him in so far as Janoo Bibi's interest is concerned. The order which I have just mentioned having been made, it would appear that in so far as Gauri Shanker was seeking the assistance of the Court for the execution of his decree, that is to say, the decree which he had purchased, he had got all he wanted except possibly some formal order which might have to be made later on. He had had his name substituted in place of the vendor of the decree, the original decree-holder, and he had got an order attaching the decree of the 2nd April 1910, and the only thing to be done then was for him to take out execution proceedings under the earlier decree which had been attached and endeavour to realise the decretal sum. Then, for some reason which does not appear, on the 19th July 1917, 10 days after the order which I have just referred to, there is an order in the order-sheet to this effect:—

"Copy of orders for attaching decree of Money Suit No. 118 of 1909 disposed of on 27th June 1914 received. Ordered case dismissed for want of further prosecution."

That being so, it appears that on the 26th August, that is, rather more than a month later, the present appellant, Amirul Hasan, purchased from Asfandiar and Riayasat Bibi who had succeeded to the interest of Janoo Bibi the decree which they then had against Wazir Bibi, and on the 9th September Gauri Shanker filed an application for execution of that decree in pursuance of the order of attachment which he had already received in the execution proceedings in the title suit. On the 5th November 1917 Amirul Hasan also applied for substitution of his name and for execution of the same decree claiming that it had been purchased by him. When the matter came before the Subordinate Judge, who had to decide these two cases, they both being upon his file, it was obvious that he could not allow both the applicants to execute the same decree as they were claiming in different interests. It was contended on behalf of Amirul Hasan, who is the appellant in this case, that as there had been an order made in the execution proceedings in the title suit on the 19th July 1917

dismissing that execution case for want of further prosecution, that Order XXI, rule 57, of the Civil Procedure Code applied, which provides that where any property has been attached in execution but by reason of the decree-holder's default the Court is unable to proceed further with the application for execution, it shall either dismiss the application or for any sufficient reason adjourn the proceedings to a future date and that upon the dismissal of such application the attachment shall cease. It was contended by Amirul Hasan that there had been a dismissal for default in this case and, therefore, after the 19th July 1917 there was no attachment subsisting of the decree, which he had shortly after that date purchased from the original decree-holders. He claimed that he was entitled to maintain the execution case and that Gauri Shanker had no right or title to do so. The learned Judge decided in favour of Gauri Shanker. The conclusion which he came to was that the dismissal of the original execution case, that is to say, the execution case in the title suit, did not have the effect of setting aside the attachment and in fact the view which the learned Judge has taken is that all that was necessary to be done in that execution case had been done. The attachment had been made and the applicant had been given leave to substitute his name in place of that of the original decree-holder and all that now remained to be done was to take out execution proceedings under the attached decree. It is quite clear that if in fact the execution proceedings are dismissed by reason of any default on the part of the person applying for execution that would undoubtedly have the effect of releasing any property that might have been attached in those execution proceedings, and the question we have to consider in this case is, what in fact was the effect of this order of the 19th July dismissing the execution proceedings for want of further prosecution. It is impossible to say the exact reason which induced the learned Judge to make such an order on that occasion, but it seems to me that it is impossible to conceive that there was, 10 days after the attachment order had been made, any default on the part of Gauri Shanker, who was applying for

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execution, which would have enabled the learned Judge to dismiss the case by reason of that default. There is nothing under the rules, so far as I am aware, which provides that where a decree is attached in the manner in which this was, the execution proceedings should be taken out within 10 days after the order was made nor can I find from the order-sheet any order which compelled Gauri Shanker within 10 days or any period to take out proceedings for executing the attached decree, and I have asked the learned Vakil for the appellant whether he can tell me in what respect there was default. He says that the applicant ought to have seen that the execution case was kept alive until he took out execution proceedings under the attached decree. It does not seem to me that there was any obligation upon the applicant to apply to the Court from time to time merely to see that the execution proceedings were kept alive, when in fact there was nothing further to be done in those proceedings until the attached decree had been realised by Gauri Shanker. That being so, it seems to me, whatever may be the wording of the order, that in truth and in fact there was no dismissal of the execution proceedings by reason of any default on the part of the applicant which brings it within Order XXI, rule 57, of the Civil Procedure Code, and if that is so, it follows that the attachment, which was made in order to enable the applicant to take out execution proceedings under the decree which was attached, remains in force notwithstanding the dismissal of the original execution proceedings which, as far as I can see, ought never to have been dismissed at all. It may be that the learned Judge, thinking that there was nothing further to be done in the execution taken out in the title suit, had wished to get rid of it from his file and accordingly made the order which he did, leaving the matter to proceed under the decree which had been attached, as it was by executing that decree that the applicant expected to get satisfaction. Having come to this conclusion upon the question of the effect of the order made dismissing the execution proceedings, it follows that if and so long as the attachment remained in force, any dealings by the original decree-holder or

any transfer or delivery of property comprised in the decree attached would be void as against the claims enforceable under the attachment. That is clearly laid down in section 64 of the Civil Procedure Code and, therefore, as between the two rival claimants to execute this decree there can be no doubt in my mind that the result arrived at by the learned Judge in the Court below was right and in so far as he allowed the execution to proceed on behalf of Gauri Shanker this appeal ought to be dismissed.

I have assumed in dealing with this case that the appellant has a right to appeal. But as on the merits he fails, it is not necessary for us to determine the point raised by the respondent that in fact there was no right of appeal and that the only method of approaching this Court was by revision. This does not arise because, one way or the other, assuming we had been in favour of the appellant on the merits, we should have been entitled to go into the case either because he had a right of appeal or because he was entitled to come before us by way of revision, and he has taken both courses. But as I have already said, that question we leave undetermined because it does not seem to arise at the present moment. The judgment which I have just delivered will govern the two appeals Nos. 236 and 287 of 1917 and the two Civil Revisions Nos. 333 and 334 of 1917, all of which are dismissed with costs. We assess the costs at Rs. 135 for all four cases.

MULLICK, J.—I agree.

Appeals and revisions dismissed.

COURT OF THE FINANCIAL COMMISSIONER, PUNJAB.

REVENUE REVISION No. 129 of 1917-18.

August 29, 1918.

Present :—Mr. Fagan, F. C.

KIRPA—APPLICANT

versus

NASIB SINGH AND OTHERS—RESPONDENTS,
Punjab Land Revenue Act (XVII of 1887) s. 117—

KIRPA V. NASIB SINGH.

Partition—Question of title, decision of—Procedure—Applicant not in actual possession—Burden of proof.

Where a question of title is raised by the respondent in a partition proceeding, the Revenue Officer should, in accordance with the instructions contained in paragraph 8 of the Financial Commissioner's Standing Order 27, himself proceed to decide the question without referring the objector to a Civil Court. [p. 790, col. 1.]

Where an applicant for partition is recorded as a co-sharing owner along with the other parties in the land in dispute, the presumption is that he is a co-sharer in the land of which he seeks partition. He must also be presumed to be in legal or constructive possession of his undivided share through or by means of his co-sharers. This presumption cannot be rebutted nor can such possession be defeated by the mere denial of his title by his co-sharers. To effect this there must be very clear and precise proof that their possession is in fact and really adverse to him so as to amount to his actual ouster from all connection with the land in dispute and to his acceptance of such a position. [p. 790, col. 1.]

Case forwarded by the Commissioner of Ambala on the 30th April 1918.

FACTS of the case appear from the following order of the Settlement Officer (Mr. R. Whitehead) dated 14th August 1917:—

"There are three parties to the proposed partition as shown in *Nagsha Alif* of the Vernacular File. The first two parties, Amrao Singh, etc., and Kirpa are shown as being in possession of all the land in dispute. The third party Nasib Singh is not in possession and has asked for partition. I note that other land in the same joint *khata* is held and cultivated by occupancy tenants. I also observe that Kirpa has mortgaged with possession his entire holding. As Amrao Singh and Kirpa have denied Nasib Singh's title to the land, the lower Court has directed them to sue in a Civil Court for the extinction of that title. Amrao Singh and Kirpa now appeal against that order, as they consider that Nasib Singh should have been directed to sue for possession. I find that one Mohan Singh had purchased one-half of the land in dispute from one Chikan. Amrao Singh, Kirpa and Nasib Singh obtained this half from Mohan Singh by pre-emption and I find that Nasib Singh paid his fair share of the purchase-money to Mohan Singh. Under these circumstances I refuse to interfere with the order of the lower Court. I dismiss this appeal without costs."

Upon this the defendants appealed to the

Commissioner (Mr. H. A. Casson), who passed the following order on 30th April 1918:—

"One Nasib Singh applies for partition of land, of which he is recorded owner along with (1) Amrao Singh, etc., and (2) Kirpa.

The possession is all entered in the names of Amrao Singh, etc., and Kirpa has mortgaged his rights to Amrao Singh, etc. These sharers deny Nasib Singh's right. The Assistant Collector ordered Amrao Singh and Kirpa to institute a suit within two months to get Nasib Singh's claim to proprietary right declared void. They appealed unsuccessfully to the Settlement Collector. They have not instituted the suit and the period of two months has passed.

In this application the defendants-appellants plead that the Collector did not consider all the grounds of appeal, that no guardian was appointed for one of them, a minor, and that the onus of bringing a civil suit should have been laid on applicant for partition who is now respondent. The order passed seems palpably wrong and not only so, but unjust. Why should Amrao Singh and Kirpa be ordered to go to a Civil Court? It is not they who have set matters in motion by applying for partition. Why should they peremptorily be told to go to the Civil Courts within two months on pain of having their objections brushed aside?

The proper order in this case, as the applicant for partition appears to be out of possession, and probably seeking to gain by his application a right which he knows will be disputed, was to file the application and leave either party to go to the Civil Courts. } A. Naturally the person who would have had to go to the Civil Courts, had the order taken this form, would have been Nasib Singh, as the other side are quite content with their present position.

Now as to the minor mentioned in the appeal, I find that she is a girl who is recorded as a co-sharer with Nasib Singh applicant. She is not, however, herself an applicant and so far has not been made a party to the case, nor is there any reason why she should be made a party at this stage.

I refer the case to the Financial Commissioner on the revision side and recommend that the application be accepted

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and that order be passed as at A above.

The parties do not wish to be represented on appeal."

JUDGMENT.—The facts of the case are fully set out in the orders of the Settlement Collector and of the Commissioner. The applicants for revision, being the respondents in the partition proceedings, raised the question of title before the Assistant Collector. Under the circumstance that officer, in accordance with the instructions contained in paragraph 8 of Standing Order 27, should himself have proceeded to decide the question of title without referring the objectors to a Civil Court. So far at any rate his order is incorrect.

There remains the question as to the party on whom the burden of proof lies. Now as to this it is to be observed that Nasib Singh, the applicant for partition, is recorded as a co-sharing owner along with the other parties in the land in dispute. Moreover it appears from the order of the Settlement Collector that Nasib Singh joined those other parties in a suit for pre-emption of a portion of that land and that he paid up his share of the price. Under these circumstances the presumption clearly is that Nasib Singh is a co-sharer in the land of which he seeks partition. It seems clear indeed that he is not in actual physical possession or occupation of any part of the land, but under the circumstances there arises, I hold, the further legal presumption that the possession of one co-sharer is the possession of another; that is to say, that Nasib Singh is in reality in legal or constructive possession of his undivided share through or by means of his co-sharers, the respondents in the partition proceedings. The presumption cannot, I think, be rebutted nor such possession on his part defeated by the mere denial of his title by the other parties. To effect this there must be very clear and precise proof that their possession is in fact and really adverse to him, so as to amount to his actual ouster from all connection with the land in dispute and to his acceptance of such a position. I do not think that there is such proof in this case and under the circumstances it is, I consider, for the applicants for revision to prove that Nasib Singh has no title to

the share in respect of which he claims partition or to obtain such partition. I am not prepared, therefore, to pass an order in the terms recommended by the Commissioner. I, however, set aside the orders of the Assistant Collector and the Settlement Collector and return the case to the former officer for disposal in accordance with the above remarks. He should call upon the respondent objectors in the partition proceedings to file a duly stamped plaint by a fixed date. No order as to costs.

Case remanded.

MADRAS HIGH COURT.

CIVIL SUIT No. 379 OF 1917.

March 15, 1918.

Present:—Mr. Justice Coutts Trotter.

MESSRS. BEST & CO., LTD.—PLAINTIFFS

versus

THE COLLECTOR OF MADRAS—

DEFENDANT.

Government of India Act, 1915 (5 & 6 Geo V, Ch. 61), s. 106 (2)—Income Tax Act (II of 1886), s. 31—Income Tax (Amendment) Act (V of 1916)—Composition of income tax—Repudiation of agreement by Collector under provisions of Act V of 1916—Suit to declare agreement binding on Collector, maintainability of—Original jurisdiction of High Court, limits of.

A suit to declare that an agreement for composition of income-tax under the provisions of section 31 of Act II of 1886 which was repudiated by the Collector after the enactment of Act V of 1916 is binding on the Collector, does not lie on the Original Side of the High Court and is exempted from its jurisdiction by section 106 (2) of the Government of India Act. [p. 791, col. 1.]

In the absence of an averment that the Collector was *mala fide* using the Statute to commit an act of aggression, the High Court has no jurisdiction to make an enquiry on the merits to determine whether the Collector was right in his view of the law. [p. 792, col. 2.]

FACTS appear from the judgment.

The Hon'ble Mr. S. Srinivasa Aiyangar, (Advocate General) for the Defendant, took the preliminary objection that the High Court had no jurisdiction to entertain the suit at all under section 106 (2) of the Government of India Act. The matter is one which pertains to the collection of revenue and the original jurisdiction of the High Court

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is expressly excepted by the terms of the section.

Mr. Nugent Grant, for the Plaintiffs.—In *Collector of Sea Customs, Madras v. Punniar Chithambaram* (1) the Judges held that the prohibition against the exercise of jurisdiction contained in 39 & 40 Geo. III, C. 79, was impliedly repealed by the Charter Act and Letters Patent of the High Court. Section 106 (1) of the Government of India Act, 1915, re-enacts the Letters Patent and its effect is to overrule the prohibition contained originally in 39 & 40 Geo. III, C. 79.

There is no prohibition in the language of section 106 (2) of the Government of India Act against the High Court going into the merits to see if the repudiation of the agreement of composition was illegal. Under the terms of the section the High Court cannot try matters relating to the collection of revenue according to the usage or practice of the country or the law for the time being in force.

JUDGMENT.—This was a suit brought by Messrs. Best & Co., Ltd., a firm of merchants carrying on business in this city, for a declaration that an agreement dated the 4th October 1915 entered into by them with the Collector of Madras of the day was binding on the parties. The action is brought because, on the 22nd May 1917, the Collector purporting to act in consequence of the Income Tax Act, V of 1915, declared that the agreement was no longer binding on him and repudiated it. The plaintiffs tendered the sum that they said to be due under the agreement and brought this action to safeguard their rights under it. The agreement is one made with the Collector of Madras under the provisions of the former Income Tax Statute II of 1886, section 31, which enables persons, instead of being reassessed every year, to arrange with the Collector for a definite sum to be assessed for a fixed period, and in this case the period agreed upon was five years from the 1st April 1915. The plaintiffs originally sued the Secretary of State for India. At one time the point was taken

on behalf of the Government that the proper person to be sued was not the Secretary of State but the Collector of Madras but, on a suggestion made at the time of the settling of issues, that difficulty, which was purely a technical one, was obviated by adding the Collector of Madras as a party, so that, the relief being in the alternative against one or other of those officials, it is really immaterial to decide as to which of them is actually liable. Of course, we all know it really comes to the same thing, the Collector being the revenue authority.

By way of preliminary objection, another point was taken by the learned Advocate-General which is embodied in the first issue in the case, and that was that I, sitting as a Judge on the Original Side of the High Court of Judicature at Madras, had no jurisdiction under section 106 (2) of the Government of India Act, 1915, to try the suit. The words of the section seem to be quite explicit and are as follows:—"The High Courts have not and may not exercise any original jurisdiction in any matter concerning the revenue, or concerning any act ordered or done in the collection thereof according to the usage and practice of the country or the law for the time being in force." As I say, on the face of it, it appeared to me that that entirely precluded me from entertaining the suit on the merits or from entertaining it at all. Mr. Grant took two points in answer to that contention. The first point was this: that by the decision in *Collector of Sea Customs v. Punniar Chidambaram* (1), which of course if the situation were unchanged would be binding upon me, I was compelled to hold that the prohibition against the High Court on the Original Side trying revenue suits had disappeared, because one of the learned Judges, Mr. Justice Kernan, held that the prohibition contained in the section of Act 39 & 40 Geo. III, C. 79, otherwise known as the Government of India Act, 1800, was repealed by 53 Geo. III, C. 155, sections 99 and 100, and the other learned Judges apparently held that the prohibition contained in 39 & 40 Geo. III, C. 79, was by necessary implication repealed by the Charter Act and the Letters Patent of this Court. What Mr. Grant says is, as

(1) 1 M. S. 9; 1 Ind. Jur. 150; 1 M. L. R. 16; 1 Ind. Dec. (N. S.) 58 (F. B.).

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I follow it, here in 1874 at the date of the judgment of that Bench, there was in existence the Act 39 & 40 Geo. III, C. 79, but the learned Judges still held that the effect of later legislation had been to abrogate that section of the Act. Then, he says, the Government of India Act, 1915, sub-section, 1 of section 106 re-enacts the Letters Patent and, therefore, I must hold just the same as the learned Judges did in 1874, viz., that the effect of re-enacting the Letters Patent is to overrule the prohibition contained originally in 39 & 40 Geo. III, C. 79, and now in the Act of 1915. I do not think that is a possible construction for me to adopt. It is very unfortunate that the section of the Act 39 & 40 Geo. III, C. 79, should have been re-enacted in section 106 of the Government of India Act, 1915, because the conflict between the King's Courts and the Sudder Courts, which was the only reason for the introduction of the section in the old Act of 1800, has entirely passed away and there is no rhyme or reason in prohibiting the Original Side of this Court from trying revenue cases. But I am not concerned with the wisdom or the policy of the legislation. The Legislature has thought fit to re-enact the section in circumstances which do not, in my opinion, require it. It has done so and I cannot hold, where an express prohibition has been re-enacted in 1915, that I can act on the view formed by a Bench of this Court in 1874 as to the effect on the original section of subsequent Statutes all of course prior to 1874, long prior to the Government of India Act, 1915. I am of opinion that the prohibition is absolute and that I have no jurisdiction to entertain this suit.

Mr. Grant took the further point that the fetter on my jurisdiction was only with regard to "acts ordered or done in the collection of the revenue according to the usage and practice of the country or the law for the time being in force," and he says, "if you go into the facts, on the merits you will find that my contention is well founded, that this was an illegal repudiation of the agreement." That contention, I think, was disposed of as long ago as 1849 in a judgment of their Lordships of the Privy Council in the case of *Richard*

Spooner v. Juddew (2). In that case the Court put a construction on a protective Statute of this kind which, so far as I know, has never been departed from, and it is put in much clearer words than I can put it, by Lord Campbell in giving their Lordships' opinion at page 379 of the report. What he says is this: "The point, therefore, is, whether the exception of jurisdiction only arises where the defendants have acted strictly according to the usage and practice of the country, and the regulations of the Governor and Council. But upon this supposition the proviso is wholly nugatory: for, if the Supreme Court is to enquire whether the defendants in this matter concerning the public revenue were right in the demand made, and to decide in their favour only if they acted in entire conformity to the regulations of the Governor and Council of Bombay, they would equally be entitled to succeed, if the Statutes and the Charters contained no exception or proviso for their protection. Our books actually swarm with decisions putting a contrary construction upon such enactments, and there can be no rule more firmly established, than that if parties *bona fide* and not absurdly believe that they are acting in pursuance of Statutes, and according to law, they are entitled to the special protection which the Legislature intended for them, although they have done an illegal act." It is not suggested in this case that the Collector of Madras or the Secretary of State acted *mala fide* or purported to seek the protection of the Statute with the full knowledge that all that was being done was to commit a mere act of aggression. Whether they were right or wrong, they thought clearly and honestly that they were taking advantage of the provisions which the Statute allowed them to take advantage of, in terminating this agreement. I am, therefore, compelled to hold that this Court has no jurisdiction to entertain this suit. I may add that I asked the parties if they wanted me to go into the other questions in the suit and save them from further trouble in case I should be held to be wrong in holding that I have no jurisdiction. I am not

(2) 4 M. I. A. 353; 6 Moo. P. O. 257; Perry O. O. 392; 1 Sar. P. O. J. 363; 18 E. R. 734; 4 Ind. Dec. (O. s.) 358.

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asked to do that but only to decide the preliminary point, and on that I hold that I have no jurisdiction. I dismiss the suit with costs (one set) of the Secretary of State.

M. C. P.

Suit dismissed.

PUNJAB CHIEF COURT.

MISCELLANEOUS SECOND CIVIL APPEAL

No. 1360 OF 1915.

May 21, 1918.

Present:—Mr. Justice Scott-Smith and Mr. Justice Martineau.

THAKUR AND OTHERS—DEFENDANTS—
APPELLANTS

versus

RAM SINGH—PLAINTIFF AND KALA—
DEFENDANT—RESPONDENTS.

Custom—Alienation—Occupancy holding—Exchange of holding with landlord—Sale of land obtained under exchange—Reversioner of tenant, suit by, maintainability of.

An occupancy tenant entered into an arrangement with his landlord, whereunder the former gave up his occupancy rights in a portion of the holding and obtained full proprietary rights in the remainder. Subsequently, he sold the land which he had obtained in full proprietary right to the defendant. Plaintiff, a reversioner of the vendor, brought a suit for a declaration that the sale would not affect his reversionary rights after the death of the vendor:

Held, that the occupancy rights with which the vendor had parted being ancestral, the land received by him in exchange from the landlord in full proprietary right must also be treated as ancestral, and that, therefore, the plaintiff had a *locus standi* to bring the suit. [p 794, col. 1.]

Miscellaneous second appeal from the order of the District Judge, Amritsar, dated the 29th April 1915.

Dr. Gokal Chand Narang and Bhagat Govind Das, for the Appellants.

Mr. Nanak Chand, for the Respondents.

JUDGMENT.—This is an appeal from the order of the lower Appellate Court remanding the case under Order XLII, rule 23, Civil Procedure Code, for decision on the merits. The facts are simple. Kala, defendant No. 1, was the occupancy tenant of a plot of 39 *kanals* 19 *marlas* of land of which the landlords were Ghania Singh and

Gopal Singh. Kala Singh without the permission of the landlords mortgaged this occupancy holding to Moti Ram for Rs. 3,500 on the 25th August 1913. The landlords intended to take steps to avoid the mortgage, but a settlement was effected between them and Kala by deeds of the 26th December 1913. In accordance with the agreement then come to, the landlords gave up their proprietary rights in 20 *kanals* out of the 39 *kanals* 19 *marlas* in favour of Kala, and Kala in consideration therefor gave up his occupancy rights in the remainder of the land, namely 19 *kanals* 19 *marlas*. By this arrangement Kala became full owner of 20 *kanals* of land, out of which he on 5th February 1914 sold 15 *kanals* 7 *marlas* to Moti Ram. His brother Ram Singh sued for a declaration that this sale would not affect his reversionary rights after the death of Kala. The first Court held that the land was not ancestral *qua* the plaintiff and dismissed the suit. It is admitted that Kala's occupancy holding of 39 *kanals* 19 *marlas* was ancestral and that Ram Singh would have been entitled to succeed to it upon Kala's death. The lower Appellate Court, following *Ghauns v. Imam Din* (1), held that the proprietary land which Kala had received from the landlords in exchange for ancestral occupancy land must be treated as ancestral, and that, therefore, the plaintiff had a *locus standi* to contest the alienation. It accordingly set aside the first Court's order and remanded the case.

Dr. Narang in arguing the case on behalf of the appellants urges that there had in reality not been any exchange of land. He points out that, under section 36 of the Tenancy Act, Kala could relinquish his tenancy at any time without the consent of his reversioners. He also urges that Kala could have sold his occupancy rights to the landlords, and with the money so obtained could subsequently have bought the proprietary land, and that if he had done this the latter would have been his self-acquired property. This, however, is not what happened and we, therefore, are not going to decide whether such land could have been considered as self-acquired property or not. What obviously

(1) 7 Ind. Cas. 465; 57 P. R. 1910; 95 P. W. R. 1910; 106 P. L. R. 1910.

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did happen was that there was an exchange between Kala and his landlords, Kala giving up his occupancy rights in a certain plot of land and receiving in exchange full proprietary rights in another plot. This was clearly an exchange though it was not such an exchange as is contemplated by section 7 of the Punjab Tenancy Act. Dr. Narang says that the object of the arrangement between Kala and his landlords was to avoid litigation. We do not see how the object with which the arrangement was effected can affect the nature of the arrangement. In *Ghaun v. Imam Din* (1) it was held that in the case of an exchange the character of the land acquired is that of the land parted with and that if the latter was ancestral, the acquired land is equally ancestral. That case followed a previous Division Bench decision of this Court in Civil Appeal No. 304 of 1897. In the present case there was clearly an exchange and as the occupancy rights which Kala parted with were ancestral, the land which he received in exchange from the landlords is also ancestral.

We, therefore, consider that the lower Appellate Court's decision is correct and we dismiss the appeal with costs.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1493 OF 1916.

August 12, 1918.

Present:—Mr. Justice Phillips
and Mr. Justice Kumaraswami Sastri.
PANANGIPALLI SURANNA—PLAINTIFF
—APPELLANT

versus

Sree Raja KATTA VENKATA
SURYANARAYANA JAGAPATHIRAJU
BAHADUR GARU AND OTHERS—

DEFENDANTS NOS. 1 TO 8—RESPONDENTS.

Madras Estates Land Act (I Mad. of 1908), ss. 5, 77, 125, 132—Rent, decree for, by Revenue Court—Execution sale, whether passes title free of incumbrances—Charge for arrears of rent, nature of—Transfer of Property Act (IV of 1882), s. 100—Civil Procedure Code (Act V of 1908), O. XXXIV, r. 14—Bengal Tenancy Act (VIII B. C. of 1885), s. 65.

A sale in execution of a decree for rent in a Revenue Court passes the property to the purchaser free of all encumbrances except those specified in section 125 of the Madras Estates Land Act. [p. 796, col. 2; p. 797, col. 2.]

The statutory charges on a land for arrears of rent is not a charge within the meaning of section 100 of the Transfer of Property Act. [p. 796, col. 1; p. 797, col. 1.]

Royzuddi Sheik v. Kali Nath Mookerjee, 33 C. 985; 4 C. L. J. 219, *Gopi Nath Mahapatra v. Kashi Nath Beg*, 1 Ind. Cas. 35; 9 C. L. J. 234; 13 C. W. N. 412 and *Fotick Chunder Dey Sircar v. E. G. Foley*, 15 C. 492; 7 Ind. Dec. (N. S.) 912, followed.

Narayana Ayyar v. Venkataramana Ayyar, 25 M. 220 (F. B.), explained.

Taraniprosad Roy v. Narayan Kumari, 17 C. 301; 8 Ind. Dec. (N. S.) 740, not followed.

Surbo Lal v. Wilson, 32 C. 630, considered.

Per Phillips, J.—The Madras Estates Land Act treats the charge for arrears of rent on a holding as being of the same nature in all cases and creates no distinction between the charge where rent is payable in kind and the charge where rent is payable in money. [p. 796, col. 1.]

Though section 65 of the Bengal Tenancy Act is not specifically re-enacted in the Madras Estates Land Act, section 132 of the latter Act leads to the same result. [p. 796, col. 2.]

Per Kumaraswami Sastri, J.—The absence of any separate section in the Madras Estates Land Act like section 65 of the Bengal Tenancy Act makes no difference in the scheme of the former Act, as it contains provisions in different sections which, in effect, reproduce the provisions of section 65 of the Bengal Tenancy Act. [p. 798, col. 1.]

Second appeal against the decree of the Court of the Subordinate Judge, Cozanada, in Appeal Suit No. 72 of 1915, preferred against the decree of the Court of the Additional District Munsif, Peddapur, in Original Suit No. 235 of 1914.

FACTS appear from the judgment.

Mr. C. Rama Rao for Mr. P. Narayana-murthi, for the Appellant.—The sale in execution of a rent-decree is subject to the pre-existing mortgages. The arrear of rent is a charge on the holding: *vide* section 5 of the Madras Estates Land Act. The charge is within the meaning of section 100 of the Transfer of Property Act, to which the provisions of Order XXXIV, rule 14, Civil Procedure Code, apply. The decree is a simple money-decree and the fact that it is a money decree for rent will not place it on a higher footing than an ordinary money decree. The pre-existing encumbrances are preserved and the purchaser at the auction sale cannot claim the same consequences to flow as in the case of a sale

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by a Collector. *Tariniprosad Roy v. Narayan Kumari* (1) is in appellant's favour. The case relied on by the lower Appellate Court proceeds on the language of section 65 of the Bengal Tenancy Act and as there is no provision corresponding to it in the Madras Estates Land Act, the reasoning adopted by the Calcutta High Court in that case does not apply to the present case.

The definition of 'charge' in the Transfer of Property Act should be adopted in construing the Estates Land Act. In *Narayana Ayyar v. Venkataramana Ayyar* (2) it was held that, for the purposes of the Limitation Act, the words 'charge' and 'mortgage' should be given their meanings in the Transfer of Property Act.

Mr. F. Nagabhushanam, for the Respondents. —The charge for arrears of rent is not within the meaning of section 100 of the Transfer of Property Act. To hold so would lead to an anomalous position. The latter provision can only be applied where rent is payable in money, but where rent is payable in kind the charge cannot obviously come within section 100. The statutory charge cannot be a charge within the meaning of section 100 in some cases and not be a charge in others. If the provisions of section 100 be applied, the tenant's position is similar to that of a mortgagor, i. e., the tenant, whose holding is security for the rent, can redeem the mortgages. Under the Estates Land Act, however, a tenant cannot, by payment of the rent, extinguish the charge. The charge continues to be security for future rent.

The absence of a provision in the Madras Act similar to that of section 65 of the Bengal Tenancy Act does not affect the case. The scheme of the Madras Act proceeds on the footing of that provision. The combined effect of sections 5, 6, 77 and 135 of the Estates Land Act is substantially to reproduce section 65 of the Bengal Tenancy Act.

The provisions of Chapter VI of the Estates Land Act, relating to sales by a Collector for arrears of rent, are by section 132 made applicable to rent decrees of

Revenue Courts. Therefore, it follows that the sale in execution of the latter passes the property to the purchaser free of incumbrances.

Mr. Rama Rao was heard in reply.

JUDGMENT.

PHILLIPS, J.—The plaint properties were sold to 7th defendant in execution of a decree for rent due upon them, and the sole question for decision is, whether the purchase by 7th defendant is subject to plaintiff's mortgage on the properties or not. The two lower Courts have taken opposite views, the District Munsif holding, on the strength of the ruling in *Tariniprosad Roy v. Narayan Kumari* (1), that a sale in execution of a decree for rent did not affect a prior mortgage, while the Subordinate Judge, following the opinion of the Calcutta High Court in *Royzuddi Sheik v. Kali Nath Mookerjee* (3) that the statutory charge upon the land for arrears of rent was not a charge within the meaning of section 100 of the Transfer of Property Act, held that the sale transferred the property free of encumbrance.

Under section 5 of the Madras Estates Land Act a first charge is created upon the land for rent, but the provision in section 65 of the Bengal Tenancy Act that the land can be sold in execution of a decree for rent finds no place in the Madras Act, under which a landlord may sue for his rent or distrain moveable property (section 77) or sell the land through the Collector (section 111). The question is, whether having obtained a money-decree, the property can be brought to sale in execution with the same result as would follow from a sale effected by the Collector. If the charge upon the land is a charge within the meaning of section 100, Transfer of Property Act, the provisions of Order XXXIV, rule 14, of the Code of Civil Procedure clearly forbid the sale of the property except by instituting a suit for sale in enforcement of the charge. Under section 100, Transfer of Property Act, "where immovable property of one person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person

(1) 17 C. 301; 8 Ind. Dec. (N. S.) 740.

(2) 25 M. 220 (F. B.).

(3) 33 C. 985; 4 C. L. J. 219.

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is said to have a charge on the property and all the provisions hereinbefore contained as to a mortgagor shall, so far as may be, apply to the owner of such property." If we apply this section, the owner of the property, i.e., the tenant whose holding is security for the rent, is treated as being in the position of a mortgagor, and has the rights of a mortgagor, under sections 60 and 61, to redeem the charge, but under the Estates Land Act a tenant cannot get rid of the charge upon his holding by paying the rent, for the charge, continues as security for rent to be paid hereafter. It may also be noted that, where rent is payable in kind, the charge for arrears of rent cannot come within the definition in section 100 which refers only to payment of money, and it would be most anomalous that a charge created by Statute should be a charge within the meaning of section 100 in some cases, but not so in others. The Estates Land Act treats the charge as being of the same nature in all cases, and creates no distinction between the charge where rent is payable in kind and the charge where rent is payable in money. Section 73 of the Transfer of Property Act would also seem to indicate that a charge for rent is not of the nature contemplated in section 100. I would, therefore, accept the view of the Calcutta High Court expressed in *Fotick Ohunder Dey Sircar v. E. G. Foley* (4) and in *Royzuddi Sheik v. Kali Nath Mookerjee* (3) that a charge for rent is not within the meaning of section 100 of the Transfer of Property Act. In this view, Order XXXIV, rule 14, is inapplicable to the present case.

There is, however, another aspect of the case which has to be considered. Under the decree for rent the property can be brought to sale, but if the decree were merely for money due on a debt, the sale would not have the effect of passing the property free of encumbrance, and it is difficult to see how the fact that the debt is a debt for rent can affect the case when the decree is passed by a Civil Court. In the present case, however, we are not concerned with a Civil Court's decree, because the rent-decree was obtained in a Revenue Court and under section 132

of the Estates Land Act the provisions of Chapter VI relating to sales by a Collector for arrears of rent are made applicable to the execution of a decree of a Revenue Court for arrears of rent. A sale by a Collector under Chapter VI passes the property free of all encumbrances except those specified in section 125, and consequently by virtue of section 132 a sale in execution must do the same. This view is also supported by the fact that under section 133 the Collector has certain powers given to him both in executing a decree for arrears by sale and in holding a sale for default under Chapter VI, no distinction being drawn between the two sales. Although section 65 of the Bengal Tenancy Act is not specifically re-enacted in the Madras Act, section 132 of the latter leads to the same result, and I must hold that a sale in execution of a decree for rent in a Revenue Court passes the property to the purchaser free of all encumbrances except those specified in section 125.

This second appeal is accordingly dismissed with costs.

KUMARASWAMI SASTRI, J.—The plaintiff is the appellant. Defendants Nos. 1 and 2 filed a suit in the Revenue Court against the 3rd defendant for arrears of rent, got a money-decree and in execution sold the holding. The plaintiff, who claimed to be a mortgagee under a registered deed of mortgage, dated 6th May 1910, sued for a declaration that the sale in execution was subject to his mortgage. The District Munsif was of opinion that inasmuch as the sale was in execution of a simple money decree, the decree holders must be presumed to have given up their lien on the holding conferred by section 5 of the Estates Land Act and passed a decree in favour of the plaintiff. On appeal, the Subordinate Judge reversed the decree and held that the charge was not affected by the form of the decree.

It is argued for the appellant that the charge created by section 5 of the Estates Land Act is a charge within the meaning of section 100 of the Transfer of Property Act so as to attract to it the provisions of Order XXXIV of the Code of Civil Procedure and that consequently the sale of the property charged in execution of a simple money-decree will not bind a

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mortgagee or prevent him from redeeming. It is also argued on the strength of the observations of Petheram, C. J., in *Tariniprosad Roy v. Narayan Kumari* (1) that the sale in execution of a simple money-decree for rent would have no higher effect than any other sale in execution of a money-decree.

As regards the first contention I do not think that rent due by a tenant to his landlord which may be payable either in kind or in money can be said to be a charge within the meaning of section 100 of the Transfer of Property Act, which expressly refers to the security being only for the payment of money. It is extremely unlikely that the Legislature intended that landlords who receive their rent in kind should be on a different footing from those who receive the rent in money and that while the former are untrammelled by the provisions of Order XXXIV of the Code of Civil Procedure the latter are bound by them.

In *Srimati Moharunee Dasya v. Harindra Lal Roy* (5) it was pointed out that there was no strict analogy between a charge for rent and a mortgage. In *Fotick Chunder Dey Sircar v. E. G. Foley* (4) it was held that rent due by a tenant, which by virtue of section 65 of the Bengal Tenancy Act was a charge on the holding, was not a charge within the meaning of section 100 of the Transfer of Property Act. And a similar view was taken by Mookerjee, J., in *Royzuddi Sheik v. Kali Nath Mookerjee* (3). In *Gopi Nath Mahapatra v. Kashi Nath Beg* (6) the purchaser in execution of a rent-decree was held to have priority over a purchaser in execution of a mortgage decree: and reference was made to section 73 of the Transfer of Property Act, which enacts that where property is sold for arrears of rent the mortgagee is entitled to enforce his mortgage against the surplus sale-proceeds.

Reliance has been placed by the appellant's Vakil on the observations in *Narayana Ayyar v. Venkataramana Ayyar* (2), to the effect that in construing the words "mortgage" and "charge" for the purpose of the Limitation Act, the definitions of the Transfer of Property Act should be applied in the absence of any definition in the Limita-

tion Act. These observations do not lay down an imperative rule of construction, but only indicate that in the absence of any repugnancy, Courts will adopt the definition in a substantive enactment, when they have to construe other Acts where the same words are used. The fact that rent is not necessarily payable in money renders the definition of a charge in section 100 of the Transfer of Property Act inapplicable. I think the view taken by the Calcutta High Court is sound and see no reason to differ from the decisions above referred to.

On the second question I am of opinion that a sale in execution of a money-decree for rent in a suit under section 77 of the Estates Land Act passes title free from all encumbrances, except when the encumbrance falls within section 125 of the Act. Section 5 declares that the rent of *ryoti* land together with any interest which may be due in respect thereof shall be a first charge on the holding. Under the Act the landlord can recover the rent due in these ways: (1) by distraint and sale of moveable property; (2) by a sale through the Collector; and (3) by a suit under section 77 of the Act in a Revenue Court and sale in execution of the decree passed therein. So far as distraint and sale by the Collector are concerned, there can be little doubt that the sale would confer a title on the purchaser free from all encumbrances except such as are contemplated in section 125 and there seems to be no reason why the intervention of a decree for rent should make any difference if the provisions of Order XXXIV of the Code of Civil Procedure do not apply. The following observations of Mr. Ameer Ali in his commentaries on section 65 of the Bengal Tenancy Act, when dealing with *Tariniprosad Roy v. Narayan Kumari* (1), are in point:—"There is no warrant in the provisions of the Act for holding that a difference in the form of the action would alter the rights of the landlord relating to the enforcement of his decree for arrears of rent. If the suit is for rent and the decree is for rent, the absence of a declaration in the ordering part of the decree that the decretal amount is a charge on the tenure or holding would not, it is submitted, alter the character of the decree,

(5) 1 O. W. N. 458.

(6) 1 Ind. Cas. 35; 9 C. L. J. 234; 13 C. W. N. 412.

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the effect of which, under the law, is to make the rent a first charge on the tenure or holding in respect of which the arrears are claimed."

The observations of Petheram, C. J., in *Tariniprosad Roy v. Narayan Kumari* (1) are dissented from in *Surto Lal v. Wilson* (7) and in *Royuddi Sheik v. Kali Nath Mookerjee* (8). Mookerjee, J., was of opinion that the consequence which follows from the provision that rent is a first charge upon an under-tenure is that a sale held in execution of a decree for arrears of rent produces the effect described in Chapter XIV of the Bengal Tenancy Act, which refers to sales for arrears under a decree and which provides for a title free from all except certain specified encumbrances to the purchaser.

It has been argued for the appellant that, as there is no section in the Estates Land Act similar to section 65 of the Bengal Tenancy Act, the decisions above referred to have no application. Section 65 provides that where a tenant is a permanent tenure-holder or a *raiya*, holding at fixed rates or an occupancy *raiya*, he shall not be liable to ejectment for arrears of rent but his tenure or holding shall be liable to sale in execution of a decree for the rent thereof, and the rent shall be a first charge thereon. As observed by the Privy Council in *Arthur Henry Forbes v. Maharaja Bahadur Singh* (8) section 65 is not a happily worded section and the clause refers to "rent being a first charge" and the words "seem from their collocation to have been inserted as an after-thought without sufficient consideration of their applicability to the rest of the provisions contained in the section." The Estates Land Act contains provisions in different sections which, in effect, reproduce all the provisions of section 65 of the Bengal Tenancy Act. Section 5 of the Estates Land Act provides that rent due by a *ryot* shall be a first charge. Section 6 gives a *ryot* rights of permanent occupancy. Section 77 gives the landlord the right to recover arrears of rent in a Revenue Court, and section 132 provides that the provisions of Chapter VI

shall be applicable, so far as may be, to the execution by a Revenue Court of any decree for arrears of rent. It will thus be seen that the absence of any separate section like section 65 of the Bengal Tenancy Act makes really no difference in the scheme of the Estates Land Act and does not render the reasoning adopted by the learned Judges of the Calcutta High Court inapplicable.

Sections 111 to 131 relate to sales by the Collector on the application of the landlord to whom rent is due, and section 125 enacts that the purchaser will only take the holding subject to "any right or interest which the *ryot* has created therein with the landlord's permission in writing registered and subject to any encumbrances created before the passing of the Act." It seems to me that the combined effect of sections 125 and 132 is to give the same rights to a purchaser in execution of a decree for rent, there being nothing in the Act repugnant to such a construction.

I am, therefore, of opinion that the purchaser in execution of a decree for rent gets the properties free from encumbrances, except such as are specially reserved by the provisions of the Estates Land Act. The second appeal fails and is dismissed with costs.

M. C. P.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 1632 OF 1913.

May 18, 1918.

Present :—Mr. Justice Chevis, and Mr. Justice Broadway.

BARKHURDAR—PLAINTIFF—
APPELLANT

versus

CHHATTA MAL AND OTHERS—DEFENDANTS
—RESPONDENTS.Civil Procedure Code (Act V of 1908), O. II, r. 2—
Mortgage—Suit claiming that mortgage has been

(7) 32 C. 680.

(8) 23 Ind. Cas. 632; 41 C. 926; 27 M. L. J. 4; 15 M. L. T. 380; 18 C. W. N. 747; 12 A. L. J. 633; (1914) M. W. N. 397; 1 L. W. 1059; 41 L. A. 91; 25 C. L. J. 434 (P. C.).

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satisfied and for recovery of excess balance realised by mortgagee, dismissal of—Redemption, suit for, maintainability of.

Plaintiff mortgagor brought a suit against the defendant mortgagee, claiming that the latter had realised more than was due to him under the mortgage and asking for a decree for Rs. 100. The Court held that the mortgage had not been paid off and dismissed the suit. Subsequently the plaintiff brought a suit to redeem the mortgage:

Held, that the suit for redemption was barred by Order II, rule 2 of the Civil Procedure Code.

Second appeal from the decree of the Additional Divisional Judge, Multan, dated the 5th May 1913.

Mr. Niaz Ali, for the Appellant.

Mr. Govind Das, for the Respondents.

JUDGMENT.—The plaintiffs in this case mortgaged their land to the defendants in 1873. The mortgage was with possession. A portion of the land was redeemed in 1890 and for some reason or other the defendants allowed the plaintiffs to re-take possession of the rest. In 1909 the defendants sued the plaintiffs in the Revenue Court for the value of produce on certain wells. The plaintiffs urged that the defendants had already realised more than the full sum due to them under the mortgage. The Revenue Court, acting under section 98 of the Tenancy Act, referred the parties to a civil suit, and the plaintiffs then brought a civil suit, claiming that the defendants had realised even more than was due to them under the mortgage and asking for a decree for Rs. 100. This suit was dismissed, the Civil Court holding that the mortgage debt had not been paid off. The plaintiffs now sue to redeem on payment of Rs. 300 or whatever other sum may be found to be due under the mortgage. The first Court gave a decree for redemption on payment of Rs. 240-2-6, but the learned Divisional Judge on appeal dismissed the suit as barred by Order II, rule 2, Civil Procedure Code.

The plaintiffs appeal, urging that order II, rule 2, is no bar as the cause of action is not the same in the two suits. We are unable to find any different causes of action. It is the existence of the mortgage which gives the plaintiffs a right to sue for redemption. That mortgage was existing at the time when the former suit was instituted, though the plaintiffs did

not then choose to admit it. It would be idle for the plaintiffs now to contend that the mortgage was not in existence at the time when the former suit was instituted, for if it was not in existence then, it is clear that it cannot be in existence now, for nothing has occurred since the date of the former suit to revive an extinguished mortgage or to create a new one. And if the mortgage be not in existence now, there is nothing which the plaintiffs can now sue to redeem. As the mortgage was in existence at the date of the former suit, the plaintiffs could have sued then for redemption, and not having done so the present suit is barred by Order II, rule 2. For the plaintiffs it is contended that a mortgagor may sue to redeem more than once, and that a mortgagor who has sued and obtained a decree for redemption but has failed to execute that decree within the period of limitation allowed by law is not debarred from bringing a subsequent suit to redeem. This may be so but it has nothing to do with Order II, rule 2, which provides a bar to a subsequent suit for a relief which has not been claimed in the former suit. The rulings [*Bhav. Balaji v. Hari Nilkanthrao* (1), *Laluchand v. Girjappa* (2) and *Ram Din v. Bhup Singh* (3)] cited by the learned Divisional Judge support his decision.

We uphold the decree of the Divisional Judge dismissing the suit and dismiss this appeal with costs.

Appeal dismissed.

(1) 7 B. 377; 4 Ind. Dec. (N. S.) 253.

(2) 20 B. 459; 10 Ind. Dec. (N. S.) 877.

(3) 30 A. 225; 5 A. L. J. 192; A. W. N. (1908) 96.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 65 OF 1916.

April 22, 1918.

Present:—Mr. Justice Spencer and

Mr. Justice Krishnan.

NADHAMUNI IYYAN (DECEASED)

AND ANOTHER—DEFENDANT NO. 3 AND HIS

LEGAL REPRESENTATIVE—APPELLANTS

versus

APPU ODAYAN AND OTHERS—

PLAINTIFF AND DEFENDANTS NOS. 1 AND 2—

RESPONDENTS.

Hindu Law—Joint family—Alienation—Collusive

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decree against some co-parceners—Execution—Sale—Purchase by decree-holder—Suit by other co-parceners to set aside decree as fraudulent—Relief awardable—Decree, form of—Partition, working out of, in suit—Plaintiff, right of, to recover whole property—Decree-holder purchaser, whether entitled to equities.

A collusive decree obtained against some of the co-parceners in a joint family on a sham transaction is not binding on the other co-parceners. Where joint family property is sold in execution of such a decree, the co-parceners are entitled to get the sale set aside and to sue for the recovery of their shares. They are not, however, entitled to recover the whole property and the decree-holder is entitled to the shares of his judgment-debtors. [p. 805, col. 2 p. 806, col. 1.]

Where specific properties are sold in Court auction, it is not necessary that there should be a separate suit for partition for the allotment and ascertainment of the shares. Partition may be directed in the suit itself and the plaintiff may be given his share. [p. 806, cols. 1 & 2.] (Authorities reviewed.)

The decree-holder purchaser cannot claim against the plaintiffs, who were no parties to the collusive decree based on a non-existent debt, an equitable remedy such as that implied by subrogation. [p. 808, col. 1.]

Second appeal against the decree of the District Court, South Arcot, in Appeal Suit No. 38 of 1915, preferred against the decree of the Court of the District Munsif, Tirukoilur, in Original Suit No. 1430 of 1913.

This second appeal coming on for hearing on the 10th and 11th of September 1917, the Court delivered the following

JUDGMENT.—The District Judge has based his decision largely on Court Exhibits I and II, which he admitted as evidence produced on the Court's own motion. He states that these documents are conclusive on the point of fact.

Order XL, rule 27, of the Code of Civil Procedure makes it imperative that an Appellate Court should record its reasons for admitting additional evidence whenever additional evidence is allowed to be produced.

Apart from the irregularity arising from the omission to comply with this rule, we think that in fairness these documents should not have been relied on for the purpose of proving that the properties attached by the 3rd defendant (plaintiff in Original Suit No. 133 of 1909) were treated as the joint properties of defendants Nos. 1 and 2 in this case (defendants Nos. 1 and 2 in Original Suit No. 133 of 1909) without giving the 3rd defendant, who was examined as 1st defence witness

at the original trial, an opportunity of explaining the circumstances under which he made the application to attach those properties and his admission in the application. In considering the other evidence of joint dealing with the property, the District Judge has not considered and met the possibility of the explanation suggested by the District Munsif for the joint execution of the mortgage deed to Abboy Chetti by plaintiff and defendants Nos. 1 and 2 being true; and he also appears to have overlooked the point, which the District Munsif noticed, that the plaintiff's evidence as to the purchase of the plaintiff properties by sale of ancestral properties must be hearsay, when he spoke to what occurred when he was only 2 years old.

We think that it is necessary to call for a fresh finding from the District Judge on the question whether the plaintiff has any interest in the properties.

If he finds this question in the affirmative, he will also return a finding on issue No. 3 which he has left undetermined.

Findings should be returned within two months from this date. Ten days will be allowed for filing objections.

In compliance with the order contained in the above judgment, the District Judge of South Arcot submitted the following

FINDINGS.—This is a case which has been remanded to me for findings on the question, "Whether the plaintiff has any interest in the properties?" and *secondly*, if the above issue is found in the affirmative, "If the sale is to be set aside, to what equities, if any, is the 3rd defendant entitled?"

It has been pointed out by the High Court that I have fallen into an irregularity in not complying with Order XLII, rule 27, of the Civil Procedure Code in relying on Court Exhibits I and II which I admitted as evidence produced on my own motion, in that I did not record the reasons for admitting this further evidence. It is also observed that there was great hardship on the 3rd defendant in admitting this in evidence, because he was not given an opportunity of meeting this document which contradicted his evidence. It is brought to my notice by the learned Vakil for the appellant that as a

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matter of fact the subject of these two Exhibits I and II was brought to the notice of the 3rd defendant when he gave his evidence in the Court and that he then had an opportunity of explaining the fact, which must have been present to his memory, that he attached the property as being the property of the defendants. However, the man is since dead and in view of the High Court's observation I do not think it advisable that I should rely on these documents, nor record a reason at this stage why I should admit them, because in any case one obvious explanation and observation attaches to them, that the general conduct of the parties might have led the 3rd defendant, who would not be intimately acquainted with family affairs, to believe the property to be joint family property and it is not the conduct or the admissions of a third party, as the 3rd defendant was, which can affect the nature of the ownership of any given bit of property. The learned Vakil for the appellant brings it to my notice that the decisions in *Indar Sahai v. Shaim Bahadur* (1) and *Madhavaiya Chetty v. Damodaram Chetty* (2) are a clear basis for holding that, although there may be no nucleus of family property, where the family work together and live together and eat together and treat the property as joint property, they make a joint family even if there has been no original nucleus of family property.

As regards the observations of the District Munsif with reference to the joint execution of the mortgage deed to Abboy Chetti by the plaintiff and the defendants Nos. 1 and 2, I have had my attention directed to it in argument and I have given my attention to it as directed by the order of reference of their Lordships of the High Court; and I think it is right to observe that this explanation by the District Munsif, that it was possible that the sons were also joined in the execution of this document as they were naturally required to do as a matter of safety by the mortgagee, is an explanation which was open to the

parties and yet was not made by the 3rd defendant. But as regards the explanation that the execution of the mortgage deeds Exhibits I and X to Shroff Abboy Chetti might show that the plaintiff properties were thrown into the common stock and enjoyed by the family jointly though acquired by a single member, that does in fact appeal to me and that is in fact my final view. The decision in *Thyrlambeal v. Krishna Pattar* (3) is an exact decision in point. As regards the Full Bench case in *Ethirajulu Naidu v. Govindarajulu Naidu* (4) I have to observe with great respect that it seems to me that a good deal would turn on the date of the Will in question. If after treating the property in every way as joint property, the acquirer at his very last gasp makes a Will disposing of it as if it was still his sole self-acquired property, I think it would be open to the other members of the joint family to show that by his action in treating the property as joint property and thus keeping the family together they were prevented from going out in the world and setting up on their own account, and, therefore, it was not open to him, just before his death, to execute a Will which reversed the tacit agreement among them. If, on the other hand, in such a series of circumstances as are detailed in *Ethirajulu Naidu v. Govindarajulu Naidu* (4) the acquirer of the property made and registered a Will 3 or 4 years before his death, that would be a very different matter. However, though I venture to express this proviso, my present finding is not given in opposition to the decision in *Ethirajulu Naidu v. Govindarajulu Naidu* (4) but because it seems to me, having regard to the provisions of Exhibit X, dated 1904, and Exhibit I, dated 1908, that after setting forth most clearly that it was self-acquired property it is stated with equal clearness and precision that the property is in the joint possession of all the members of the family. And this is exactly the course and conduct which, according to the ruling in *Madhavaiya Chetty v. Damodaram Chetty* (2), where the family all live together, is enough to

(1) 17 Ind. Cas. 78C; (1913) M. W. N. 122; 25 M. L. J. 57; 15 Bom. L. R. 418; 13 M. L. T. 155; 17 C. L. J. 299; 17 O. W. N. 609 (P. C.).

(2) 17 Ind. Cas. 347; (1912) M. W. N. 972; 12 M. L. T. 240.

(3) 32 Ind. Cas. 955.

(4) 32 Ind. Cas. 12.

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finally invest the property with the character of joint family property. The learned Vakil for the 4th respondent would wish to argue from *Ram Kishen Das v. Tanda Mal* (5) that there can be no joint family unless there is a nucleus of joint family property. But the decision in 1912 Madras Weekly Notes [*Madhavaiya Chetty v. Damodaram Chetty* (2)] is exactly opposed to such a view. It is perfectly true that the evidence as to the property having been acquired with the grandfather's own money is mere hearsay, as the High Court has been pleased to point out to me, and it is true that in certain cases, as set out in the decision in *Jangi Nath v. Janki Nath* (6), a single owner of a property may for certain reasons, and to avoid family quarrels, associate with himself persons who in reality have no joint title and may afterwards insist on his own full separate rights. Personally I incline to the view that this is not a line of conduct which should be encouraged or which in the end conduces to the peace and welfare of families [to quote the Privy Council in *Lala Muddun Gopal Lal v. Khikhinda Koer* (7)] because it seems to me that it is substituting for a temporary disagreement an inevitable, bitterly-contested law suit, which will certainly go as far as the Privy Council if the family funds or credit permit. However that may be, the present is not such a case. Here there has been a living together in one house ever since the family migrated to Sandaipettai on account of the great famine of 1876-77. A house was bought and eventually land; and this land is the subject of the present litigation. The oral evidence on the side of the plaintiff is indeed meagre and a great part of the evidence he gives as his own witness is false. But the learned District Munsif found as a fact that the plaintiff and the defendants Nos. 1 and 2 have been living all along and messing together and the plaintiff's present statement to the contrary is a deliberate falsehood. This fact, while lending great weight to the theory of collusion in the present suit, is also a very important one in deciding whether

the family have been throwing all their income such as it is into one joint stock. Taken with the contents of Exhibits I and X, I am satisfied that the property was altered into joint family property with the full final consent of the father who acquired it and for this reason I find the issue in the affirmative that the plaintiff has an interest in the properties.

As regards the 3rd issue the learned Vakil for the respondent wishes me to go once more over the whole question of fraud and to show that on account of the fraud being non-existent and the pro-notes being executed with legitimate purposes, his client is entitled to re-payment of the following sums of money, Rs. 600 for Exhibit I, Rs. 224 under Exhibit C and Rs. 300 towards the discharge of Exhibit VI. He argues from the decision in *Palamalai Mudaliyar v. South Indian Export Co., Ltd.* (8) that the 3rd defendant is entitled in equity to have these sums made a charge on the property as there is no evidence to rebut the fact of payment; for, as he points out, P. W. No. 1 (the 2nd defendant) admits in evidence that Rs. 40 is due from him on the pro-notes for which Exhibit C was substituted. On the other hand my attention has been drawn to the Privy Council decision in *Sahu Ram Chandra v. Bhup Singh* (9), by which it is said that the sale of joint family property by only one or two members excluding a person who is a common co-sharer with them has no effect whatsoever and cannot bind the property at all. Thus there is no equity for the 3rd defendant retaining his two-thirds of the suit property nor for his getting his money back. It seems to me that this is the decision which I must apply in the present case and that my finding on the 3rd issue is the same as the lower Court's, viz., that the 3rd defendant (who is now represented by the 4th respondent) is not entitled to any equities in this case. Although I base

(5) 10 Ind. Cas. 543; 33 A. 677; 8 A. L. J. 723.

(6) 2 A. L. J. 225.

(7) 18 C. 341; 18 I. A. 9; 15 Ind. Jur. 93; 5 Sar. P. C. J. 676; 9 Ind. Dec. (N. S.) 226.

(8) 5 Ind. Cas. 33; 33 M. 334 at p. 333; 7 M. L. T. 167; 20 M. L. J. 211; (1910) M. W. N. 239.

(9) 39 Ind. Cas. 283; (1917) M. W. N. 439; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 493; 26 C. L. J. 1; 33 M. L. J. 14; 22 M. L. T. 22; 6 L. W. 213; 39 A. 437; 41 I. A. 126 (P. O.).

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my decision on the ruling in the Privy Council cases noted above and not on the finding as regards fraud—because it seems to me that I am not bound or justified in reviewing my finding on that point that there was fraud in the matter—if I take that finding as holding good, I will also say that on account of the fraud practised in the matter to which the 3rd defendant was necessarily a party he is not entitled to any equities in the case. But my finding as given above is independent of the finding on the question of fraud, which as it seems to me has been excluded from the scope of the reference. I am corrected by the learned Vakil for the respondent as regards his arguments based on 33 Allahabad [*Ram Kishen Das v. Tanda Mal* (5)]. He points out that his argument was that there is no presumption as to the existence of joint family property and any one who alleges it must prove it. This, of course, I concede, but he proceeded to argue as stated above that there must necessarily be a nucleus of joint family property before anything can be added to it, and this is not a correct statement of the law. Allowing, as I do, that all the burden of proof rests entirely on the plaintiff in such a case as this, it seems to me that he has discharged that burden and proved that he has an interest in the plaint properties.

This second appeal came on for final hearing on the 17th April 1918, after the return of the findings of the lower Appellate Court upon the issues referred by the High Court for trial.

Messrs. T. R. Vencatrama Sastri and M. S. Vencatrama Aiyar, for the Appellants.—The District Judge erred in passing a decree in favour of the plaintiff for the whole of the joint properties. Even on the finding of fraud such a decree is not warranted. Here is a case of a Court sale and not of a private alienation. The decree in Original Suit No. 133 of 1909 by the appellant (3rd defendant) against defendants Nos. 1 and 2 was found to be a sham and a collusive decree and was in respect of a fictitious and non-existent debt. Defendants Nos. 1 and 2 were *participes criminis* in the fraud and their suit to set aside the sale was dismissed. They have no equities to ask for their shares in proceedings had at their

instance and they cannot be permitted to obtain an indirect benefit by setting up the plaintiff to claim the whole property on their behalf. The plaintiff can only lay claim to his share in the joint family property. *Kama Row v. Nukamma* (10).

Whatever may be the rights of a private alienee, the claim of the 3rd defendant-appellant rests upon his sale certificate and it passes at least the $\frac{2}{3}$ shares of defendants Nos. 1 and 2.

The 3rd defendant's rights can be worked out in this suit alone and he need not be driven to bring a general suit for partition. It is settled law that the alienation by a co-parcener is binding on him to the extent of his share. In this case, the plaintiff will not be prejudiced by the shares being determined and assigned.

Lastly, Rs. 280 of the purchase amount paid by the 3rd defendant-appellant was used to pay 2 decrees which were equally binding on plaintiff. He also redeemed an *othi* by paying Rs. 600. Plaintiff is bound to pay to the appellant $\frac{1}{3}$ rd of these amounts. The appellant is entitled to relief in the nature of subrogation. *Palamalai Mudaliyar v. South Indian Export Co. Ltd.* (8) and *Chama Swami v. Padula Anandu* (11).

Mr. C. Padmanabaiyar, for Respondent No. 1.—The appellant, who obtained the decree in Original Suit No. 133 of 1909, was an active abettor of the fraud practised on the plaintiff and on the Court. The decree was fraudulent and collusive and the debt or claim in respect of which the decree was obtained was found to be fictitious. The decree-holder should be treated as having acquired nothing by the decree. His position is no better than that of a trespasser. His purchase at Court-auction should be traced back to the earlier proceedings and the decree and when these latter were tainted with fraud, the auction sale and the certificate which purports to convey title to the appellant should be treated as a nullity. Plaintiff was, therefore, entitled to eject the appellant as a trespasser and he could sue on behalf of his co-sharers also.

(10) 31 M. 485; 18 M. L. J. 576; 4 M. L. T. 331.

(11) 31 M. 439; 3 M. L. T. 395; 18 M. L. J. 306.

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Assuming that appellant acquired the rights of defendants Nos. 1 and 2 by his purchase, he can get no relief in this suit against the plaintiff. At the best the right secured by the appellant is only an inchoate right to enforce partition of his alienor's share. He cannot claim to be entitled to any specific items of property by reason of his purchase. In *Deendyal Lal v. Jugdeep Narain Singh* (12) the Privy Council gave the son possession of the entire property as against the holder of the decree against the father. See also *Suraj Bansi Koer v. Sheo Persad Singh* (13), *Ramanna v. Venkata* (14) and *Nanjaya Mudali v. Shanmuga Mudali* (16).

The appellant is not entitled to any equities in the nature of subrogation as against plaintiff. There can be no such relief where the very foundation of the claim is tainted with fraud. The equity does not arise by the mere fact that plaintiff was benefited by the payments. The cases cited by the appellant's Vakil do not apply. In *Palamalai Mudaliyar v. South Indian Export Co. Ltd.* (8) and *Ummachakutti v. Ummekutti Haji* (16) the payments were made by persons to whom real sales were effected by persons who owned the properties, but they were held to be in fraud of creditors, and, therefore, set aside. In this case no consideration was paid by him for the notes on which he sued.

Mr. T. R. Vencatrama Sastri, in reply.—There is no analogy in the position of the appellant with that of a trespasser. It is only plaintiff that is left unaffected by the decree in the prior suit, Original Suit No. 133 of 1909. The rights of the other co-parceners are subservient to that decree, which is binding on them until it is vacated by proper proceedings instituted by them for the purpose. The certificate of sale passes to the appellant the title of defendants Nos. 1 and 2 in the properties.

(12) 3 C. 198; 1 C. L. R. 49; 4 I. A. 247; 3 Sar. P. C. J. 730; 3 Suth. P. C. J. 468; 1 Ind. Jur. 604; 1 Ind. Dec. (N. s.) 715.

(13) 5 C. 148; 6 I. A. 88; 4 Sar. P. C. J. 1; 3 Suth. P. C. J. 589; 4 C. L. R. 226; 2 Shome L. R. 242; 2 Ind. Dec. (N. s.) 705.

(14) 11 M. 246; 12 Ind. Jur. 177 and 453; 4 Ind. Dec. (N. s.) 171.

(15) 22 Ind. Cas. 555; 38 M. 684; 15 M. L. T. 186; (1914) M. W. N. 356; 2 M. L. J. 576.

(16) 29 Ind. Cas. 583.

It is not necessary to drive the appellant to a suit for a general partition. Where there are also properties not comprised in the decree, such a course may be necessary. Here, however, the decree in Original Suit No. 133 of 1909 comprises all the properties in the family. The rights and equities of the parties may be worked out in this suit itself without the plaintiff being in any way prejudiced by it. In the Privy Council case, *Deendyal Lal v. Jugdeep Narain Singh* (12), the Privy Council stated that the purchaser was entitled to have the rights acquired by him by purchase ascertained by partition. In *Deendyal Lal v. Jugdeep Narain Singh* (12) and *Suraj Bansi Koer v. Sheo Persad Singh* (13) their Lordships were not dealing with the question of likely prejudice to the parties if a partition were worked out in the co-parcener's suit itself. In *Ramkishore Kedarnath v. Jainarayan Ramrachpal* (17) such a right is recognised. In none of the cases was the point expressly considered as to how the alienor's equity was to be worked out. In any event, the observations in those cases are beside the point as they do not relate to purchases at Court-auction.

JUDGMENT.

SPENCER, J.—My learned brother has fully discussed the questions of law which have been raised in the arguments upon the 2nd appellant's memorandum of objections and I have little to add to what he has written in the judgment he is about to deliver.

We must accept the learned District Judge's findings on the issues referred to him. I think that the plaintiff is not entitled to recover more than his 3rd undivided share and that the decree in Original Suit No. 133 of 1909 is binding on defendants Nos. 1 and 2 who were parties to it.

I am further of opinion that on the District Judge's finding as to fraud and on the principle that he who comes into equity must come with clean hands, the 3rd defendant, having been a party to a collusive decree based upon a non-existent

(17) 20 Ind. Cas. 958; 40 C. 966; (1913) M. W. N. 661; 14 M. L. T. 163; 17 C. W. N. 1189; 18 C. L. J. 237; 15 Bom. L. R. 867; 11 A. L. J. 865; 25 M. L. J. 512; 40 I. A. 213; 110 N. L. R. 1 (P. C.).

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debt, cannot ask as against a person who was not a party to that decree for an equitable remedy such as that implied by subrogation [*vide Karuppan Ambalagaran v. Muhammad Sakuth Levvai* (18)]. The suit must be remanded to the lower Court for having a partition of the plaintiff's share effected by metes and bounds and for passing a final decree for the possession of the share allotted to the plaintiff.

The plaintiff will get costs throughout proportionate to the value of his share. The defendants will bear their own costs throughout. The lower Court's decree will be modified accordingly.

KRISHNAN, J.—The learned District Judge has returned findings on the issues remitted to him, adversely to the appellant and he has filed a memorandum of objections to them.

On the 1st issue the learned Judge finds that the plaint properties were treated as joint family property with the full consent of the father long before the decree in Original Suit No. 133 of 1909 and the sale in execution of it, and that, therefore, the plaintiff has a share in them. It is objected that this is a new case which had not been set up previously by the plaintiff and that the 3rd defendant has been prejudiced by such a new case being now made out against him. Plaintiff had stated in the plaint that the properties were "common family properties" without specifying how; on the other hand the 3rd defendant had alleged that they were 1st defendant's self acquisitions. Though there was no direct issue on this question, the parties treated the second part of the 1st issue as raising it and evidence was given about it by both sides. The plaintiff's evidence was not only that they were purchased from family funds but also that they were dealt with by his father and other members of the family as joint property. The District Judge has now accepted the latter portion of his case, though he had originally found that the properties were purchased with joint family funds. There is, however, no ground for saying that the present finding amounts to the setting up of a new case for the plaintiff.

All the evidence was on record and the finding is on such evidence. I do not think the 3rd defendant can properly be said to be prejudiced, nor has he shown that any evidence was properly omitted by him from being adduced. As this is the only objection to the finding as to the joint character of the property, and as it fails, we must accept it.

The next question is, what relief the plaintiff is entitled to on that finding. He claims the right to recover the whole property, whereas the 3rd defendant contends that he should be given only his one-third share. The District Judge has accepted the plaintiff's contention. The plaint items were attached and sold in execution of the decree in Original Suit No. 133 of 1909 obtained by the 3rd defendant against defendants Nos. 1 and 2, the father and brother of plaintiff; and they were purchased by the 3rd defendant himself. The Munsif has found that the promissory notes on which that decree was obtained were sham transactions and without consideration and the decree was a collusive and fraudulent one probably intended to harass a creditor. On this finding plaintiff's rights in the property were clearly unaffected by the decree and sale, as he was no party to them. The District Judge has concurred in this finding of fraud. Defendants Nos. 1 and 2 had themselves brought Original Suit No. 965 of 1912 to set aside the decree and sale; but that suit failed for non-payment of costs within the time fixed. They can no longer sue to avoid the sale; and being parties themselves to the fraudulent decree they would have, even otherwise, no right to recover the plaint properties. See *Kama Row v. Nukamma* (10). So far, therefore, as their two-thirds share is concerned, it must thus be taken that the 3rd defendant's sale certificate is valid against them and the title to their share has passed to him. That being so, it will not be right to allow the plaintiff to recover the whole property and thus enable defendants Nos. 1 and 2 to get their shares indirectly through him when they cannot get them directly, unless it is strictly necessary to allow plaintiff to do so to work out his own rights. It has not been attempted to be shown that plaintiff would in any way be

(18) 22 Ind. Cas. 253; 26 M. L. J. 74; 14 M. L. T. 478; (1914) M. W. N. 131.

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prejudiced as to his own rights in the properties if partition should be directed in this suit itself and he given his share.

It was, however, urged that the 3rd defendant should be looked upon as a trespasser and that it was plaintiff's right as a member of the joint family to eject him altogether from the properties. This argument fails, as the 3rd defendant is not altogether a trespasser but has got the rights of defendants Nos. 1 and 2 in the properties.

Then it was argued that even if we look upon the 3rd defendant as the Court auction purchaser of the shares of defendants Nos. 1 and 2, he is still not entitled to resist the plaintiff's suit to recover the whole property, his right being only to bring a suit for partition. In support of this proposition the learned Vakil relied on the Privy Council judgments in *Deendyal Lal v. Jugdeep Narain Singh* (12) and *Suraj Bansi Koer v. Sheo Persad Singh* (13) and *Ramanna v. Venkata* (14) and *Nanjaya Mudali v. Shanmuga Mudali* (15). Though the alienee of a share of an undivided co-parcener is not strictly entitled to possession of any property before suing for partition, he having only an equity to enforce a partition; still in a case like the present where he is in possession of specific properties, it is not necessary to eject him and drive him to a fresh partition suit, as the rights of the parties could be worked out in this suit itself without prejudice. In the case in *Deendyal Lal v. Jugdeep Narain Singh* (12) their Lordships of the Privy Council no doubt confirmed the decree giving the son possession of the whole property purchased by the holder of the decree against his father, but they added a declaration that the purchaser was entitled to have the share and interest purchased by him ascertained by partition. The case in *Suraj Bansi Koer v. Sheo Persad Singh* (13) takes a similar view. But neither of them is in my opinion against allowing the alienor's equity being worked out in the suit by the co-parcener, if it can be done without prejudice to the plaintiff. That question was not before their Lordships in the two cases cited. On the other hand, they have themselves recognised that a partition may be directed in the co-parcener's suit itself; for in the case of *Ramkishore Kedarnath*

v. Jainarayan Ramrachpal (17) their Lordships, while holding that the co-parcener not party to the alienation was not bound to sue for partition, expressly say "that it may well be that it is open to the alienee to insist that he stands in the shoes of his alienor as to the latter's share on partition and that the Court then would itself at the alienee's instance direct partition in that suit." The case in *Ramanna v. Venkata* (14) was one of a gift by a Hindu father which was found to be invalid and not binding on the son or on the father. The learned Judges, while giving effect to the power of interdiction by the son in those circumstances, recognised that in the case of a sale the alienation should be upheld to the extent of the alienor's share as a matter of equity; which, however, did not exist in that case. They did not consider how the alienor's equity was to be worked out; and moreover in the present case we have a Court auction sale binding on defendants Nos. 1 and 2, and, therefore, the observations in that case do not apply to this case. The decision in *Nanjaya Mudali v. Shanmuga Mudali* (15) is not in point here and the observations in it are not inconsistent with the view I am taking; in fact the observation in the case in *Ramkishore Kedarnath v. Jainarayan Ramrachpal* (17) above referred to is cited and followed.

Where co-parceners alienate their shares in specific properties, the other co-parceners have a right to sue for partition and for recovery of their shares in those properties alone without suing for a general partition; the validity of such suits has now been settled by the Full Bench in *Iburaamsa Rowthan v. Thiruvankatasami Naick* (19). Though no doubt an alienee of a co-parcener's share in a specific property has to sue for general partition to work out his rights, still where, as in the present case, there do not seem to be any other properties to be divided than the suit ones there is no object in making him bring a fresh suit. The District Judge has relied on the case in *Sahu Ram Chandra v. Bhup Singh* (1917) M. W. N. 439 (9) (the same case is reported in I. L. R. 39 All. 437)

(19) 7 Ind. Cas. 559; 34 M. 263; (1910) M. W. N. 380; 8 M. L. T. 269; 20 M. L. J. 743.

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for his view that the 3rd defendant has no "equity" to get a two-thirds share in the properties: apparently he relies on the observation of Lord Shaw that "any deed of gift, sale or mortgage granted by one co-parcener on his own account of or over the joint family property is invalid; the estate is wholly unaffected by it and *its entirety* stands free of it." The observation refers to private alienations and does not apply to the present case, which is one of a Court sale; the right to attach and sell a co-parcener's share for his decree debt has been established by the decision of the Privy Council itself and has never been doubted. In our Presidency, even as regards private alienations it is settled law that one co-parcener may dispose of the ancestral undivided estate to the extent of his own share by private conveyance whether for value or by gift; and this was recognised and laid down by the Judicial Committee itself in *Suraj Bansi Koer v. Sheo Persad Singh* (13) above referred to. That being so, an alienation of the joint family property by one co-parcener will bind his share, though it may not bind the shares of the other co-parceners. Their Lordships cannot well be taken to have overruled this view as they do not refer to it at all. The Madras cases referred to by their Lordships were all cases in which the question was whether the amount borrowed under a mortgage could itself be considered an antecedent debt justifying a Hindu father in mortgaging his son's share also in the joint property. As stated above, we have here a case of a Court-sale but when the question is raised about a private alienation, the applicability of *Sahu Ram-Chandra's case* (9) may be considered with reference to the observations of the learned Chief Justice and of Mr. Justice Kumaraswami Sastri with reference to another point dealt with by the same case, in *Peda Venkanna v. Sreenivasa Deekshatulu* (20).

For the above reasons I am of opinion that the plaintiff should be given a decree only for his share in the plaint properties, which is admittedly one-third.

The next question is, whether there are any equities in favour of the third defendant. (20) 43 Ind. Cas. 225; 33 M. L. J. 519; 22 M. L. T. 334; 6 L. W. 649; (1918) M. W. N. 55; 41 M. 136.

ant. He states that Rs. 280 of the money he paid for the Court purchase was used to pay off two other decrees binding on the plaintiff and that he subsequently redeemed an *othi* binding on the property by paying Rs. 600. He claims that he should be paid one-third of these amounts by the plaintiff on his getting one-third of the property. Plaintiff on the other hand contends that the 3rd defendant is not entitled to any equities in his favour as against him, and both the lower Courts have accepted this view.

Whatever the rights of the 3rd defendant may be as against defendants Nos. 1 and 2, we must take it on the findings in this case that the decree in Original Suit No. 133 of 1909 was a collusive one for a non-existent debt and that the 3rd defendant was a party to the fraud by which it was obtained. His Court-auction purchase was in execution of that fraudulent decree and the payments he pleads were made as such purchaser. The very foundation of his present claim is thus tainted with fraud and it seems to me the lower Courts were, therefore, right in refusing to recognise any equity in his favour against plaintiff who was not involved in that fraud. His payments have no doubt enured to the benefit of the plaintiff but that consideration by itself is not sufficient to give rise to any equity; as for example in the case of volunteers where no equity is recognised as arising from such payments. The learned Vakil for the appellant relied on the cases in *Chama Swami v. Padala Anandu* (11), *Palamalai Mudaliyar v. South Indian Export Co., Ltd.* (8) and *Ummachakutti v. Ummerkutti Haji* (17). The two last cases referred to payments by persons to whom real conveyances had been executed by owners of property for consideration paid and which were only set aside against creditors as being in fraud of them. Those cases are clearly distinguishable from the present case, as here there was fraud from the very beginning and there was no consideration paid by the 3rd defendant for the notes sued on by him. This is a stronger case against allowing any equity than the one in *Karuppan Ambalagaram v. Muhammed Sakuth Levvai* (18), where subrogation was disallowed. In the case in *Chama Swami v.*

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Padala Anandu (11) there was no fraud at all; the sale to the person who paid off the prior mortgage failed because of a prior sale to another under whom some of the defendants claimed. I am, therefore, of opinion that the equitable doctrine of subrogation cannot be invoked here in 3rd defendant's favour against the plaintiff.

In the result I would give a decree for partition to plaintiff for his one-third share in the plaint properties and dismiss the suit as to the balance. Plaintiff will receive proportionate costs throughout. The case will go back to the 1st Court for a final decree.

M. C. P.

*Appeal partly allowed;
Case remanded.*

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 25 OF 1915.

May 28, 1918.

Present:—Mr. Justice Scott-Smith and
Mr. Justice Martineau.

ISHAR AND OTHERS—PLAINTIFFS—

APPELLANTS

versus

SUNDAR—DEFENDANT—RESPONDENT.

Custom—Alienation—Occupancy rights, creation of, whether can be challenged by reversioners.

The creation of occupancy rights in land amounts to a transfer of valuable rights and can be challenged by the heirs of the proprietor in accordance with the well-recognised principles of customary law. [p 809, col. 2; p. 810, col. 1.]

Second appeal from the decree of the District Judge, Hoshiarpur, dated the 16th November 1914.

ORDER.

LESLIE JONES, J. (May 3, 1915)—One Munshi has, for a consideration which is called *nazrana*, created occupancy rights under section 6 of the Tenancy Act in favour of Sundar. The annual rent is to be 2 annas per rupee on the land revenue over and above the Government demand.

Munshi's collaterals sued for the usual declaration and in the first Court they obtained a decree, the Munsif finding, though

without reference to authority, that the transaction amounted to an alienation, and that even if consideration was proved, necessity was not made out.

On appeal the District Judge dismissed the suit, without discussing the question of necessity, on a finding that the transaction could not be regarded as more than a creation of occupancy rights and that consequently, *Faquir Muhammad v. Fazal Muhammad* (1) being cited, it was not open to challenge by reversioners.

Notice was issued on the ground that no such plea had been taken. It does not, it is true, appear in the written pleas, and there were no written statements, but the plea must have been raised orally, as otherwise it is impossible to account for the first issue which the Munsif framed.

I think that it must be faced. The question is, of course, discussed at great length in *Faquir Muhammad v. Fazal Muhammad* (1), but as in point of fact the Division Bench which decided that case, were able to find that the transaction there under consideration did in fact amount to a sale, the discussion as to the result of a genuine creation of occupancy rights not amounting to a sale appears to me to be *obiter*.

In the present case it does not seem to be possible to hold that this transaction is a sale, and Counsel for the respondent has not been able to explain to me why it should be so regarded. At the same time the principle involved is one of very grave importance, because if the learned argument in *Faquir Muhammad v. Fazal Muhammad* (1) is sound, it opens the way to the uncontrolled transfer of rights which may be very much more valuable in some respects than those of a mortgage.

With all deference, I cannot avoid a suspicion that there may be a flaw in the argument to which I refer, and perhaps I may explain myself.

To follow the argument. B transfers to C with the consent of A. B's collaterals cannot object, because the transaction is valid under Statute Law. Equally the heirs of A, it is presumed, would have no *locus standi*. Why? I think because A has

(1) 16 P. R. 1906; 66 P. L. R. 1906.

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a statutory right to consent, and, moreover, A is not necessarily parting with a valuable right.

Then if B transfers to A, and A transfers to C, A's heirs cannot object. Why? It seems to me that one very good reason would be that A is parting with self-acquired property, whether he parts with it a year or ten years afterwards, and to that his reversioners could in no case object.

Again, why can A not have an equal right, in the first instance, to create occupancy rights in favour of C? I suggest that it is because he is parting with valuable rights which he has not himself acquired. There may, of course, be an ample answer to these suggestions and I have not had the benefit of any criticism. But in view of the importance of the matter and the doubts which I entertain, I am of the opinion that this appeal should go to a Division Bench, and I admit it accordingly.

I have since seen that the argument in *Faqir Muhammad v. Fazal Muhammad* (1) has been questioned in *Nikka v. Gurdai* (2).

Mr. Gokal Chand, for the Appellants.

Mr. Nihal Chand Mehra, for the Respondent.

JUDGMENT OF THE DIVISION BENCH.

The facts of the case are given in the order passed in Chambers by Leslie Jones, J., who referred the case to a Division Bench. The question which we have to decide is whether the creation of occupancy rights for a consideration can be challenged by the heirs of the person who created those rights. The lower Appellate Court relied upon *Faqir Muhammad v. Fazal Muhammad* (1), wherein the opinion was expressed (see pages 61, 62) that it is open to a landowner to create occupancy rights in his land and that as a general rule it is not open to the landowner's heirs to challenge his action. This opinion was based upon the view that if a tenant transfers his tenancy with the consent of his landlord his heirs cannot object. This latter view is, however, contrary to the decision reported as *Puran Chand v. Mahesha* (3), in which it was held, follow-

ing the Full Bench ruling in *Karam Din v. Sharaf Din* (4), that the plaintiff as reversionary heir of an occupancy tenant was competent to dispute the validity of the alienation, in favour of a stranger, of his ancestor's occupancy rights, although such alienation had received the assent of his landlords and was made under Act XXVIII of 1868, the rights of the said landlords not being in question. Now, we agree with Leslie Jones, J., that the discussion in *Faqir Muhammad v. Fazal Muhammad* (1) as to the result of a genuine creation of occupancy rights was *obiter*, because the Division Bench which decided that case found that the transaction then in question did in fact amount to a sale. With all due deference to the Division Bench which decided the case reported as *Faqir Muhammad v. Fazal Muhammad*, (1) we think the decision in *Puran Chand v. Mahesha* (3) is correct. It appears to us that the consent of the landlord only validates a transfer of occupancy rights *qua* the landlord and that such consent cannot take away from the reversioners the inherent rights which they possess under the customary law to challenge an alienation of ancestral land made by a person whose reversioners they are. We have not, however, to decide this specific point in the present appeal. What we have to decide is whether the creation of occupancy rights for consideration by a landowner can be challenged by the landowner's heirs. Now, even if the creation of occupancy rights cannot be considered as a sale in the strict sense, it is undoubtedly a transfer of valuable rights in land. In the present case Munshi by creating occupancy rights in his land has parted with very valuable rights, and to hold that such a transfer cannot be contested by the heirs would, in the words of the referring Judge, open the door to the uncontrolled transfer of rights which may be very much more valuable in some respects than those of a mortgagee. We are unable to hold that Munshi's act in creating these occupancy rights was an act of management. We hold that the creation of occupancy rights, being a transfer of valuable rights, can be challenged by the heirs in accordance with

(2) 9 Ind. Cas. 292; 52 P. L. R. 1911; 201 P. W. R. 1911.

(3) 69 P. R. 1900.

(4) 89 P. R. 1898.

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the well-recognised principles of customary law.

We, therefore, accept the appeal and setting aside the order of the lower Appellate Court remand the case there-to for re-decision under Order XLI, rule 23, Civil Procedure Code. Stamp in this Court will be refunded and other costs will be costs in the case.

*Appeal accepted;
Case remanded.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 279 OF 1917.

October 9, 1918.

Present:—Mr. Justice Phillips and

Mr. Justice Krishnan.

GOPALASAMI NAICK AND ANOTHER—

DEFENDANTS—APPELLANTS

versus

NAMMALWAR NAICK—PLAINTIFF

—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, r. 2—Execution of decree—Payment out of Court—Satisfaction not certified—Execution, application for—Suit by judgment-debtor for damages—Cause of action, —Damages, measure of—Limitation—Limitation Act (IX of 1908), Sch. I, Arts. 115, 120.

Where a decree-holder does not certify a payment made to him out of Court by the judgment-debtor towards the satisfaction of the decree under the provisions of Order XXI, rule 2, Civil Procedure Code, and takes out execution without giving credit for such payment, the judgment-debtor has a right to sue the decree-holder for any damage he may have suffered by the latter's neglect to certify and by the proceedings in execution. [p. 811, col. 1; p. 812, col. 1.]

Such a suit is one for breach of the implied promise to certify payment to the Court and to make it effectual in execution [p. 811, col. 1; p. 812, col. 1.]

In such a case the filing of the execution petition in itself gives a cause of action though no money may have been realized, and successive applications may give rise to successive breaches and fresh causes of action. If money is subsequently realized, that will give a fresh cause of action as a further breach of the covenant and the amount recovered will form the main portion of the damages; but where money is not realized, the damages awarded can only be by way of compensation for any injury caused to the judgment-debtor and for any loss he may have been put to by the attempted execution of a satisfied decree. [p. 812, col. 1.]

In the matter of *Medai Kaliani Anni*, 30 M. 545; 3 M. L. T. 15, considered.

Viraraghava Reddi v. Subbakka, 5 M. 397; 6 Ind. Jur.

633; 2 Ind. Dec. (N. S.) 275 (F. B.) and *Arunachella Pillai v. Appavu Pillai*, 3 M. H. C. R. 188, not approved.

Such a suit is governed by Article 115 and not by Article 120 of the Limitation Act. [p. 812, col. 2; p. 811, col. 1.]

Second appeal against the decree of the District Court, Tinnevely, in Appeal Suit No. 9 of 1916, preferred against the decree of the Court of the District Munsif, Koilpatti, in Original Suit No. 299 of 1914.

FACTS appear from the judgment of Krishna, J.

Mr. K. R. Rangasawmy Aiyangar, for the Appellants.—There is no cause of action for the plaintiff's suit. If he is entitled to maintain the suit at all, the cause of action dates from defendant's failure to certify payment under the provisions of Order XXI, r. 2, Civil Procedure Code. The suit is premature as no money was, at its date, realised in execution. Till money is realised plaintiff sustains no damages and he is not, in any event, entitled to ask for return of the money paid by him to the defendant. *Sriramulu v. Dalayya* (1).

The suit is barred by limitation. The defendant's first execution application was in 1910 and plaintiff should have brought his suit within three years from that date. Having failed to do that, he cannot rely on any subsequent execution application as giving a fresh starting point or as affording a fresh cause of action.

Mr. V. Viswanatha Sastri, for the Respondent.—The cause of action for the suit is the breach of an implied promise by the defendant to certify payment to Court and make it effectual in execution. *Vide* Full Bench decision in *Viraraghava Reddi v. Subbakka* (2). When the defendant received the decree amount out of Court he must be deemed impliedly to have given an undertaking to abstain from executing the decree for the same amount.

The action is not premature, as plaintiff need not wait till defendant realised money in execution. The damage has been caused by the very fact of execution and plaintiff is entitled to compensation for the mental pain caused by an unlawful coercive process and to incidental expenses incurred by him in resisting an unlawful claim.

(1) 16 M. L. J. 54.

(2) 5 M. 397; 6 Ind. Jur. 633; 2 Ind. Dec. (N. S.) 275 (F. B.).

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The suit is not barred. Article 120 of the Limitation Act is applicable. In any event, though a claim for damages is barred for the unlawful execution application of 1910, plaintiff is in time to enforce whatever damages were caused to him by the second application of 1914. Successive breaches of the covenant give rise to fresh causes of action.

JUDGMENT.

PHILLIPS, J.—Appellants' chief contention is that plaintiff can have no cause of action until money has been recovered from him in execution. In *Viraraghava Reddi v. Subbakka* (2), a similar suit was held by the majority of this Court to be one to recover damages for the breach of the implied promise to certify the payment to the Court and thereby make it effectual in execution. The third Judge, no doubt, based the right of suit on the failure to discharge a statutory duty. The two views are very similar, but the former is, I think, more accurate, for the duty of certifying satisfaction imposed by the Code of Civil Procedure can be performed at any time, and no period is prescribed for its performance, whereas if the cause of action be held to be the breach of an implied covenant not to execute the decree, any application for execution would be a breach of the covenant and would give a right to sue for damages. I think, therefore, that plaintiff had a cause of action, when the execution application of 1910 was filed, but a suit on that cause of action would now be barred under Article 115 of the Limitation Act. As plaintiff cannot act upon this breach of the covenant, he relies upon a subsequent breach in 1913, treating the first breach as condoned and in this view his suit is within time.

Treating the suit as one for damages, the measure of damages is not necessarily the sum paid by plaintiff in satisfaction of the decree together with subsequent interest, for that is the maximum amount of damages that plaintiff could suffer if the decree were actually executed and plaintiff could only claim that sum if it were actually recovered from him. In the present case it is necessary to consider how far plaintiff has been damaged by the filing of the execution application, which is the breach of covenant complained of. He would be entitled to all expenses incurred

by him in defending the claim, and also to compensation for any moral or mental worry caused by the fact that an executable decree is unlawfully kept alive, and steps may be taken against the judgment-debtor at any moment. I, therefore, agree in the order proposed by my learned brother.

KRISHNAN, J.—The facts necessary for the decision of this second appeal may be briefly stated as follows: A mortgage decree was obtained by the father of defendants Nos. 1 and 2 against the plaintiff and his sons in 1906. In 1907 plaintiff paid Rs. 500 towards this decree; this payment, though denied by defendants, has been found to be true by both the lower Courts. Plaintiff alleged a further payment of Rs. 40 but that has not been proved. Without certifying the payment of Rs. 500 and without giving credit for it, defendants applied for execution for the whole decree amount, first in July 1910 and then again in June 1913. In July 1914 plaintiff brought this suit, praying that the defendants may be directed to certify payment or to pay back the amount paid with interest at 18 per cent. The lower Courts disallowed the first prayer; the Munsif held that it could be granted only in execution proceedings under Order XXI, rule 2, Civil Procedure Code, and no objection was taken to this view in the Appellate Court. The Munsif had dismissed the suit *in toto* as barred by limitation, but the District Judge has given a decree for Rs. 500 and interest at 18 per cent, as claimed.

The first point argued before us is that as no money had been realised in execution of the decree, plaintiff had no cause of action at all. We must, therefore, consider what the nature of the plaintiff's suit is and what his rights are. The nature of a suit like the one before us was considered by a Full Bench of this High Court in *Viraraghava Reddi v. Subbakka* (2) and though Kindersley, J., was of opinion that the suit should be taken as based on the ground of fraud or negligence on the part of the decree-holder in not certifying the payment to Court as he was under a statutory obligation to do, the majority consisting of Turner, C. J., and Muthuswami Aiyar, J., considered it to be "a suit to recover damages for the breach of the implied promise to certify the payment to the

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Court and thereby make it effectual in execution." I am prepared to follow the view of the majority that the suit is really one for damages for breach of implied contract. When a decree-holder receives from the judgment-debtor money outside Court in payment of the decree amount, if there is no express agreement between the parties at the time, it may properly be held that the decree-holder does so under an implied promise that he would certify that payment as required by law and that he would not execute the decree any more for the amount or realise the amount again in execution. If this is the implied contract, as I think it is, the breach will give rise to a cause of action; and it is clear that the decree-holder commits a breach as soon as he files his execution petition claiming the same amount again. It seems to me, therefore, that the filing of the execution petition in itself gives a cause of action, though no money may have been realised; and successive applications will give rise to successive breaches and fresh causes of action. If money is subsequently realised, that will give a fresh cause of action as a further breach of the covenant. In each case the amount of damages payable for the breach will have to be ascertained. Where money is realised from the judgment-debtor in execution over again, that amount, of course, will form the main portion of the damages; but where it is not so realised, as in the present case, the damages awarded can only be by way of compensation for any injury caused to plaintiff and for any loss that he may have been put to by the decree, which ought to have been treated as part satisfied, being attempted to be executed in full against him. That, of course, will not include the amount that has not yet been realised.

This view is to some extent supported by the ruling in *Medai Kaliani Anni, In the matter of* (3), though that case does not deal with the measure of damages. There the claim was treated as one based on the ground of breach of duty; but as already stated, I am inclined to think that is really a breach of an implied contract as held by the majority in the Full Bench. The case of *Sriramulu v. Dalayya* (1) has been cited to us as

against this view. But that case contains no discussion of the law and no reasons are given for the view held, and I am unable to follow it. It overlooks the fact that coercive processes may be adopted in execution of a decree and considerable injury may be caused thereby to the judgment-debtor without any money being realised. If the decree-holder's action in taking out fresh execution was wrongful, there is no reason why he should not be liable in damages resulting from it. The ruling in *Arunachella Pillai v. Appavu Pillai* (4) is no longer law as it was departed from in the Full Bench in *Viraraghava Reddi v. Subbakka* (2). I, therefore, hold that the recovery of the decretal amount in execution was not essential to give a cause of action to the plaintiff and this suit is maintainable.

The next question argued is one of limitation. Respondent's Vakil contended that Article 120 should be applied. But that is a residuary Article and can be applied only if no other Article applies. In the view I am taking of the nature of the suit, it clearly falls under Article 115 so far as it claims refund of the money paid. The relief claimed by way of injunction to direct defendants to certify payment was disallowed by the first Court and not asked for in the Appellate Court and has been expressly abandoned before us by the respondent's Vakil, as he was entitled to do. It is not, therefore, necessary to discuss what Article applied to the suit with reference to that relief; nor is it necessary to consider whether such relief could be given in this suit.

We have a case here of two successive breaches of implied contract by two successive applications in execution, one made in 1910 and the other in 1913. So far as the claim is based on the first application it is barred by limitation as the suit was filed in 1914, i.e., more than three years from the date of the cause of action. But the plaintiff is entitled to damages resulting from the application in 1913, as he is within time for it. The decree of the lower Court is clearly erroneous in holding that the plaintiff was entitled to recover the whole of the money paid by him with 18 per cent. interest. If defendants had realised the money a

(3) 30 M. 545; 3 M. L. T. 15.

(4) 3 M. H. C. R. 188.

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second time, that would have formed a proper item of damages but not otherwise. There must be a finding on the question "what damages, if any, is plaintiff entitled to as the result of defendants' execution application in 1913." Parties may adduce fresh evidence. Finding two months; objections seven days.

In compliance with the order contained in the above judgment, the District Judge of Tinnevely submitted the following

FINDING.—A finding is required on the question, "What damages, if any, is plaintiff entitled to as the result of defendants' execution application in 1913."

The only evidence on this point is the evidence of the plaintiff. He stated before the Munsif that he obtained copies of the application made by the defendants for execution of their decree (Exhibits F and F-1); but admitted that he received no notice of these applications until after he had instituted his criminal complaint. To this Court he estimated his loss at about Rs. 200, but said that he spent this sum in applications and in the criminal case. He has given no details of what he spent in applications, nor specified to what matter these applications relate. He has not shown that he incurred any expenditure in consequence of the applications for execution made by the defendants; for it cannot be held that the criminal case entitles him to damages in consequence of the application for execution made by the defendants in 1913. He admits that his memory is bad; and it is not improbable that any expenditure incurred by him was made in the criminal case. I cannot accept his vague estimate of expenditure, and he has given no basis for estimating any damages incurred by him. I find that he has not proved satisfactorily that he is entitled to any damages in consequence of the defendants' execution application in 1913.

This second appeal coming on for final hearing after the return of the finding of the lower Appellate Court upon the issue referred by this Court for trial, the Court delivered the following

JUDGMENT.—Upon the finding that plaintiff has sustained no damages in connec-

tion with the execution proceedings he had no grounds for coming to Court. His suit must, therefore, be dismissed, but in the circumstances each party will bear his own costs throughout.

M. C. P.

Suit dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 1052 OF 1914.]

May 27, 1918.

Present:—Mr. Justice Shadi Lal and Mr. Justice Wilberforce.

BUDHI PARKASH AND OTHERS—PLAINTIFFS
—APPELLANTS

versus

CHANDER BHAN AND OTHERS—DEFENDANTS
—RESPONDENTS.

Custom—Succession—Daughters versus collaterals—Dhani Brahmins of Kamalia, District Montgomery—Riwaj-i-am and wajib-ul-arz, entries in, value of.

Among Dhani Brahmins of Kamalia in the District of Montgomery daughters and daughters' sons exclude collaterals from succession to acquired property. [p. 815, col. 1.]

At the time when *riwaj-i-ams* and *wajib-ul-arzes* were first prepared, acquisition of property by purchase or otherwise being of rare occurrence, no inquiry took place regarding succession to such property. Therefore, in the absence of a clear statement to the contrary, an entry in a *riwaj-i-am* or a *wajib-ul-arz* must be taken to refer merely to ancestral property. [p. 814, cols. 1 & 2.]

Second appeal from the decrees of the Divisional Judge, Lahore, dated the 26th January 1914.

Mr. Rambhaji Datta, for the Appellants.

The Hon'ble Pandit Sheo Narain, for the Respondents.

JUDGMENT.—The parties in this case, who are Dhani Brahmins of Kamalia and Jamal Pahar in the Montgomery District, have been held to be governed by ordinary agricultural custom in the matter of succession. Their pedigree-table is given at page 10 of the printed paper-book and need not be repeated here. The plaintiffs, who are the daughters' sons of the last male holder, have had to institute the present suit as mutation of the land left by his widow has been sanctioned in the names of his male collaterals. The case has had a prolonged life, having been instituted in 1911. The plaintiffs based their suit upon Hindu Law and it was first dismissed on the ground that they were governed by agricultural custom. This finding was upheld by the learned

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Divisional Judge. On appeal to the Chief Court it was held that the question whether parties were governed by custom could not be contested in the absence of a certificate, but that the Divisional Judge had wrongly excluded from consideration certain instances in favour of the plaintiffs on the ground that they related to non-ancestral property. It was also doubted whether any great part of the property was ancestral and the case was remanded for a decision on the issues, whether the land was ancestral and if not, whether there is a custom among Dhani Brahmins of Kamalia by which a brother's grandsons exclude daughters and daughters' sons from succession to non-ancestral property. The Subordinate Judge has now held that out of 400 *kanals* only an area of 33 *kanals* 6 *marlas* is ancestral. He has held, however, that by custom the collaterals exclude the daughters' sons in respect of acquired property. The District Judge in a brief note forwarding the case has doubted the decision regarding the ancestral character of part of the property and has otherwise agreed with the Subordinate Judge.

The main question in this case is one of Customary Law regarding the rights of collaterals among Dhani Brahmins of Kamalia to exclude daughters' sons in respect of acquired property. The onus of this issue was placed upon the collaterals in accordance with paragraph 23 (2) of Rattigan's Customary Law and it has to be seen how far this onus has been discharged. In the first place copies of the *Wajib-ul-arz* and the *Riwaj-i-am* of the Montgomery and other Districts have been relied on by the collaterals. These copies have been described by Mr. Agnew, Divisional Judge, and by the learned Subordinate Judge on remand. It is not necessary for us to deal with them at length, as in practically all these cases no distinction is made between inheritance to ancestral and acquired property. It has been held on frequent occasions by this Court that in the absence of a clear statement to the contrary an entry in a *Riwaj-i-am* or *Wajib-ul-arz* refers merely to ancestral property. At the time when these records of custom were prepared, acquisition of property by purchase or otherwise being of rare occurrence, no inquiry whatever took place

regarding succession thereto. In only two of the extracts on the record is there any reference to acquired property. The first reference is in D3, an extract from the *Riwaj-i-am* of the Montgomery District which has been misinterpreted by Mr. Agnew. It is to the effect that daughters have no right of succession in the absence of male descendants, but that in the matter of gifts by a proprietor to daughters or others there is no distinction between ancestral and self-acquired property. It does not refer to the right of daughters to inherit acquired property in the presence of collaterals. D4 is practically to the same effect, with the addition that Brahmin proprietors have full power of alienation of ancestral or self-acquired property. These entries are in no way in favour of the collaterals. Indeed they show that in the matter of alienations Brahmin proprietors more nearly follow Hindu Law than the normal customary law of agriculturists, and under these circumstances the onus on these high class Hindus to prove a custom excluding daughters from inheritance to even acquired property in the absence of male descendants is by no means lightened.

There only remain the instances of the exclusion of daughters by collaterals in the inheritance to self-acquired property. As regards these instances, eleven have been considered to be proved by the learned Subordinate Judge on remand. These instances are somewhat in favour of the collaterals, though their value appears to have been exaggerated by the Subordinate Judge. In the first place, most of the instances refer to Brahmins leaving acquired and ancestral property. The proportionate values of the properties are not shown; nor is it clear whether the daughter was in any position to contest the claim of the male collaterals; nor whether the property left was of any real value to her. There is also no definite information regarding the age of the daughter or whether she had married and was living in a locality distant from the property. Moreover although in some cases there is documentary evidence that part of the property was self-acquired, the greater part of the evidence is oral and of little value. Many of the witnesses refer to events which

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took place before their birth. Also many of the instances most probably refer to land held by a joint Hindu family to which a daughter would have no right of inheritance. Other instances refer to land held by occupancy tenants to which a daughter has legally no claim. As for house property, Brahmins being usually non-proprietors in the village, the daughter again would have no claim in view of paragraph 231 (a) of Rattigan's Customary Law.

On the other hand, even admitting these instances to be of some value, there are strong reasons for refusing to admit that they have proved the case of the collaterals. Instances are bound to occur in which the rights of girls or women are overridden by their stronger male relations and in which they are unable to contest properly the actions of usurpers. To sum up the case, therefore, we consider that the collaterals have failed to establish any custom by which they are entitled to exclude daughters or daughters' sons from inheritance to acquired property.

There was some contest before us whether an area of 110 *kunals* belonging to Chah Brahmanwala in Jamal Pahar was ancestral or self-acquired. The common ancestor of the parties obtained the land in about 1822 by a *lekha mukhi* mortgage and at some time sank a well. In 1872 it is stated that his descendants had since then been in possession and that for the last 15 years the land had been lying unoccupied. The Subordinate Judge considered that it was only proved that the common ancestor had acquired mortgagee rights and that there was no proof that he had obtained the full proprietary rights in the land. The mere fact that the common ancestor sank a well does not in any way raise a presumption that at the time he was the proprietor. We do not for these reasons share the opinion of the District Judge that the land is ancestral.

The result is, therefore, that we accept the appeal and give plaintiffs a decree for the properties sued for excluding the shop and the land known as Khata Arazi Chah Tutwala in Kamalia and the joint Khata in the same well measuring respectively 31 *kanals* 18 *marlas* and 1 *kanal* 8 *marlas* referred to as Nos. 3 and 4 in the report of the Subordinate Judge. As plaintiffs have succeeded in respect of more than 11.126hs

of their claim, we give them their full costs in all the Courts.

Appeal accepted.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 233 OF 1916.

November 28, 1918.

Present:—Sir Henry Richards, Kt., Chief Justice, and Justice Sir P. C. Banerji, Kt.

MUKAT LAL—PLAINTIFF—APPELLANT

versus

GOPAL SARUP—DEFENDANT—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 2—Execution of decree—Court officer improperly holding sale—Suit for damages—Limitation.

Plaintiff's property having been advertised for sale in execution of a decree, he tendered the amount of the decree to the defendant, who was the Court Amin and whose duty it was under Order XXI, rule 69, of the Civil Procedure Code, to receive the money and not to proceed with the sale. The defendant, however, refused to accept the money and proceeded to hold the sale. The plaintiff brought a suit for damages against the defendant.

Held, that the basis of the suit being that the defendant had refused to accept the money which he was bound to accept under the provisions of the Civil Procedure Code, or that he had improperly held a sale purporting to be under the provisions of the Code, the suit was governed by Article 2, Schedule I, of the Limitation Act. [p. 816, cols. 1 & 2.]

First appeal from a decree of the District Judge, Meerut.

Mr. Sital Prasad Ghosh, for the Appellant.

Mr. Kailas Nath Katju, for the Respondent.

JUDGMENT.—This appeal arises out of a suit in which the plaintiff claimed damages against the defendant on certain allegations which are set forth in the plaint. They are as follows:—There was a decree out against the plaintiff for a small sum of Rs. 205-13-0. The defendant was the Court Amin, whose duty it was to sell the plaintiff's property in execution of the decree. The plaintiff alleges that on the day of the sale he tendered the amount of the decree to the defendant, whose duty it was under Order XXI, rule 69, to receive the money and not proceed with the sale. The plaintiff goes on to allege that the defendant, being a friend of the decree-holder, refused to accept the money and proceeded with the sale, the result being that the plaintiff had to deposit the full purchase money which the auction-purchaser had bid for the property together with 5 per cent. as a condition precedent to getting the sale set aside. The defendant denied that the plaintiff had

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tendered him the money (and it does seem a little strange that the plaintiff would have allowed the property, which he alleges to be worth about Rs. 5,000, to be attached and advertised for sale sooner than discharge a decree for a trivial sum). However, these questions have not been gone into in the Court below. The learned District Judge, instead of allowing the case to be tried by the Munsif, took it on his own file because the conduct of a Court official was being challenged by the suit. We think his action in this respect was quite correct. The learned Judge held that the suit was barred by Article 2 of the Limitation Act. That Article provides a period of limitation of ninety days for suits brought for "compensation for doing or for omitting to do an act alleged to be in pursuance of any enactment in force for the time being in British India."

In the present case if the act of the defendant complained of be the alleged refusal to accept the money due on foot of the decree, the suit is based on the allegation that the defendant omitted to do an act which it was his duty to do under one of the provisions of the Code of Civil Procedure, namely, to receive the decretal money before sale. If on the other hand the act complained of be the proceeding to sell the property, again there can be no doubt that the complaint is that the defendant did an act, purporting to be under the Code but improperly, namely, to sell the property after the decretal amount had been tendered. The learned District Judge dismissed the plaintiff's suit as barred by Article 2 of the Limitation Act (it being admitted that the suit was not brought within ninety days of the alleged act of the defendant). As a matter of fact the suit was not instituted until after the expiration of about nineteen months of the act complained of. In appeal to this Court it has been argued that Article 2 does not apply to any case where the act alleged is a wilful act and that the Article only applies where the defendant in doing or omitting to do the act *bona fide* believed that he was acting correctly and in accordance with law; and it is accordingly contended that the Court below ought to have determined whether or not the defend-

ant wilfully refused to receive the decretal money from the plaintiff and if it found that he did, it ought to have given a decree against him notwithstanding the suit had been instituted after the expiration of ninety days. In support of this contention a number of authorities have been cited. For the most part they are cases in which the defendant claimed the protection of provisions in various enactments requiring notice of action. In one case, no doubt, the question whether or not Article 2 of the Limitation Act applied did arise, namely, in the case of *Ranchordas Moorarji v. Municipal Commissioner for the City of Bombay* (1), but it seems to us that the learned Judges who decided that case held that the Article of the Limitation Act did not apply, by applying the reasoning which formed the basis of the decision in some cases that the defendant could not plead the want of notice of action. It seems to us that the reasons which have been given in several cases for holding that the defendant could not plead want of notice of action do not necessarily apply to a plea of limitation. In the present case the whole foundation of the plaintiff's claim is the alleged omission by the defendant to perform a duty imposed by the Code. The policy of the law is quite clear, namely, that suits of this nature should be brought and investigated as promptly as possible. The issue of fact in the present case would have been whether the plaintiff tendered and the defendant refused to receive the decretal amount. A moment's reflection will show how unsatisfactory it would be that such a matter should be investigated two or three years after the sale. It may not be unreasonable, where a defendant pleads as a defence to an alleged illegal act that the act was done in pursuance of a legislative enactment which requires notice of action before the institution of suit, that the defendant should show that he acted *bona fide* and in the belief that his action was justified. But such reasoning is not equally applicable to a plea of limitation. We think that the view taken by the learned District Judge was correct and we accordingly dismiss the appeal with costs.

Appeal dismissed.

(1) 25 B. 387; 3 Bom. L. R. 158.

MOGAL BEG, *In re*.

MADRAS HIGH COURT.

CASE REFERRED NO. 55 OF 1918.

CRIMINAL REVISION CASE NO. 352 OF 1918.

September 24, 1918.

Present—Mr. Justice Phillips and
Mr. Justice Napier.*In re* MOGAL BEG AND ANOTHER—ACCUSED.*Criminal Procedure Code (Act V of 1898), s. 439—
Revision—Acquittal, order of, interference with—
Jurisdiction.*

The High Court has jurisdiction to interfere in revision even in the case of an order of acquittal, but such interference will only be where serious injustice has been caused by an error of law.

Case referred for the orders of the High Court, under section 438 of the Criminal Procedure Code, by the Sessions Judge, Guntur, in his letter, dated the 27th April 1918.

FACTS appear from the judgment.

Mr. S. Krishnaswami Aiyangar, for the Accused.—The High Court has appellate jurisdiction in the case of acquittals. That jurisdiction is specifically given to it by Statute, and that only on application to it by Government. The language of section 439 which alone gives it revisional jurisdiction points only to cases of conviction. The reference in the section to powers conferred on a Court of Appeal in the sections therein named exclude its competency to interfere in cases of acquittals on the revisional side. It is also against the established practice of the High Court to exercise revisional jurisdiction in such cases.

The Public Prosecutor, for the Crown.—In this case the reference is made by the Sessions Judge, and not by a private party. There is nothing in the language of section 439, read with section 430, Criminal Procedure Code, to derogate from the jurisdiction to interfere, in revision, in cases of acquittals. The interference has, no doubt, been very rare and only where manifest injustice has been caused, but the jurisdiction exists and is very wide.

ORDER.—It is argued for accused that this Court has no jurisdiction to entertain an application for revision in the case of an acquittal. It is, however, clear from the language of section 439, read with section 430 of the Criminal Procedure Code, that this Court has jurisdiction to interfere even in such cases. It has, however, been

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consistently laid down by this Court that it will not interfere with cases of acquittal when Government has not appealed, except in extreme cases. This has been held both when a private party has moved the Court and also when a District Magistrate has done so, but the present reference is made by a Sessions Judge who has not the same facilities as a District Magistrate for moving Government to file an appeal. Although the rule of non-interference might be somewhat relaxed in cases referred by a Sessions Judge, yet we think it would be wrong to interfere even in such references unless we are convinced that serious injustice has been caused by error of law.

In the present case, although we agree with the Sessions Judge's view of the law, we think the case is one of such a petty nature that we must refuse to interfere with an order of acquittal. Let the papers be returned to the Sessions Judge.

M.C.P.

Records returned.

CALCUTTA HIGH COURT.

CRIMINAL APPEALS NOS. 224 AND 226
OF 1918.

July 31, 1918.

Present—Mr. Justice Richardson and
Justice Sir Shamsul Huda, Kt.

August 22, 1918.

Present—Mr. Justice Fletcher.SRILAL CHAMARIA AND ANOTHER—
ACCUSED—APPELLANTS
versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 107, 108, Expls. (2), (4), 103, 116—Abetment of abetment—'Abetment of offence,' meaning of—Abetment of abetment of offence not committed, whether offence.

Under Explanation 4 to section 103 of the Penal Code, when the abetment of an offence is an offence, the abetment of such abetment is also an offence. The words "when the abetment of an offence is an offence" do not mean when an abetment of an offence is actually committed. They mean when the abetment of an offence is by definition or description an offence under the Code, that is, when an abetment of an offence is punishable under section 109 or section 116 or some other provision of the Code, then the abetment of such abetment is also an offence. [p. 823, col. 1; p. 831, cols. 1 & 2.]

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One S., an agent or partner of one B. who was accused in a case on charges framed under sections 448, 453 and 430 of the Penal Code pending in the Court of the 6th Presidency Magistrate of Calcutta, voluntarily and without any coercion or threat approached K., the Bench Clerk of the Magistrate, intending to incite K. to instigate the Magistrate to take a bribe and to acquit B. K. then saw the Chief Presidency Magistrate of the Court with reference to the matter and played the part of a Police spy. When S. made over to K. at the latter's place the bribe which was to be handed over by K. to the Magistrate, a Police Inspector, who was concealed behind a curtain, seized the money. S. was then tried on charges framed under sections 161 and 109 of the Penal Code and convicted:

Held, that S., when he handed over the money to K., committed a distinct incitement of K. to instigate the Magistrate to take a bribe and so was rightly convicted under section 109, even though no bribe had ever been offered to the Magistrate. [p. 823, col. 2, p. 831, col. 2.]

It makes no difference in the guilt of the abettor if the agent falls in with the plans of the abettor, knowing his criminal purpose, to cause its detection. [p. 831, col. 2.]

Appeals against the order of the 3rd Presidency Magistrate, Calcutta, dated the 15th April 1918.

Mr. Jackson, Sir B. O. Mitter, Mr. K. N. Chowdhuri and Babus Manmotha Nath Mukherjee, Bibhuti Bhusan Shaha and Santosh Kumar Mitra, for the Accused in No. 224.

Sir B. O. Mitter, Messrs. O. R. Das and R. N. Chowdhuri and Babus Atulya Charan Bose and Bibhuti Bhusan Shaha, for the Accused in No. 226.

The Hon'ble Mr. Camell, Advocate General, for the Crown.

JUDGMENT.

RICHARDSON, J.—The two appellants before us, Srilal Chamaria and Mimraj Benia, have been convicted by the 3rd Presidency Magistrate of Calcutta on charges framed under sections 161 and 109 of the Penal Code. The appellant Srilal has been sentenced to suffer rigorous imprisonment for three months and to pay a fine of Rs. 1,000 or in default to suffer a further period of two months' rigorous imprisonment. The appellant Mimraj has been sentenced to pay a fine of Rs. 1,000 or in default to suffer rigorous imprisonment for two months. The appeals are preferred from these convictions and sentences.

At the trial charges were also framed against the appellants on the footing that they respectively attempted and abetted an attempt to commit an offence punishable under section 161 read with section

109 and were, therefore, punishable under section 511 of the Code or in the case of Mimraj under that section read with section 109. These charges, however, were not pressed by the prosecution and so far as they are concerned, the learned Magistrate must be taken to have recorded a verdict of not guilty.

I am not going to enter upon an elaborate review of the facts in detail. The facts are fully stated in the judgment of the Magistrate, Mr. K. B. Das Gupta, and, without adopting every word of his reasoning, I agree on essential points with the conclusions at which he has arrived in regard to the appellant Srilal.

The outstanding feature of the case is that on the night of the 5th February a sum of Rs. 2,500 was admittedly handed over by Srilal to the witness Karuna Bhusan Banerjee, the Bench Clerk and Interpreter of the Court of the 5th Presidency Magistrate, Mr. Asutosh Mookerjee. A case was at the time pending before Mr. Mookerjee, in which the complainant was a Marwari named Ram Gopal Khemkar and the accused was a wealthy Marwari merchant named Bilas Roy Chowdhuri. Ram Gopal had been the tenant of a room in a building belonging to Bilas Roy. It is said that he was adjudicated insolvent, looked up the room and paid no rent for two months. Bilas Roy had the room opened and certain things were removed therefrom. The complaint preferred by Ram Gopal was in respect of that entry. I am not dealing with the merits. The hearing began on the 3rd January and by the 13th January a number of witnesses for the prosecution had been examined. On the 31st January charges were framed against Bilas Roy under sections 448, 453 and 380 of the Penal Code. It is clear that the case was fought with great personal animosity on both sides, though, after the present case had been instituted against the appellants, a settlement seems to have been arrived at between the parties and Bilas Roy was acquitted on the 22nd February.

Now, whether Srilal is the Gomastha or the Munib Gomastha or partner of Bilas Roy, there can be no doubt that in his dealings with Karuna he was acting on Bilas Roy's behalf and that he intended

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that the money paid should be made over by Karuna to the Magistrate, Mr. Mookerjee, as a bribe to secure the acquittal of Bilas Roy and something more, which I shall presently mention.

On the facts the whole controversy turns on the question whether the suggestion that the Magistrate should be bribed came originally from Srilal or from Karuna.

According to the case for the prosecution Srilal approached Karuna first on the 13th January, visiting him on that day and on a number of subsequent occasions at his house. He pressed his proposals and Karuna unsuccessfully tried to put him off. On the 28th January, Karuna laid the facts before the Chief Presidency Magistrate, Mr. Swinhoe. Thereafter Karuna played the part of a Police spy, appearing to fall in with the proposals made to him, and finally on the night of the 5th February accepted from Srilal the sum of Rs. 2,500 already mentioned, in the presence of Inspector Mohendranath Mukerjee and two other witnesses, Benode Behari Bose and Narendranath Seal, who were all concealed behind a curtain. The money was seized then and there by the Inspector. The two appellants bagged for mercy. The Inspector expressed his inability to hush up the matter and the appellants after giving their names and addresses went away.

As to the 2nd appellant, I should mention that during the first part of the conversation on this occasion between Srilal and Karuna, the former was unaccompanied. When he made his terms with Karuna he went out to get the money. He returned after a short interval with the 2nd appellant, who carried the money in. The money was in notes made up in small packets. The 2nd appellant handed the packets to Srilal, who in his turn handed them to Karuna and the latter counted them and found the total correct. While it cannot be said, therefore, that there is no evidence against the 2nd appellant, the case against him is not a strong one and as we propose to acquit him, I shall from this point confine myself to the case against Srilal.

The case for the prosecution was supported in the witness box by Karuna, Mr.

Swinhoe, the Inspector and the two other witnesses I have named. Karuna was subjected by Sir Binode Mitter to a long and searching cross-examination extending over six days. I am not saying for a moment that the cross-examination, though exhaustive, was unduly protracted. Karuna was the principal witness for the prosecution and sitting, as we do, in a Court of Appeal with a paper record before us; it can only be a source of satisfaction to us to know that his account of the whole matter was thoroughly tested. Some of the questions put to the witness were no doubt argumentative questions. Some of the answers made by him may suggest the doubts and difficulties which were pressed upon us by learned Counsel. But on the whole the result of the cross-examination seems to me to have left Karuna's evidence unshaken on those points which can properly be regarded as material. That view is confirmed in my mind by the corroboration which Karuna's story receives from witnesses for the prosecution who have no reason for not speaking the truth and whose evidence, in my opinion, is beyond suspicion.

The evidence for the prosecution was such that some explanation at least was called for. The case for the defence was first put to Karuna in cross-examination on the 20th March. On the 26th March, after all the prosecution witnesses had been examined, Srilal filed a written statement and to support that statement several witnesses were examined. The case, as it is put for Srilal, is that Karuna came to his office at 2, Royal Exchange Place, on the 4th January and saw and spoke to him a number of times subsequently both there and elsewhere, as, for instance, in the neighbourhood of the Court-house and in the Court-room itself. The gist of what Karuna finally said was that he was also in treaty with the other side, Ram Gopal, and that Bilas Roy, a wealthy man, would secure results very satisfactory to himself by paying a bribe to the Magistrate, while if no bribe were paid he might find himself in Jail. The witnesses Joy Doyal Kasera, Mr. Griffiths and Mukha Lal were called to speak to seeing Karuna at 2, Royal Exchange Place. I can only say that I am not more favourably impressed

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than was the Magistrate by the evidence of those witnesses. To my mind their evidence adds not the slightest weight to Srilal's written statement. That statement, in other words, stands uncorroborated by any evidence on which I can place any reliance.

On the evidence, therefore, on this record, without indulging in more speculation as to what may or may not have happened, my finding is that the first advances were made by Srilal to Karuna.

But even if I accepted Srilal's statement, so far as it is at all possible to accept it, that is, to the extent of believing that the suggestion that a bribe should be offered to the Magistrate came first from Karuna, I do not think the result would be different in law. I shall come to that point later. Meanwhile, I make the following further observations on the facts generally.

If Karuna in the first instance tempted Srilal, Srilal very readily succumbed to the temptation. I refuse to believe that either Bilas Roy or Srilal was in the result influenced by any threats conveyed by Karuna. In Srilal's statement the word threat is not used until near the end: "I say that I paid the money on account of Karuna's threat." The reference appears to be to the following passage which occurs previously in the statement:—

"On the 31st (that is after Karuna's interview with Mr. Swinhoe on the 28th, there is nothing said as to any express threat before the 31st), he (Karuna) came to my office at Royal Exchange Place and told me, 'now the charges have been framed and recognizance bonds have been taken', and I must realize it was a case for Jail.....He assured me that if I did pay, not only would the case be dismissed and declared false but a sanction would be granted for the prosecution of Ram Gopal, and in case I did not pay, he would close with the other side and Bilas Babu would be sent to Jail." On the evidence I do not believe that Karuna went to Royal Exchange Place on the 31st or on any other day. I cannot, therefore, accept it that the particular threat of which the statement speaks was used.

Mr. Langford James, who was called for the defence, tells us that he was consulted

by Srilal before the 31st January and gave the opinion that the case against Bilas Roy was "demonstrably false."

It seems improbable that after that, though I do not forget that the charges were not framed till the 31st January, Marwari merchants like Bilas Roy and Srilal would be frightened by anything that Karuna might say or might have said. In my opinion, they were out to secure something more than the mere acquittal of Bilas Roy. They wanted the case against him to be declared false and they wanted sanction for the prosecution of Ram Gopal for bringing a false case.

Turn to the culminating incident of the 5th February. The conversation between Karuna and Srilal on that occasion was overheard. We have the evidence of the Inspector, Binode and Narendra. There is nothing to show that Srilal was acting under any sort of coercion or threat. He went voluntarily to Karuna's house. There is nothing to suggest that having entered the house he found himself in a strange place. There is nothing in what was said and done on that occasion inconsistent with his having visited the house before. He voluntarily sought the aid and co-operation of Karuna for the purpose of procuring the acceptance of a bribe by the Magistrate. He wanted to assure himself that the money which he took to Karuna would reach the hands of the Magistrate and he stipulated for the case against Bilas Roy being declared false and for sanction to prosecute Ram Gopal. This seems to me too clear for words and it all finds a certain amount of corroboration in Srilal's own statement.

There is one point to which I have not yet referred and I will say a word about it. According to both stories the amount of the bribe originally mentioned was Rs. 10,000. On the 28th January, Karuna seems to have told Mr. Swinhoe that Srilal had reduced his offer from Rs. 10,000 to Rs. 5,000. Srilal says that before the 31st Karuna expressed himself willing to accept "even Rs. 5000." It is said that is more in accordance with the general case for the defence than with the general case for the prosecution. I do not think, however, that Karuna's version is necessarily inconsistent with the main trend of his

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story. Srilal may have begun his bidding with an offer of Rs. 10,000 but he would not spend more than what was necessary. If Karuna showed any signs of yielding, Srilal might conclude that a smaller sum would suffice. Srilal may also have been influenced by the legal advice which he had received. If he was satisfied that Bilas Roy would in any case be acquitted, he was paying only for the sanction to prosecute. He may again have thought that Karuna and the Magistrate would deem it safer to accept the smaller sum than the larger. The larger the sum the more likely it would be that circumstances might afterwards arise in which the possession of so much money might lead to inquiry and detection. Karuna says that previously Srilal had offered ornaments or ingots of gold instead of money.

On the 5th February the total amount agreed upon was Rs. 5,000, Rs. 2,500 was paid at the time and the balance was to be paid later.

Our attention was invited to a passage in Note E to the Penal Code as drafted by the commission over which Macaulay presided. The passage runs:—

"There are countries.....where men give bribes to Magistrates from exactly the same feeling which leads them to give their purses to robbers or to pay ransom to pirates; where men give bribes because no man can, without a bribe, obtain common justice." The phraseology is picturesque enough to be Macaulay's own and the statement may represent the state of things which existed in 1837 or even in 1846 (*vide* paragraph 88 of the second report of the Indian Law Commissioners). But it does not represent the state of things now.

Bilas Roy and Srilal are not unsophisticated villagers. They are merchants living in Calcutta in the 20th century, with plenty of money behind them, having ready access to the best legal advice available. They would not put their hands in their pockets at the mere nod of a Bench Clerk. In the present case, who was most likely to act the part of tempter? The rich man or the poor man? The question seems to me to answer itself. Macaulay's phrases do not help Srilal on the facts and as to the law, the commentaries of

the various Indian Law Commissions are not evidence, however interesting they may be historically. We are bound to construe the Penal Code in the form in which it was finally passed by the Legislature in 1860, with such amendments as may have been subsequently made by the same authority.

On the facts, in my opinion, it is abundantly clear that Srilal's conduct on the 5th February was entirely voluntary. In my opinion on that occasion he instigated Karuna to instigate the Magistrate to accept the bribe which he himself delivered to Karuna. Such conduct is shameful and iniquitous in the highest degree. It deserves the strongest condemnation at the hands of every respectable man in the country, every man who feels that it is essential to the welfare of society that justice should be pure and should not be defiled by corruption.

But we are not concerned with the moral quality of Srilal's actions. We are only concerned with their criminal quality. Nothing is a criminal offence which is not made so by the law. If Srilal has committed no offence within the meaning of the Penal Code, he is entitled to an acquittal. The question before us is even narrower. We do not propose to consider whether Srilal might have been charged and convicted of some offence other than that with which he has been charged and of which he has been convicted. We confine ourselves to the precise charge on which the conviction rests, to which alone the argument at the Bar has been directed. The question is whether on that charge given the facts I have found, the conviction can or cannot be supported in law.

What is charged is that by instigating Karuna to instigate the Magistrate to accept a bribe from Srilal, Srilal committed an offence under sections 161 and 109 read with section 116 of the Penal Code. The reference to section 109 is superfluous and may be disregarded.

Section 161 deals with the acceptance by a public servant of an illegal gratification or bribe "as a motive or reward for doing or forbearing to do any official act, or for showing or forbearing to show, in the exercise of his official functions, favour to any person." No question arises upon

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that section. The money given to Karuna was to be given to the Magistrate as a bribe.

Under the Code the person who offers a bribe to a public servant is treated as the abettor of the offence created by section 161. If the bribe is accepted, the public servant is punishable under section 161 and the giver of the bribe under that section read with section 109. The case is put in illustration (a) of the latter section. If the bribe is not accepted, the public servant commits no offence, but the person who offers the bribe is still punishable under section 161 read with section 116. The case is again put in illustration (a) of section 116. In both cases the offence committed by the person who offers the bribe is, according to the scheme of the Code, an abetment of the offence described in section 161, which may for brevity be called the offence of bribery.

In the present case, no bribe was actually offered to the Magistrate. The bribe was given to Karuna for the Magistrate but was arrested in his hands. The question is whether in these circumstances Srilal committed abetment of bribery. The answer to it depends on the true construction of sections 107, 108, 109 and 116 of the Code.

It is argued on his behalf that these provisions do not make it punishable for one man to instigate another to instigate the commission of bribery, unless the second abetment is actually committed and the public servant is actually instigated to accept the bribe.

Now, section 107 defines generally what is meant by the abetment of a thing. "A person abets the doing of a thing who—

First, instigates any person to do that thing; or,

Secondly, engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or

Thirdly, intentionally aids, by an act or illegal omission, the doing of that thing."

The explanations appended to the section need not detain us,

Section 108 defines what is meant by abetting an offence and for the present purpose an offence is a thing made punishable by the Code (section 40). It is provided in section 108 that "a person abets an offence who abets either the commission of an offence or the commission of an act which would be an offence if committed by a person capable by law of committing an offence." It will be observed that what is abetted is in section 107 "the doing of a thing" and in section 108 "an offence" or "an act". Abetment as an offence consists of abetting some offence made punishable by the Code.

Section 108 has five explanations, of which the second and fourth are as follows:—

"Explanation 2.—To constitute the offence of abetment, it is not necessary that the act abetted should be committed, or that the effect requisite to constitute the offence should be caused."

"Explanation 4.—The abetment of an offence being an offence, the abetment of such an abetment is also an offence."

The question before us really turns on Explanation 4, but that Explanation must be construed with the rest of section 108 and with sections 109 and 116. I leave out section 115, which deals with a special case and is on the same lines as section 116.

Sections 10 and 116 prescribe the punishment for the offence created by or described in section 108, in the two cases (1) when the act abetted is committed in consequence of the abetment and (2) when the offence abetted is punishable with imprisonment and is not committed. The expression "act abetted" in section 109 can only mean "offence abetted", meaning the principal offence. No one can be punished under section 109 unless the offence or act abetted within the meaning of section 108 is actually committed. The word "act" is used in section 109 instead of "offence" as a more general word with reference to the first clause of section 103.

Explanation 4, as the learned Advocate-General suggested, may be read as follows:—"When the abetment of an offence is an offence, the abetment of such an abetment is also an offence." The abetment of

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an offence is not generally an offence, if the offence abetted is not committed and is not punishable with imprisonment (section 116). In other cases the abetment of an abetment of an offence is expressly declared to be an offence, that is, a thing made punishable by the Code. The words "when the abetment of an offence is one offence" do not mean "when an abetment of an offence is actually committed." They mean "when the abetment of an offence is by definition or description an offence under the Code," that is, when the abetment of an offence is punishable under section 109 or section 116 or some other provision in the Code.

But it is argued—and at first I was somewhat impressed by Mr. Das's argument on this point—that though the Code declares in the plainest terms that the abetment of an abetment is under certain conditions an offence, the Code provides no punishment for the abetment of an abetment. It is conceivable that the Legislature were guilty of this omission, but it is not likely. The true view seems to be that reading Explanation 4 with the rest of section 108 and with sections 109 and 116, what is meant is that the abetment of an abetment of an offence is merely one form of the offence made punishable by these sections, namely, abetment of what may be called the principal offence, that is, the offence aimed at by the first abettor.

Take the illustration to Explanation 4. "A instigates B to instigate C to murder Z." If B instigates C and Z is murdered there is no difficulty. It is not disputed that A is punishable, but how is he punishable except under section 109 for abetment of murder? If B instigates C but C refuses to murder Z, it is similarly not disputed that A is punishable, but he can only be punished under section 115, again for abetment of murder.

Then comes the case which approaches the present case, B refuses to instigate C and Z is not murdered. A is still guilty of abetment of murder just as he was before. A's criminality is under the Code the same in all three cases. Explanation 2 of section 108 applies when B does not instigate C just as much as when C does not murder Z.

The result would be the same, however long the chain may be between A and Z.

In this view the abetment of an abetment of an offence is no more and no less than the abetment of that offence. If the second abetment is not committed, Explanation 2 applies. This seems to me the only intelligible way of interpreting the language used. The words mean—when the abetment of an offence is punishable under section 109 or under section 116, the abetment of such an abetment is also punishable under one or other of those sections, as the case may be.

In the present case A has instigated B to give C a bribe offered by A. If the Code made the giving or offering a bribe an offence under section 161 in the same way as the section makes the acceptance of a bribe an offence, there would be no difficulty at all. We should have heard nothing of abetment of abetment. It appears to me to make no difference that the giving or offering a bribe is punishable under the Code, not under section 161 but as an abetment under section 109 or section 116, as the case may be. The offering a bribe is an offence. That offence was clearly abetted and the abetment amounts to an act punishable under the Code as an abetment of bribery or the acceptance of a bribe.

The argument that the Code treats the person abetted as the agent of the abettor is without foundation, so far as the Penal Code is concerned. The Code, as I have pointed out, speaks of abetting an act or an offence. Under the Code if A orders B to murder Z and afterwards recalls the order but B nevertheless murders Z, A would still be guilty of abetment of murder. The law in England is apparently different. (Stephen's Digest of the Criminal Law, 42). In fact the cognate topics are dealt with in English Law on lines so different that the English cases which were referred to in the argument appear to me to be of little or no assistance and I do not propose to deal with them. I feel that I might easily be misled by false analogies.

As to the Indian authorities there seems to be only one case in the Indian Law Reports which is in point, *Emoress v. Troylukho Nath Chowdhry* (1). The case

(1) 4 C. 366; 3 C. L. R. 525; 2 Ind. Dec. (N. S.) 232.

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when properly read supports the view I have expressed, but the circumstance that there was no argument for the prisoner detracts from its weight as an authority. As put in the judgment, it is the case of an abetment of an abetment and it is cited by Mayne in support of the proposition that it makes no difference in the guilt of the abettor if the agent "falls in with the plans of the abettor, knowing his criminal purpose, but intending to cause its detection" (2nd Edition, page 468). The "agent" was a man named Cummins. The prisoner as abettor instigated Cummins to aid the prisoner in stealing the goods of Cummins' master. Cummins informed his master and laid a trap for the prisoner. So it might be said in the present case: Srilal instigated Karuna to aid Srilal in bribing the Magistrate.

I have hitherto dealt with the question of law on the footing on which it was principally argued, namely, that the suggestion that the Magistrate should be bribed came from Srilal. But I have said above that, if the other view be taken, namely, that Karuna first approached Srilal on the subject, the fact, in my opinion, makes no difference in law. Srilal, as I have found, was a free agent, free to give or refuse a bribe, free to act according to the disposition of his own mind. It is indisputable that the bribe was to come from Srilal, not from Karuna. It is not as if Karuna, for reasons of his own, had determined to bribe the Magistrate and had then been incited by Srilal to pay the bribe out of his (Karuna's) own pocket. The resemblance is not to the case where *A* instigates *B* to murder *Z*, *B* having already made up his mind to commit the murder. The resemblance is to the case where *A*, whether he or *B* first suggested the murder to the other, comes to *B* at the last minute and gives *B*, who has no weapon, a loaded pistol for the purpose in view. Karuna could not have moved a step unless money were supplied by Srilal. It was Srilal who eventually did supply the money. The bribe, when delivered, would not have been Karuna's bribe, it would still have been Srilal's bribe delivered through Karuna's hands. Whatever may have previously happened, however much, either before or after the 28th January,

Karuna may have led Srilal on, it still remains that in the final act, about the facts of which there is really no dispute, Srilal, when he handed over the Rs. 2,500 to Karuna, committed a further, separate and distinct act of instigation for which the law makes him punishable as for an abetment of bribery. In this view the overt act of supplying the money, Srilal's own act, is given the prominence which it deserves.

For the reasons indicated I would dismiss Srilal's appeal.

As to Mimraj, we set aside his conviction. The fine imposed upon him must, if paid, be refunded.

SHAMSUL HUDA, J.—The appellant Srilal Chamaria and Mimraj Benia were tried together by the 3rd Presidency Magistrate of Calcutta. Srilal has been convicted of an offence under sections 161 and 109, read with section 116, Indian Penal Code, and sentenced to three months' rigorous imprisonment and a fine of Rs. 1,000. Mimraj has been convicted of having abetted the offence committed by Srilal and sentenced to a fine of Rs. 1,000 only. Both of them have appealed. There were other charges framed against them but these were not pressed before the Magistrate and I am not concerned with them.

The story told by the prosecution is to the following effect:—On the complaint of one Ram Gopal Khemkar, Bilas Roy Chowdhury was placed on his trial on charges of criminal trespass, house-breaking and theft before Mr. Asutosh Mookerjee, who was then the 5th Presidency Magistrate for the town of Calcutta. The first date of hearing was the 3rd of January 1918, and the trial lasted till the 22nd of February 1918, when the complainant and the accused having settled their differences, the Court acquitted the accused under section 258 of the Criminal Procedure Code. It is of some importance in this case to bear in mind the nature of the complaint against Bilas Roy Chowdhury and the defence set up by him in that case, as the gravity or otherwise of the charge against Bilas Roy must have, to a very large extent, influenced the conduct of Srilal. It appears that the complainant Ram Gopal Khemkar was for a long time carrying on business in a room at 203/1, Harrison

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Road. There was a number of other shops in the same premises. In the meantime Bilas Roy became the lessee of the house and the complainant thus became one of his sub-tenants. Bilas Roy gave notice to the complainant on the 4th of June 1917 to vacate the room on or before 15th Asarh (Sudi) Sambat 1974 (4th July 1917), and on failure to comply threatened to charge him rent at Rs. 200 a month, complainant having refused a proposal to increase his rent. Complainant, however, did not vacate the room. There were insolvency proceedings against the complainant at the instance of some of his creditors and on the 24th of August 1917 he was adjudicated an insolvent, and on the same day the Official Assignee seized some of the piece goods in the shop and other things found there. Complainant's case was that he had resumed carrying on his business from the 24th of September 1917 with the permission of the Court, that, as usual, he closed his shop in the evening on the 4th of November 1917 and went to his house, which was near by, after locking up the door. At 10 or 10.30 A. M. on the 5th of November 1917 he was informed by his Darwan that Bilas Roy had broken the padlocks of his shop and carried off all the goods in it including his account books. It appears that Bilas Roy's Gomasta had filed an application in the Court of the 2nd Presidency Magistrate on the 3rd of November 1917 against Ram Gopal Khemkar, stating that Ram Gopal was his tenant paying him rent at Rs. 71-9-0 per month, that he had become an insolvent and had removed all the goods from the room and had kept the room under lock and key for more than two months and had not paid his rent, and he prayed that he may be allowed to open the room in the presence of respectable persons and make a list of articles, if any be found there. The Magistrate examined the complainant and made the order "file." Apparently, after this order passed by the Magistrate, Bilas Roy opened the shop and removed what was there.

The defence of Bilas Roy to the charge was that as landlord he had a right to do what he did, that the goods of the complainant in his shop had vested in the Official Assignee and the complainant could not, therefore, complain of the action taken

by Bilas Roy. It was also stated by Bilas Roy in one of his applications to this Court that there was nothing in the shop except a chisel, a hammer, a few gunnies and some waste papers; all the articles in the shop having been previously removed by the Official Assignee. When these proceedings were going on between Ram Gopal and Bilas Roy, the prosecution case is that on the 13th of January 1918 Srilal Chamaria, who looked after the business of Bilas Roy and was either his Gomasta or partner, came to the house of Karuna Bhusan Banerjee, the Bench Clerk of the 5th Presidency Magistrate, and offered to pay the Magistrate Rs. 10,000 on behalf of Bilas Roy as a bribe for acquitting Bilas Roy. Karuna had in the beginning of the interview told Srilal that he would try but afterwards declined to make such an offer to the Magistrate, whereupon Srilal left. Srilal renewed his visits from time to time, but Karuna remained abdurate and even told him not to come to his house. On the 24th of January 1918 Srilal offered Rs. 1,500 as reward to Karuna. Karuna again told him not to come to his house. A day or two later he came again and Karuna's attitude did not change. On the 28th of January 1918, Karuna seems to have thought that his position was being compromised, as it appears from his evidence that he had some suspicion that he was being watched by Ram Gopal's men, that he felt uneasy at the thought that Srilal's constant visits in a motor car may have attracted the attention of his neighbours and that different men that accompanied Srilal at different times might also circulate the fact. Accordingly, for his own protection he went to the Chief Presidency Magistrate and told him what had happened. The Magistrate told him to "play" with Srilal and himself communicated with the Police. Srilal came again the next day and offered ornaments worth Rs. 5,000, if money was not acceptable. After the interview with the Chief Presidency Magistrate, Karuna's attitude towards Srilal changed and he was holding out false hopes to Srilal and it was ultimately arranged that Mohendra Nath Mukerjee, Inspector of C. I. D., with two respectable residents of the locality, would remain in hiding in Karuna's house and that Srilal

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would be invited to come and make the payment. On the 5th of February 1918, Karuna sent word to Srilal to come to his house between 8 and 9 p. m. with the money. He came at about 7-15 p. m., had a talk with Karuna, then went out for a while and then came back with Mimraj. There were currency notes with Mimraj and 25 packets, each consisting of currency notes of Rs. 10 and 5 to the value of Rs. 100, were handed to Karuna and as soon as this was done, Mohendra and his companions, who were in hiding and were hearing what was going on between Srilal and Karuna, came out of their hiding place and seized the packets of notes, which were afterwards produced before the Chief Presidency Magistrate. From the conversation that was overheard by Mohendra Nath Mukerjee the arrangement between Srilal and Karuna seems to have been this: that Srilal was to pay Rs. 2,500 then and the remaining Rs. 2,500 he was to pay the next Saturday to the Magistrate himself when Karuna would introduce him to the Magistrate. Mohendra and the witnesses as well as Karuna also state that Srilal not only insisted on an acquittal for Bilas Roy but also insisted on the Magistrate sanctioning the prosecution of Ram Gopal Khemkar for bringing a false case. These are the salient facts of the case as alleged by the prosecution.

It may be convenient to dispose of the case of Mimraj first. It would be seen from the facts I have stated above, that evidence against him is insufficient to support his conviction. Agreeing with my learned brother I direct that he be acquitted.

I shall now deal with the case of Srilal. He admits that on the 5th of February he paid Rs. 2,500 to Karuna, but denies that the proposal to bribe the Magistrate emanated from him. His defence, which is contained in his written statement filed before the trying Magistrate on 26th March 1918, is to the effect that it was Karuna who instigated him to bribe the Magistrate, that Karuna, when the case was going on, saw him several times in his place of business in the Royal Exchange and in the precincts of the Court, proposed that he should pay a bribe to the Magistrate and get rid of the case pending against Bilas Roy, that he was

unwilling to do so at first but afterwards yielded, being threatened that if he did not pay, Karuna will close with the other side who were also proposing to pay a bribe to the Magistrate and Bilas Roy would be sent to Jail, but on the other hand if he agreed to pay, not only the case against Bilas Roy will be dismissed but also sanction will be given for prosecution of the complainant under section 211, Indian Penal Code.

The trying Magistrate has accepted the story as told by the prosecution and has disbelieved the defence.

In support of the appeal by the accused persons, it has been contended before us that the story told for the prosecution is inconsistent with the probabilities of the case and the true version is that given by the defence. The defence, I may state, examined some witnesses mainly to prove Karuna's visits to Srilal at the Royal Exchange. Karuna denies having ever gone there. An attempt has been made on behalf of the appellants to show that Karuna had been punished for misappropriating money out of fine realised from a convicted person and is not a man of the high moral character which he claims to be. It appears that a sum of Rs. 3 had actually been misappropriated and the question was, who had misappropriated the money, the Bench Clerk Karuna or Amarnath Bose the cashier. The Chief Presidency Magistrate believed the cashier and punished Karuna but subsequently Amarnath Bose was, within a few months of this incident, tried and convicted of criminal breach of trust to the extent of Rs. 1,000 and thereafter Karuna approached the Chief Presidency Magistrate for reconsideration of his previous decision and the Chief Presidency Magistrate rescinded his previous order and restored Karuna to his former grade and post. I do not think there is sufficient evidence in the record upon which I could say that Karuna had misappropriated this amount. I am not, however, prepared to believe Karuna's story so far as it is not supported by any other evidence, and although I do not consider the defence evidence to be satisfactory, there are circumstances in the case which make me hesitate to accept Karuna's story that

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up to the 28th of March he had spurned Srilal's proposals with contempt, that before the 28th of March he had held out no hopes and had given no encouragement to Srilal.

That Srilal would at the very beginning come out with a proposal to pay Rs. 10,000 and then reduce the amount to Rs. 5,000 seems to be only consistent with the amount of bribe being a matter of negotiation between Karuna and Srilal, Karuna asking for a larger amount and Srilal only agreeing to pay a smaller sum. This conduct of Srilal is wholly inconsistent with the prosecution story that all the importunity and solicitation was on the side of Srilal and lends support to the story of the defence. It is proved that on the 5th of February Srilal wanted from Karuna an assurance that the money which he was going to pay would ultimately reach the Magistrate. This was a reflection on Karuna and was an insult to him. If all the importunity was on the side of Srilal, would he dare to offend Karuna in this way? Srilal's attitude on the 5th of February may, however, be explained by the fact that Karuna during the last few days before that date had pretended that he was anxious to close the bargain with Srilal, and it is a possible explanation that Srilal took advantage of Karuna's pretended anxiety to close with him and did not hesitate to dictate his own terms, but reduction of the offer from Rs. 10,000 to Rs. 5,000 cannot be so easily explained. It is not clear from Karuna's evidence on what date the offer was reduced from Rs. 10,000 to Rs. 5,000, and I feel a strong suspicion that Karuna felt uneasy after he spoke of this reduction as having taken place before the 28th February and then changed his story and added that this reduction was made after that date *i. e.*, after Karuna had communicated with the Chief Presidency Magistrate. This was in examination-in-chief. Mr. Swinhoe's evidence suggests that the reduction from Rs. 10,000 to Rs. 5,000 had been made before Karuna saw the witness on the 28th of January. That Karuna told an untruth when he changed his own story is clear from his statement contained in Exhibit I.

If this be so, I consider Karuna to be

unreliable and this conclusion is based largely on the broad facts of the case and not on anything said by him under the stress of cross-examination.

If the reduction was made before the 28th of January, it must have been on the 25th or the 26th at the latest, as Srilal did not see Karuna again before the 29th. Apparently, the position of Bilas Roy in relation to the proceedings taken against him was less favourable on the 26th than it was on the 13th of January, when Srilal first saw Karuna. The only explanation that can be suggested is that Srilal had become somewhat confident of success by reason of the advice given by Mr. Langford James. This advice, however, appears to have been given about the 28th or the 29th of January and could not have, therefore, influenced Srilal if he had offered the reduced amount on the 25th or 26th.

It is also inconsistent with the prosecution story that although Karuna felt indignant at the offer of a bribe, he did not forthwith tell anything about it to the 5th Presidency Magistrate, to whose Bench he was attached and whom he met every day in Court. Karuna has given no satisfactory explanation of this omission. It appears from the evidence of the Magistrate that he came to know from Karuna for the first time on the 6th of February of the attempt made to bribe him. Karuna's evidence does not also explain how Srilal, having agreed to pay Rs. 5,000, came on the 5th prepared to pay only Rs. 2,500 that day, agreeing to pay the rest later on. It is also significant that when making the payment Srilal for the first time makes a new condition of an important nature about sanction to prosecute Ram Gopal. From the tenor of the conversation overheard by Mohendra and from the evidence of Mr. Swinhoe it would seem that this condition was not wholly new but had been previously discussed between Karuna and Srilal but Karuna has chosen to withhold the information.

It has also been suggested on behalf of the defence that there is no explanation why the detection of Srilal did not take place on the 3rd of February or at any rate on the 4th. It appears from Mohendra's

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evidence that he was ready on the 3rd as well as on the 4th to go to Karuna's house. Karuna's explanation that he was afraid, if he tried to secure witnesses, the report might reach the ears of Srilal does not appear to be satisfactory and the defence suggestion that Srilal could not be easily induced to part with his money is not without force. Karuna's conduct in continuing a pretended attitude of friendliness towards Srilal when Mohendra detected him in the act of paying money to Karuna is also suspicious and explains why Srilal did not then and there expose Karuna before the Police Officer. The impression produced in Srilal's mind was that both he and Karuna were taken by surprise by the Police Officer, and not that Karuna had betrayed him.

My conclusions, therefore, are that the truth of the defence story has not been negatived and it has not been established beyond reasonable doubt that the instigation first came from Srilal, and I am not prepared to say that the suggestion to pay a bribe to the Magistrate did not first emanate from Karuna. As I have said before, it is possible that immediately before the 23th of January something had happened which frightened Karuna and he went to the Magistrate to clear his character. If he was from the very beginning indignant at Srilal having made such a daring proposal to him, it is not likely that Srilal would have persisted in visiting Karuna about 6 times unsuccessfully. It is noticeable that although Karuna's present story is that Srilal had visited him 6 times before the 23th January, to the Chief Presidency Magistrate he mentioned only two such visits. If Srilal came to Karuna's house as often as it is alleged in motor car, the absence of any of Karuna's neighbours from the witness-box to prove such visits would also throw suspicion on the story. Without, therefore, being able to say that the defence case has been fully established, I would say that upon the evidence I am not satisfied that the story of the prosecution except as regards the incidents of the 5th of February has been established beyond reasonable doubt. I, however, see no reason to disbelieve the story of the prosecution relating to the occurrence of the 5th of February as dis-

closed in the evidence of Mohendra Nath Mookerjee, Benode Behary Basu and Norendra Nath Seal. It appears from the evidence of Mohendra Nath Mookerjee that on the 5th of February Srilal came to the house of Karuna at about 7-30 p. m. and called him from outside. Karuna, who was then in the room which is his *baita-khana* the doors of which were bolted from inside, asked who he was and a voice answered 'Manmatha'. Then Karuna went out, saw the visitor and came back. Karuna then opened the door of his room and Srilal came in and had a talk with Karuna. He told Karuna that he was going to give Rs. 2,500 then and on being satisfied that the Magistrate had got the money after an interview with him on the following Saturday, he would pay the balance of Rs. 2,500. His condition was that the case before the 5th Magistrate was to be declared false and the prosecution party were to be charged under section 211. Then Srilal went out saying that he was going to fetch the money. He then returned with Mimraj. Mimraj handed a bundle of papers to Srilal, out of which Srilal took out 25 packets of Government currency notes and gave them to Karuna. Karuna counted the contents of each packet and as soon as the counting was finished, Mohendra Babu and his companions came into the room from behind the screen and snatched the bundle from Karuna. Srilal and his companion beseeched the Inspector to hush up the matter. They took off their *pugris* and placed them at Mohendra's feet and wept. The Inspector then prepared a search list which was signed by his companions and Karuna.

The question is whether this evidence, if believed, is sufficient for a conviction. It is urged on behalf of the appellants that mere offer of a bribe is not an offence unless the act amounts to abetment of an act of receiving a bribe by a public servant under section 161, Indian Penal Code. If the defence story is true and Srilal did not instigate Karuna to pay money to the Magistrate but on the other hand it was Karuna who was trying to induce Srilal to pay a bribe to the Magistrate, threatening him with injury if he did not comply, Srilal would not be guilty of any offence. As I have said before, I am not satisfied that the incite-

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ment in the first instance came from Srilal and upon this view of the case I hold that the instigation charged against Srilal has not been established. It is not unusual in this country for ministerial officers to take bribe in the name of their superiors. There is some evidence in the record to show that the atmosphere of the Police Court is not wholly pure (P. W. No. 6, page 25, Part I).

It has been further contended that even upon the facts as alleged by the prosecution, on the 5th and for some days immediately preceding that date, Karuna was inciting Srilal to pay the money with the ultimate object of catching him into a trap according to instructions given to him by the Chief Presidency Magistrate. Upon the charge as framed and on which Srilal has been convicted the question to be answered is, whether on the 5th February Srilal was instigating Karuna to instigate the 5th Presidency Magistrate to accept a bribe; my answer is in the negative. Admittedly on that day Karuna had himself sent for Srilal and had asked him to come with money to bribe the Magistrate. The incitement or instigation came from Karuna, and not from Srilal. The case is different from that of a Police spy who procures the commission of an offence for the purpose of detecting it. In those cases the instigation by the spy does not affect the offence committed at his instigation. Here the question being whether Srilal instigated Karuna, the fact that Karuna was himself instigating Srilal would negative his being instigated by Srilal.

The next argument put forward on behalf of the prosecution raises a question of considerable difficulty and importance and although upon the view of the case that I take it is not necessary to decide that question, yet as the point has been fully argued I think I may shortly express my views on it. It has been contended that under Explanation 4 of section 108, Indian Penal Code, the abetment of an abetment means the abetment of an act which subsequently ripens into an actual abetment of the principal and not an abetment or incitement merely to incite another when that other has not at all been incited. In other words, it is urged that without Karuna inciting the Magistrate the abet-

ment of Karuna by Srilal did not amount to an abetment of an abetment. The language of Explanation 4 is not very clear. The idea that the law was expressed in the form of syllogism cannot be entertained. It would be so foreign to the usual method of drafting a Statute. It is suggested by the learned Advocate-General that Explanation 4 should be read thus "when the abetment of an offence is an offence, the abetment of such an abetment is an offence." I think this is the correct way of interpreting the section.

The question mainly turns on the meaning of the words "abetment of an abetment." Having regard to the nature of the charge in this case, the only form of abetment we need consider is abetment by instigation. There is no question of a conspiracy as according to the prosecution case, Karuna and Srilal were at cross-purposes from the very beginning. I would, therefore, substitute the word 'abetment' by the word 'instigation' and put the question in this form. Was there in this case an instigation of an instigation? Having regard to the definition of the word 'abetment' as including both the abetment of an offence as well as the abetment of an act which, if committed, would be an offence, the question is whether there was on the part of Srilal an instigation of an actual instigation by Karuna, which instigation amounted to an offence, or the instigation of an act which, if committed would have amounted to an offence. It is clear there was in this case no instigation of an actual instigation, but if the prosecution story is true, Karuna was instigated to do an act which, if committed, would have been an offence. The position seems to me to be fairly clear. Our attention has been drawn to an expression of opinion contained in 4th Edition of Mayne's, Indian Penal Code (p. 239), that if *A* asks *B* to go to a place and instigate *C*, *A* commits no offence until *B* has instigated *C*. It is noticeable that this expression of opinion is not to be found in the author's own edition of the book but for the first time appears in the 4th Edition revised by Mr. Swaminadhan. No authority is cited for this proposition and I do not consider that the expression of opinion is well-founded. Reliance has been placed on various

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cases on both sides, but I do not think it necessary to go further into this question as I agree with all that has been said on the point by my learned brother.

I regret to have to differ from him. On the conclusions arrived at by me I would acquit Srilal also and discharge him from his bail-bond.

By THE COURT.—As regards Srilal Chamaria, the appellant in this appeal, our opinions differ. They will be laid before the Hon'ble the Chief Justice under section 429, Criminal Procedure Code, in order that he may appoint another Judge to hear the case.

The Chief Justice referred the case to Fletcher, J., who delivered the following

JUDGMENT.—This case comes before me under the provisions of section 429 of the Code of Criminal Procedure. The appellant Srilal Chamaria was tried along with one Mimraj Benia by the 3rd Presidency Magistrate and convicted on charges framed under sections 161 and 109 of the Indian Penal Code. Mimraj was also convicted, but his conviction has been set aside by this Court.

The appellant Srilal was sentenced by the learned Magistrate to suffer rigorous imprisonment for 3 months and to pay a fine of Rs. 1,000 or in default to undergo a further period of two months' rigorous imprisonment.

Srilal appealed to this Court. His appeal was heard by Richardson and Huda, JJ. The learned Judges were divided in their opinion. Richardson, J., was for upholding the conviction, whilst Huda, J., was of opinion that the conviction ought to be set aside.

The facts in the case are fully set out in the judgment of the Magistrate as well as in the judgments of the two learned Judges. Richardson, J., remarks in the course of his judgment:—"The outstanding feature of the case is that on the night of the 5th of February, a sum of Rs. 2,500 was admittedly handed over by Srilal to the witness Karuna Bhusan Banerjee, the Bench Clerk and Interpreter of the Court of the 5th Presidency Magistrate, Mr. Asutosh Mookerjee. A case was at that time pending before Mr. Mookerjee, in which the complainant was a Marwari, named Ramgopal Khemkar, and the accused was a wealthy Marwari merchant, named

Bilas Roy Chowdhury. Ramgopal had been the tenant of a room in a building belonging to Bilas Roy. It is said he was adjudicated insolvent, locked up the room and paid no rent for 2 months. Bilas Roy had the room opened and certain things were removed therefrom. The complaint preferred by Ramgopal was in respect of that entry. I am not dealing with the merits. The hearing began on the 3rd January and by the 13th of January a number of witnesses for the prosecution had been examined. On the 31st January charges were framed against Bilas Roy under sections 443, 453 and 380 of the Penal Code. It is clear that the case was fought with great personal animosity on both sides, though after the present case had been instituted against the appellants a settlement seems to have been arrived at between the parties and Bilas Roy was acquitted on the 22nd February." The facts contained in the above statement are not disputed. Srilal is a Gomasta or partner of Bilas Roy and in the course of his dealings with Karuna he was acting on behalf of Bilas Roy. He intended that the bribe should be made over by Karuna to the 5th Presidency Magistrate in order to secure the acquittal of Bilas Roy.

The main controversy in this case has been as to whether the suggestion that the Magistrate should be bribed came originally from Srilal or Karuna.

The case for the prosecution is that Srilal visited Karuna on the 13th of January and on subsequent occasions at his house, that Karuna on the 28th January saw Mr. Swinhoe with reference to the matter, after which Karuna played the part of a Police spy and that on the night of the 5th of February Srilal made over to him Rs. 2,500 in the presence of a Police Inspector and two other witnesses who were concealed in Karuna's house, and the money was seized by the Inspector. On the side of the defence it was stated that the first suggestion of a bribe came from Karuna and that he subsequently saw Srilal at his office at 2, Royal Exchange. Witnesses were called in support of this defence. I may say at the outset that I do not accept the evidence adduced by the defence.

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The question, therefore, is whether it is safe to convict Srilal on the evidence on the record. So far as regards the evidence apart from the incidents of the 5th of February, I think it would not be safe to convict the appellant. I am not on the whole impressed with the evidence of Karuna, although I think it is not improbable that he is right in his statement that Srilal first approached him. But apart from the incidents of the 5th of February, I should hesitate to act on the evidence of Karuna without corroboration.

The incidents of the 5th of February, however, stand on a different basis. They are amply corroborated, in fact they are not denied.

On that day Srilal went to Karuna's house voluntarily. He was under no sort of coercion or threat. The conversation between Srilal and Karuna was overheard by witnesses and deposed to by them. Srilal wanted to be satisfied that the money reached the Magistrate. He wanted the case to be declared false and sanction to prosecute Ramgopal to be granted.

There seems to have been a clear incitement by Srilal of Karuna to instigate the Magistrate to accept a bribe, which Srilal then handed over to Karuna.

The question is whether on these facts the conviction of Srilal can be supported. The answer depends on the meaning of sections 107, 108, 109 and 116 of the Penal Code. No bribe was actually offered to the Magistrate. It was argued on behalf of the defence that the Code does not make it an offence for a man to instigate another to instigate the commission of bribery unless the second abetment is actually committed. Under section 107 a person abets the doing of a thing who instigates any person to do that thing.

Section 108 defines what is meant by the abetment of an offence. There are five explanations to this section. The second explanation provides that to constitute the offence of abetment, it is not necessary that the act abetted should be committed or that the effect requisite to constitute the offence should be caused.

Explanation 4 is in the following terms: "The abetment of an offence being an offence, the abetment of such an abetment is also an offence." The prosecution

read the explanation as follows: "When the abetment of an offence is an offence, the abetment of such an abetment is also an offence." Both Richardson and Shamsul Huda, JJ., adopted this view. On consideration I am of the same opinion. As Richardson, J., points out in his judgment, the words 'when the abetment of an offence is an offence' do not mean "when an abetment of an offence is actually committed." They mean when the abetment of an offence is by definition or description an offence under the Code, that is, when an abetment of an offence is punishable under section 109 or section 116 or some other provision of the Code, then the abetment of such abetment is also an offence.

Now, if that be the true reading of Explanation 4 to section 108, there can, to my mind, be no doubt about the correctness of the conviction of Srilal. Srilal, when he handed over on 5th of February Rs. 2,500, committed a distinct incitement of Karuna to instigate the Magistrate to accept a bribe.

It makes no difference in the guilt of the abettor if the agent "falls in with the plans of the abettor, knowing his criminal purpose, but intending to cause its detection" [Mayne's Criminal Law, 2nd Edition, page 469, *Empress v. Troylukho Nath Chowdhry* (1)].

In the circumstances, I hold that the appellant Srilal was rightly convicted and accordingly dismiss his appeal.

The appellant must surrender and serve out his sentence.

Appeal dismissed.

DEWA SINGH v. EMPEROR.

PUNJAB CHIEF COURT.
CRIMINAL REVISION No. 275 OF 1918.
May 10, 1918.

Present:—Mr. Justice Shah Din.
[DEWA SINGH—PETITIONER
versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 225B—Resistance to lawful arrest—Offence, ingredients of—Overt act, proof of.

In order to constitute an offence under section 225B of the Penal Code, something more is required than an evasion of arrest or a mere assertion by the person sought to be arrested that he would not like to be arrested or that a fight would be the result of such arrest; there must be an overt act of resistance or obstruction. There must be positive evidence to show that the officer armed with a warrant of arrest produced the warrant and that the person sought to be arrested resisted such arrest.

Criminal revision from the order of the Sessions Judge, Gurdaspur, dated the 14th February 1918.

Mr. Bishen Nath, for the Petitioner.

Mr. Lal Chand, for the Respondent.

JUDGMENT.—The petitioner has been convicted of an offence under section 225B, Indian Penal Code, and the sole question for decision in this revision is whether, upon the facts found, his conviction under the said section is justified. The learned Sessions Judge records the following findings against the petitioner: "On the 1st May 1917 the bailiff took the warrant and showed it to the accused, who, however, refused to accompany the bailiff to Court"..... "In my opinion, the evidence sufficiently proves the defiant attitude assumed by Dewa Singh, who refused to accompany the bailiff, or give security for his due appearance."

In support of his view that the petitioner is guilty under section 225B, Indian Penal Code, the learned Sessions Judge observes as follows: "The warrant of arrest was to be executed under the provisions of section 55, Criminal Procedure Code. It was not necessary for the bailiff to use force, but Dewa Singh was bound to accompany him to the Court under the warrant, unless he were prepared to take the alternative of paying the decretal amount, for which he had made himself liable there and then."

Upon the above findings the petitioner is not guilty of an offence under section 225B, Indian Penal Code, inasmuch as it is not found that he intentionally offered any resistance or illegal obstruction to the lawful apprehension of himself. In a recent decision reported as *Aijaz Husain v. Emperor* (1) Mr. Justice Sundar Lal held that, in order to constitute an offence under section 225B of the Indian Penal Code, something more is required than an evasion of arrest or a mere assertion by the person sought to be arrested that he would not like to be arrested or that a fight would be the result of such arrest. There must be positive evidence to show that the officer armed with a warrant of arrest produced the warrant and that the person sought to be arrested resisted such arrest. In the Allahabad case the accused, on the warrant of arrest being shown to him, said to the officer who had come to arrest him:—"Take me, if you can, to the Tabsil. I won't go." The High Court held that this act did not constitute an offence under section 225B, Indian Penal Code. Similarly, in the case of *Emperor v. Gajadhar* (2) it was held by Mr. Justice Banerji that to justify a conviction under section 225B there must be an overt act of resistance or obstruction.

Following these authorities, I hold that the petitioner's conviction under section 225B, Indian Penal Code, is not justified. I accordingly accept this revision and, setting aside the conviction and sentence, I acquit him.

Revision accepted.

(1) 35 Ind. Cas. 973; 33 A. 506; 14 A. L. J. 731; 17 Cr. L. J. 413.

(2) 8 Ind. Cas. 823; 7 A. L. J. 1174; 11 Cr. L. J. 721.

SUBBAROYA CHETTI v. SUBRAMANIA IYER.

MADRAS HIGH COURT.

CIVIL APPEAL NO. 72 OF 1917.

April 18, 1918.

Present:—Sir John Wallis, Kt, Chief Justice,
and Mr. Justice Spencer.

T. W. SUBBAROYA CHETTI—DEFENDANT
—APPELLANT
versus

SIR S. SUBRAMANIA IYER AND OTHERS—
PLAINTIFFS—RESPONDENTS.

Trust, charitable—Trustee mixing trust funds with private funds—Presumption—Burden of proof—Trustee, removal of—Misconduct—Scheme for management—Strangers, association of, with trustee, inexpediency of—Civil Procedure Code (Act V of 1908), s. 92.

Where the trustee of a charitable endowment mixes up his private funds with the trust funds in the accounts, the presumption is that the whole of the funds belong to the trust and the onus is on the trustee to show that any portion of them is his private property. [p. 834, col. 2.]

A Court will not be justified in removing a trustee who has long held the office at the instance of strangers who have no better title, in the absence of clear proof of the trustee's misconduct. [p. 836, col. 2.]

In framing a scheme for the management of a trust, the association of strangers with the trustee which is likely to lead to friction should be avoided. Provision must, however, be made for periodical auditing of the accounts and for their inspection by those interested in the trust. [p. 837, col. 1.]

Appeal against the decree of the Court of the Temporary Subordinate Judge, Chingleput, in Original Suit No. 4 of 1916.

FACTS appear from the judgment.

Mr. T. R. Venkatarama Sastri (with him Mr. M. S. Vaidyanatha Aiyar), for the Appellant. —The finding of the lower Court negatives the specific charges of misappropriation brought against the defendant. Laxity in management and want of method in keeping and maintaining accounts cannot entail his removal from office. That is found by the Subordinate Judge. The Subordinate Judge has framed a scheme appointing a Board of Trustees to manage the temple, though the defendant is to be one of the members. This Board is to be subject to the general control of the Dharmarakshna Sabha in Madras.

The mere fact that the trustee was a young man and lacking in experience does not justify the association of strangers with him in the management of the temple. It is obvious that the machinery will not run on smoothly and there is likely to be friction among the trustees. *Mahomed*

Ismail Ariff v. Haiee Ahmed Moolla Dawood (1). "Proper safeguards might be interposed to prevent mal-administration of the trust funds, the defendant being ordered to exhibit the accounts periodically for inspection by the worshippers. Provision may also be made for periodical auditing of accounts. *Annasami Pillai v. Ramakrishna Mudaliar* (2).

The management should be under the control of a resident body and not of an association far removed from the place where the temple is situate.

Defendant and his predecessors-in-office have acquired title to the trusteeship by adverse possession. The widow of the last hereditary trustee, Sundarammal, executed a power in favour of defendant's grandfather. Defendant's grandfather and after him defendant's father and defendant have been in possession of the office since 1868. In any event they have been in enjoyment for over 12 years since the death of the widow.

Mr. P. B. Ganapathi Aiyar (with him Messrs. V. C. Seshachariar and K. S. Ramabhadra Aiyar), for the Respondents. —The defendant freely mixed up temple moneys with his own private funds. He even admitted that he used the temple moneys for his own use. That is misconduct in a trustee. The accounts had not been regularly kept and the lower Court was right in removing the defendant from the sole trusteeship and placing the management in a Board.

JUDGMENT.—This appeal is against the judgment of the Temporary Subordinate Judge of Chingleput declaring certain properties to belong to the Shri Marundiswaraswami Temple at Tiruvannamiyur and settling a scheme for that temple. The suit was brought under section 92, Civil Procedure Code, with the consent of the Advocate-General by Sir Subramania Aiyar, the President of the Dharmarakshna Sabha in Madras, and by the Village Munsif of Tiruvannamiyur, who was previously employed under the defendant's late father as the temple Shrotriarn Amin, for the removal of the defendant from the

(1) 35 Ind. Cas. 80; 43 I. A. 127; 14 A. L. J. 741; (1916) 1 M. W. N. 460; 20 C. W. N. 1118; 20 M. L. T. 110; 18 Bom. L. R. 611; 31 M. L. J. 290; 24 C. L. J. 198; 4 L. W. 269; 9 Bur. L. T. 141; 43 C. 1085; 8 L. B. R. 517 (P. C.).

(2) 24 M. 219; 11 M. L. J. 1.

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trusteeship on account of the misconduct of himself and his ancestors, for an account of management of the temple affairs during the period when the defendant's father and defendant held office, for the recovery of properties alleged to have been misappropriated by the defendant and his family, for the appointment of new trustees, and for the settlement of a scheme for the proper management of the Devasthanam.

The Subordinate Judge carefully investigated the charges made against the defendant. He found that the charges in respect of items Nos. 1 and 2 failed as the conduct of the trustees was justifiable. He found that the 2nd, 4th, 6th and 9th charges were unproved, that the 3rd and 5th charges were concocted by the 2nd plaintiff or his brother, P. W. No. 1, that the 7th charge was unfounded and that the 8th charge related to a matter for which the defendant was not responsible. In the result he found that no definite charges had been brought home to the defendant. He considered that the management of the temple by the defendant's ancestors, though somewhat lax in respect of the mixing of their own accounts with the temple accounts, was not, on the whole, dishonest. He declared that certain properties claimed on behalf of the temple by the plaintiffs belonged to the temple and that certain others belonged to the defendant. He considered that no sufficient ground had been shown for the removal of the defendant from the trusteeship and found that he was an inexperienced young man who had not had a chance of showing that he could manage the temple affairs properly before the suit was launched; and he directed that the management of the temple in future should be by a Board of Trustees consisting of the defendant and two other persons to be appointed by the Court, and that this Board of Trustees should be under the control of the Dharmarakshana Sabha of Madras.

The defendant appeals against the decree in so far as it takes away the sole management from his hands and associates two strangers with him in the management. He also appeals against the finding of the Subordinate Judge that four lands in Patta No. 35, item No. 6 of C schedule, belong to the

temple and also against the finding that the Sanad Maniyam lands in Kariambakkam belong to the temple. The plaintiffs have filed two separate memoranda of cross-objections against the finding of the Subordinate Judge that the defendant was the rightful trustee and had acquired a right by adverse possession. They also object to the finding that items Nos. 2 to 6 of A to C schedules in paragraph 50 of the judgment belong to the defendant and they ask to have the defendant altogether removed from the trusteeship.

We may first deal with the items of property about which there are disputes. Patta No. 35 contains four numbers 475, 474, 476 and 477. Of these, the defendant claimed the whole of 474, 477 and part of 475 and 476. It appears from Exhibit-L-2 that these lands were purchased in 1893 for Appu Chettiar, who was the then Manager of the temple, by the temple Kanak (accountant), Thanikachallam Pillai. They were transferred to Patta No. 11 and thence to Patta No. 35 in Appu Chettiar's name. In Exhibit L-2 under the heading "Accounts of receipt and expenditure of Maniyam Tiruvannamiyur Dharmam" there is an entry of Rs. 91 and odd paid as Teerva for the lands in Patta No. 11 and 35, with the statement that these lands "belong to the Devasthanam." This is almost conclusive in favour of the lands being the property of the temple. There is also the fact that Rs. 20 are shown in the temple accounts (Exhibit M) as spent from the temple funds towards the purchase of these lands and the Kist of the lands was also debited to the temple. We think that the Subordinate Judge was right in treating these lands as belonging to the temple. The next item is the Sanad Maniyam lands in Kariambakkam. These lands were obtained by a sale-deed, Exhibit Z, in favour of the defendant's father and his father's brother in 1890. The sale was to pay off a mortgage in favour of another member of the defendant's family. The defendant has not shown that the Rs. 100 for this purchase came from private funds. In a case like the present, where it is clear that the funds of the temple and the funds of the family have not been kept distinct in the accounts, the presumption is in favour of the temple. See *Neelayathakshi Ammal v. Taluk*

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Board of Mayaram (3) as to the duty of trustees to keep their property distinct from the trust property, and to maintain accounts of all loans taken from one property for the benefit of the other. We confirm the Subordinate Judge's finding upon this portion of the defendant's claim.

Turning now to the lands claimed in the memorandum of objections, the first is Chinnamuthan Chavadi land. This land was obtained under a 99 years' lease granted by Lord Clive in 1801 in favour of Mari Chetti of Tirupassoor. Under a partition between him and his elder brother in 1804 this land fell to the share of Mari Chetti. Before the 99 years' lease expired, a renewal was granted in the name of the defendant's father under Exhibit XIII. Three sums obtained as compensation for acquisition of portions of this land by Government were credited by the defendant's father to the temple, and the income and expenses arising out of possession of this land have all been entered in the temple accounts. See Exhibits LIX, XIX, XXVI, XXI and XXII. Exhibit XIX is headed "Account of Tiruvanmiyur Marundiswaraswamiar". The Subordinate Judge, having regard to the facts that the defendant's family conducted trade in yarn and advanced from their Maligai accounts large sums to this temple, thinks that these advances may have been intended as gifts to the temple and that the rents and profits derived from the land may have been taken by the family in compensation for the expenses incurred out of their own trade for the temple. The respondent's Pleader goes so far as to describe the Maligai accounts as an *alias* for temple accounts. But, in our opinion, he has not established so much. We find that, in some places, the temple is entered as a debtor of the family. The Maligai accounts go back to a time before the family had anything to do with the temple, and we find a system of debit and credit between the Devasthanam and the Maligai. There are also separate accounts of individual members of the family on certain pages of the Maligai accounts. The view taken by the Subordinate Judge is that, as on the whole there was always a balance of indebted-

(3) 12 Ind. Cas. 449; 10 M. L. T. 353; 31 M. 333; (1911) 2 M. W. N. 350.

ness in favour of the Maligai as against the temple, it is probable that the temple income being insufficient, the defendant's ancestors were in the habit of lending money from their own funds to supplement the temple funds without keeping any sharp distinction between the two. The entry in Exhibit XIX at page 449 of Tiruvanmiyur Marundiswaraswami temple "purchase of Seemai yarn" stands by itself, and has not been satisfactorily explained. But it is an account of 1876 and the heading in the name of the temple is inconsistent with the theory that the temple was the sole owner of all the Maligai trade. Exhibit LIX at page 668 shows that this account was in existence when Tirupassoor Subbaraya Chetti, the last trustee previous to the alienation by Sundarammal, was alive and it thus appears that the defendant and his father only followed the precedents of previous trustees in entering debit and credit items between the temple and the Maligai. A Commissioner was appointed to examine these accounts, and in his evidence he stated that the yarn account had not been brought to his notice until the trial. It appears to have been an afterthought to make much of this solitary heading. On the whole, we do not consider it proved that all the profits made from the Maligai should belong to the temple. But in respect of this particular land, we think that the onus is, as before explained, upon the defendant to prove that the property belongs to himself when he is shown to have mixed his own funds and the temple funds in his accounts; and the evidence of compensation paid in respect of portions of this land having been credited in favour of the temple and the debit and credit entries in the temple accounts for Chinnamuthan Chavadi outweighs the evidence adduced on behalf of the defendant and is sufficient for a finding that Chinnamuthan Chavadi is the property of the plaintiff temple.

The next item Palavakkani lands and a house in Brodie's Road follow the result of the finding as to Chinnamuthan Chavadi, because it appears that these properties were purchased out of money obtained in land acquisition proceedings when a portion of Chinnamuthan Chavadi lands were acquired by the Government. This land was

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mortgaged under Exhibit T to the defendant's father for Rs. 2,000. He took the mortgage as trustee of the temple and he again leased it under Exhibit T in that capacity. The interest obtained under the lease-deed was received by the defendant's father and he signed the receipts, Exhibit U series, as trustee of the temple. We find that this item is temple property.

Item No. 5—Pallipattu and Kottur lands were purchased in the name of Appu Chetti, defendant's grand-uncle. The Subordinate Judge holds that these lands are the private properties of Appu Chetti. They are now stated to be in possession of Abboy Chetti. Abboy Chetti is not a party to the suit. We do not think that we should interfere with the finding of the Subordinate Judge that these lands are the private properties of Appu Chetti.

Item No. 6—Odaikuppam lands were mortgaged to Appu Chetti in 1824. He brought a suit in 1891 on the mortgage and got a decree and became the purchaser in execution. He has since disposed of the lands by Exhibit F in 1903 in favour of Karimunnessa Begam, who is not a party to this suit. No declaration can be made in favour of the temple in respect of these lands and the respondents' Pleader has expressed his willingness to drop this item.

The Subordinate Judge held that the defendant's father, having been trustee of the temple for over 12 years from 1878, must be deemed to have become the rightful trustee by adverse possession and that the defendant as heir to his father must also be deemed to be a rightful trustee. The last trustee in the family of the founders of this charitable institution was Tirupasoor Subbaraya Chetti, who died in 1868 leaving a widow Minakshi Sundarammal. This widow executed a *powernama* in favour of Oothakadu Subbaraya Chetti, who was her uncle's son and the defendant's grandfather. He had two sons, Kandasami Chetti and Namasivaya Chetti. The latter died a lunatic and the defendant's father Kandasami Chetti died in 1911. Assuming that Sundarammal had no authority to alienate the trusteeship to persons not standing in the direct line of the founder, the defendant and his grandfather and father have been

in actual management of the temple trust since 1868. Although limitation will only begin to run from the death of the widow, see *Subraya Kakramaya v. Subraya Padayya* (4) and *Neelakanta Rao v. Narayana-swami Aiyar* (5), there is an interval of more than 12 years since Sundarammal's death in 1881 and the institution of this suit. The Subordinate Judge, therefore, was of opinion that the defendant had established a right by adverse possession in his favour. We think it unnecessary to pronounce an opinion on this point. The defendant and his predecessor have been in possession of the office for many years and we should not be inclined to disturb his possession and depose him at the instance of strangers unconnected with the family of the former trustees, who have themselves no better title than the defendant and do not suggest that there is any one living who has a better hereditary title than the defendant, unless he was clearly guilty of misconduct and it appeared to be for the clear benefit of the trust that he should be deposed.

We agree with the Subordinate Judge's finding that the plaintiffs have failed to prove that the defendant was guilty of any misconduct or fraud upon the revenues of the temple. It is unnecessary to discuss the charges in detail. Arguments were addressed to us at some length in respect of the 5th charge, which related to a sum of Rs. 59-8-0 paid for casuarina posts, also in respect of the 14th item of liability which was concerned with a sum of Rs. 1,250 of temple money deposited with a Nattukottai Chetti firm, and lastly in respect of a double entry of Rs. 150 in the *Devastanam Kurippu* Exhibit 47 at page 296, coupled with the defendant's admission that he used to take cash out of the temple balance for his own private use. It is sufficient to say that the entry of the first of these items was made by 2nd plaintiff's brother, that the 2nd plaintiff took away the temple accounts in order to set up a case of misappropriation against the defendant and that, in

(4) 7 Ind. Cas. 715; 8 M. L. T. 323; (1910) M. W. N. 445.

(5) 37 Ind. Cas. 733; 31 M. L. J. 847; 20 M. L. T. 521.

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these circumstances, any evidence against the defendant coming from that source is tainted and not worthy of any credit. As for the item of Rs. 1,250 the statement of P. W. No. 3, a Gomasta of the Nattukottai Chetti firm, that no temple money was ever kept in deposit with that firm was not of much value, when taken with his admission in cross-examination that he had not brought his firm's accounts and that without them he could not say what money had been received by the firm. The last item of Rs. 150 is not one of the items upon which any charge has been founded in the plaint. It may be that a satisfactory explanation is forthcoming for the entry as it stands, but until the defendant has had a chance of explaining, it cannot be assumed that the amount has been misappropriated.

Mr. Venkatarama Sastri contended on behalf of the appellant that the association of two strangers along with the defendant in the management is likely to lead to friction and he quoted *Mahomed Ismail Ariff v. Hajee Ahmed Moolla Dawood* (1) in support of this contention. He suggests that instead of the scheme propounded by the Subordinate Judge, the defendant should be left to manage the trust subject to an arrangement for exhibiting the accounts for the examination of worshippers in a manner similar to that in the scheme of the Malleswara and Keshava Perumal temples in *Annasami Pillai v. Ramakrishna Mulaliar* (2). We think there is considerable force in his contention. The manner in which the accounts have been kept in the past shows the necessity of a periodical audit being made, and this is conceded on both sides to be one of the conditions that should be embodied in the scheme. At the same time it does not appear to be desirable that the management of this temple should be placed under the control of a self-constituted body having its headquarters in the Presidency Town. We, therefore, direct in substitution for the scheme provided in the Subordinate Judge's decree as follows:—

(a). The defendant is confirmed in the office of sole Dharmakarta of the suit temple.

(b). After defendant's lifetime the office shall descend in succession to his eldest male heir,

(c). An annual audit of temple accounts shall be made at the temple expense.

(d). Suitable persons shall be appointed by the members of the Saidapet Taluk Devasthanam Committee for the time being as auditors to make the audit of the temple accounts for the year. Failing them the appointment of auditors shall be made by the District Court on the application of worshippers.

(e). The results of such audit shall be posted in a conspicuous spot at the entrance of the temple and shall be kept exposed to view for the space of one month.

(f). The Dharmakarta shall allow worshippers of the temple to inspect the temple accounts between the hours of 3 and 5 P.M. on one day of every week and for that purpose shall cause the books and accounts to be kept in a conspicuous place in charge of one of his subordinates.

(g). Among the books to be kept for the examination of worshippers the Dharmakarta shall maintain registers showing the various moveable and immoveable properties belonging to the suit temple as also all the valuable moveable properties inclusive of jewels.

(h). The Dharmakarta shall have the said registers duly revised once a year.

(i). The Dharmakarta, from time to time and whenever the surplus funds of the temple exceed the sum of Rs. 3,000, shall invest the said surplus funds in any of the modes mentioned in section 20 of the Indian Trusts Act.

The net result is that the appeal succeeds as regards the scheme and fails as regards the lands in Patta No. 35 and the Maniyam lands of Kariambakkam.

The memorandum of objections succeeds as regards the Chinnamuthan Chavadi and the Palavakkam lands and the house in Brodie's Road, and fails as regards the Pallipattu and Kottur lands, the Odaikuppam lands, and the prayer to remove the defendant from the management.

Each party will bear his own costs in this Court.

M.C.P.

*Appeal and memo. of objections
allowed in part,*

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PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 1162 OF 1914.

May 17, 1918.

Present:—Mr. Justice Chevis and
Mr. Justice Broadway.

SHIV RAM DAS—DEFENDANT—

APPELLANT

versus

Musammat BHAG DEVI—PLAINTIFF AND

OTHERS—DEFENDANTS—RESPONDENTS.

*Specific Relief Act (I of 1877), s. 42, proviso—
Plaintiff in possession of half house—Declaration,
suit for, in respect of whole, maintainability of—
Consequential relief—Amendment of plaint, whether
can be allowed.*

Plaintiff, who was in possession of half of a house,
sued the defendant, who was in possession of the
other half, for a declaration of title in respect of
the whole of the house:

Held, (1) that the suit was bad (under the proviso
to section 42 of the Specific Relief Act, inasmuch
as the plaintiff could have sued to eject the defend-
ant from the portion of the house of which he
was in possession; [p. 839, col. 2; p. 840, col. 1.]

(2) that the plaintiff could not be allowed in
appeal to amend the plaint so as to convert the
suit into one for ejectment. [p. 840, col. 1.]

Second appeal from the decree of the
Divisional Judge, Lahore, dated the 12th
January 1914.

The Hon'ble Pandit Sheo Narain and Mr.
Govind Das, for the Appellant.

The Hon'ble Mr. Muhammad Shaif, Messrs.
Badr ud-Din Kureshi, Durga Das and Mahesh
Das, for the Respondents.

JUDGMENT.—The following pedigree-
table will assist in understanding this case:—

Dewan DAS MAL—Musammat Gulab Kaur.

Gowardhan Das
(adopted son).Musammat Bhag Devi,
widow, plaintiff.Musammat Mohan Devi,
widow, defendant No. 3Musammat Kirpa Devi,
widow of Tulsi Dass,
defendant No. 4.

Girdhari Lal.

Musammat Gopal Devi (deceased.) = Shiv Ram Dass, defendant No. 1.

Raghubir Singh, defendant No. 2,
died during suit.

Diwan Das Mal died somewhere about 1892
or 1894 and on his death disputes arose
between Musammat Gulab Kaur and Gowardhan
Das, the former denying that the
latter was the adopted son of her husband.
These disputes were settled in 1898 and an
arrangement came to, which was evidenced
by two deeds of release dated the 13th
July 1893, by which Musammat Gulab
Kaur gave up all claims to the lands left
by her husband, acknowledged the adoption
of Gowardhan Das and took certain house
property, while Gowardhan Das took all
the lands but surrendered the said house prop-
erty to the widow.

Subsequent to this on the 10th July
1900 Musammat Gulab Kaur executed a
Will under which she divided all her
property between her four daughters in
equal shares, but with reference to the
house now in suit she devised to Musam-
mat Bhag Devi an interest in it to the

extent of Rs. 1,000 and the residue she
left to Girdhari Lal, son of Musammat
Mohan Devi, with the condition, however, that
Musammat Bhag Devi was to be allowed to
reside in the house.

On the 15th January 1909 Musammat
Gulab Kaur executed a deed of gift under
which she gave to her son-in-law, Shiv
Ram Das, and her grandson, Raghubir Singh,
the house now in suit. The reason assign-
ed in the deed of gift for adopting this
course was that Shiv Ram Das had been
attentive to her and had in every way
assisted her and that as his wife, then
deceased, had not received the same dowry
as her sisters the present provision was
made for the family. In June 1909 Musam-
mat Mohan Devi and Musammat Kirpa
Devi instituted a suit asking for a declara-
tion that this deed of gift would not affect
their rights of inheritance, having been
obtained through undue influence. In this

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suit *Musammāt Bhag Devi* was made a defendant and it was asserted that she had been siding with Shiv Ram Das and had assisted him in getting this gift executed. *Musammāt Gulab Kaur* was a defendant in that suit, which was fixed for the 6th of July 1909. When the summons was served on her, a report was made to the effect that she had made no "gift" to any one but had executed a Will in favour of Shiv Ram Das. On the 23rd June 1909 Lala Devi Das, Pleader, filed a written statement with the permission of the Court on behalf of *Musammāt Gulab Kaur*, in which she repudiated the gift and alleged that she had been deceived by Shiv Ram Das and induced to execute that document. Admittedly the lady was on her death-bed at the time and she actually expired before the 6th July 1909. That suit was accordingly dismissed on the ground that owing to the death of *Musammāt Gulab Kaur* the plaintiffs should sue for possession. The said plaintiffs, however, took no further steps in the matter, but on the 7th December 1910 *Musammāt Bhag Devi* instituted the present suit making her two sisters defendants along with Shiv Ram Das and Raghbir Singh. In the plaint it was alleged that *Musammāt Gulab Kaur* had been the owner of this house without power, however, to alienate and that the deed of gift dated the 14th January 1909 had been fraudulently obtained by Shiv Ram Das. Objection was taken to the frame of this suit, as the allegation that *Musammāt Gulab Kaur* had been full owner of the house and yet had no power to alienate the same was somewhat ambiguous. The plaint was accordingly returned for amendment and re-presented after being amended, it being then definitely stated that *Musammāt Gulab Kaur* had inherited this house from her husband and therefore her powers of alienation were limited. The defendants then produced the deeds of release referred to above and pleaded that inasmuch as Gowardhan Das, as the adopted son, was the heir the plaintiff had no *locus standi* to sue. The plaintiff denied the adoption but when it was held that Gowardhan Das had, as a matter of fact, been adopted, the line of attack was changed and it was alleged that *Musammāt Gulab Kaur* had acquired

this house under the said deeds of release as her *stridhan* and that the deed of gift relating to it had been obtained by fraud and through undue influence. No attempt, however, was made to amend the plaint in accordance with this new case. The trial Court held that this change of front could not be allowed and that undue influence had not been proved and dismissed the suit. *Musammāt Bhag Devi* thereupon preferred an appeal to the Divisional Judge, Lahore, who held that undue influence had been established and decreed the plaintiff's suit. It should be mentioned that defendants had also pleaded that inasmuch as *Musammāt Bhag Devi* was not in possession of the whole property, a declaratory suit was incompetent. With regard to this the trial Judge doubted whether the suit was maintainable as there had been no partition. The learned Divisional Judge, however, held that as *Musammāt Bhag Devi* was in possession of a portion of the house, the declaratory suit was competent.

Against this decree Shiv Ram Das preferred this appeal through Mr. Sheo Narain. Raghbir Singh has died and his father has been brought on to the record as his representative. On behalf of *Musammāt Bhag Devi* we have heard Mr. Shafi. The learned Counsel on both sides have argued at considerable length various points raised with regard to the exact nature of *Musammāt Gulab Kaur's* estate and the admissibility of certain evidence. It is not, however, necessary to discuss these matters as, in our opinion, the appeal must succeed on ground No. 7 of the grounds of appeal. It is clear that *Musammāt Bhag Devi* is in possession of about half of the house while Shiv Ram Das is in possession of the remainder. *Musammāt Bhag Devi* could, therefore, have filed a suit for the ejectment of Shiv Ram Das. See *Kallinath Chakravarti v. Upendra Chunder Chowdhry* (1) *Ramzan Ali v. Basharat Ali* (2), *Raghuraj Singh v. Bishen Tewary* (3), *Suryanarayanmurti v. Tammanna* (4) and *Ram Chand v. Radha Kishen* (5). All that

(1) 24 C. 212; 1 C. W. N. 163; 12 Ind. Dec. (N. S.) 807.

(2) 105 P. R. 1901.

(3) 37 Ind. Cas. 384.

(4) 25 M. 504.

(5) 63 P. R. 1882.

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Mr. Shafi was able to urge against this contention of the appellants was that the cases referred to above related to suits against trespassers who were in possession of the whole of the property, whereas, in the present case Shiv Ram Das is only in possession of about a half. We are unable to see any difference in principle. There can be no doubt that on the allegations made by the plaintiff, Shiv Ram Das is a trespasser and, therefore, if the plaintiff is correct in her allegations, she would be entitled to eject him. Mr. Shafi referred to section 99, Civil Procedure Code, and *Musammat Bibi Hukam Kaur v. Sardar Asa Singh* (6). Section 99, Civil Procedure Code, has no bearing on the point at issue and although in *Musammat Bibi Hukam Kaur v. Sardar Asa Singh* (6) the plaintiff was allowed to amend the plaint so as to make the claim one for possession, this concession was allowed her for very special reasons. In the present case those reasons do not exist. The defendants have throughout been objecting to the frame of the suit and it is obvious that it would be inequitable to allow plaintiff to change the nature of her suit at this late stage. In the proviso to section 42 of the Specific Relief Act it is specifically enacted that no Court shall grant any declaratory decree where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so. The suit as laid is, therefore, bad and as we can see no reason for allowing an amendment so as to make the suit one for ejectment, this appeal must be allowed.

We accordingly accept the appeal and dismiss the plaintiff's suit. In the circumstances, however, the parties will bear their own costs throughout.

Appeal accepted.

(6) 1 P. R. 1900.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1153 of 1916

AND

APPEAL AGAINST ORDER No. 74 of 1916.

November 2, 1917.

Present:—Mr. Justice Seshagiri Aiyar and
Mr. Justice Napier.

S. V. SITARAMASWAMY—

PETITIONER (ASSIGNEE FROM THE DEFENDANT)—

— APPELLANT IN BOTH

versus

DULLA LAKSHMI NARASAMMA AND

ANOTHER— PLAINTIFF AND DEFENDANT—

RESPONDENTS IN BOTH.

Civil Procedure Code (Act V of 1908), s. 146, O. XXII, r. 10—'Proceeding' and 'claiming under' in s. 146, meanings of—Assignment of party's interest pending suit—Appeal, rights to, by Assignee—Omission to be impleaded in suit, effect of—Plaint, return of, for presentation to proper Court—Devolution of interest during pendency of proceedings in first Court, effect of, in proceedings in second Court.

Order XXI, rule 10, Civil Procedure Code, only governs applications made to continue a suit. Applications presented after the termination of the suit are not within the rule. [p. 841, col. 2.]

Subba Pillai v. Rangasami, 40 Ind. Cas. 846; (1917). M. W. N. 306 and *Collector of Muzaffarnagar v. Husaini Begam*, 18 A. 86; A. W. N. (1895) 232; 8 Ind. Dec. (N. s.) 763, followed.

The 'proceeding' contemplated by section 146, Civil Procedure Code, includes an appeal and the expression 'claiming under' in the section is wide enough to cover cases of devolution, etc., mentioned in Order XXI, rule 10 of the Code. [p. 842, col. 1.]

The effect of section 146 of the Civil Procedure Code is to grant an assignee of the interest of a party to a suit a right to prefer an appeal against the decrees passed in the suit which his assignor could have preferred, even though the assignee did not make himself a party to the suit. [p. 842, col. 1.]

Obiter—Where a plaint is returned for presentation to the proper Court, any devolution of interest which takes place while the proceedings are pending in the first Court must be taken to be a devolution in the course of the suit which is subsequently tried in the second Court. [p. 841, col. 2.]

Seshagiri Row v. Velayudam Pillai, 14 Ind. Cas. 157; 36 M. 482; 22 M. L. J. 377; (1912) M. W. N. 457, considered.

Second appeal against the decree of the District Court, Ganjam at Berhampore, in Appeal Suit No. 200 of 1915, preferred against the decree of the Court of the Temporary Subordinate Judge Ganjam at Berhampore, in Original Suit No. 25 of 1914.

Appeal against the order of the District Court, Ganjam at Berhampore, in Interlocutory Appeal No. 322 of 1915, in Appeal Suit No. 200 of 1915.

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FACTS appear from the judgment.

Mr. K. V. L. *Narasimham*, for the Appellant.—The appellant acquired an interest in the subject-matter of the suit while it was pending. His failure to get himself impleaded in the suit deprived him of the right to contest the action on the merits. That does not, however, bar his right of appeal. The appellant *claims under* the original defendant within the meaning of section 146, Civil Procedure Code. The words 'claiming under' must be given a liberal interpretation so as to cover all cases of devolution of interest referred to in Order XXII, rule 10. His assignor had the substantive right to appeal and the right passes to the appellant. The word 'proceeding' in section 146 is not confined merely to suit. It covers the case of appeals.

Mr. S. *Varadachariar*, for the Respondents.—The application to be made a party was not within rule 10 of Order XXII, Civil Procedure Code. The rule says that, on the application of a person on whom the interest of a party has devolved, the *suit* may be continued. Here the suit had already terminated at the date of the application. The appellant's application to be made a party was rightly dismissed. Section 146 does not in express terms cover cases contemplated by Order XXII, rule 10. The section is aimed at securing the rights of legal representatives.

JUDGMENT.—Plaintiff, the mother, sued her son, the defendant, for a declaration that the property in suit was her *Stridhanam*. The suit was first filed in the District Munsif's Court and, on objection being taken to valuation, it was returned for presentation to the Court of the Subordinate Judge and was tried in that Court. When the suit was in the Munsif's Court the defendant executed a mortgage in favour of the present appellant. The suit was decided by the Subordinate Judge in favour of the plaintiff. It is alleged that, while the son was taking steps to file an appeal, he colluded with his mother and gave up the idea of preferring an appeal. Thereupon the present appellant filed an application to the District Court under Order XXII, rule 10, for an order that he be allowed to prefer an appeal, as the right to the property in suit devolved on him pending the suit,

At the same time, he filed a memorandum of appeal against the decree of the Subordinate Judge. On the application, the District Judge held that Order XXII, rule 10, was not applicable and dismissed it. On the appeal, he held that his order on the application concluded the right of the appellant. Against these two decisions a civil miscellaneous appeal and a second appeal have respectively been preferred.

As regards the dismissal of the application we agree with the conclusion of the District Judge, though not with the reasons given by him. He has relied on *Seshagiri Row v. Velayudam Pillai* (1) for the proposition that the suit in the Munsif's Court was not continued in the Court of the Subordinate Judge. We reserve our opinion on the exact point decided in *Seshagiri Row v. Velayudam Pillai* (1). That decision is authority only for the proposition that, for purposes of limitation, the suit in the Court of the Subordinate Judge was different from that which was first filed in the Munsif's Court. As at present advised, we are inclined to think that, where a plaint is returned for presentation to the proper Court, any devolution of interest which took place while the proceedings were pending in the first Court must be taken to be a devolution in the course of the suit which was subsequently tried in the second Court. But the order of the District Judge can be supported on the ground that when the appellant applied to the District Judge there was no suit pending. Order XXII, rule 10, only governs applications made to continue a suit. Consequently the application presented after the termination of the suit was not within the rule. The recent decision of this Court in *Subba Pillai v. Rangasami* (2) takes that view, which is also supported by *Collector of Muzaffarnagar v. Husaini Begam* (3). We agree with the view taken in these decisions. Following them, we hold that the District Judge was right in rejecting the application and we dismiss the civil miscellaneous appeal with costs.

The District Judge is clearly wrong in holding that the appeal failed by reason

(1) 14 Ind. Cas. 157; 36 M. 482; 22 M. L. J. 377; (1912) M. W. N. 457.

(2) 40 Ind. Cas. 846; (1917) M. W. N. 306.

(3) 18 A. 86; A. W. N. (1895) 232; 8 Ind. Dec. (N. S.) 793.

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of his rejection of the application. Apparently his attention was not drawn to the provisions of section 146 of the new Code of Civil Procedure. It is rather anomalous that if the person claiming under a party applied to continue the suit while it was pending, the Court had a discretion to permit him to do so or to refuse his application; the effect of section 146 is to grant such a person an undeniable right to prefer the appeal which his assignor could have preferred. But the language of the section is clear and we are not at liberty to go behind its plain terms. The proceeding contemplated by the section would include an appeal and the expression 'claiming under' is wide enough to cover cases of devolution, etc., mentioned in Order XXII, rule 10. We, therefore, hold that the appellant was entitled to prefer the appeal to the District Judge. That appeal must now be heard on the merits. We reverse the decree of the District Judge and remand the appeal to him for disposal.

Costs of the second appeal will abide the result.

M. C. P.

Case remanded.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 556 OF 1914.

May 6, 1915.

Present:—Mr. Justice Shah Din and
Mr. Justice LeRossignol.

SHADI—DEFENDANT—APPELLANT

versus

ALIA—PLAINTIFF—RESPONDENT.

Custom—Will in favour of resident son-in-law, whether can be treated as gift—Gift in favour of daughter, validity of—Collaterals, rights of—Virak Jats of Mauza Harar, Tahsil Gujranwala.

Among Virak Jats of Mauza Harar in Tahsil Gujranwala a male proprietor is empowered by custom to make a gift of his ancestral property in favour of his daughter to the exclusion of his collaterals in the 4th degree. [p. 844, col. 1.]

A bequest of ancestral property by a male proprietor in favour of his resident son-in-law can be treated, so far as the testator's power of disposition is concerned, as a gift for the benefit of his daughter and her issue. [p. 843, col. 1.]

Second appeal from the decree of the Additional Divisional Judge, Gujranwala, dated the 17th February 1914, affirming that of the Subordinate Judge, 2nd Class, Gujranwala, dated the 13th October 1913, decreeing claim.

Lalas Hari Chand and Tirath Ram, for the Appellant.

Mr. Badr-ud Din Kuieshi, for the Respondent.

JUDGMENT.—The facts of this case are fully stated in the judgment of the Subordinate Judge, which contains a pedigree table showing the relationship of the parties (page 5 of the paper-book). Fateh Din, son of Muhammad Yar, made a Will on the 5th December 1887 leaving his whole property to his son-in-law Shadi, who was also his sister's son. He died on the 1st January 1888, and on the 18th March 1888 mutation in respect of his land took place in the name of his widow Musammat Sultan Bibi. On the 2nd February 1892 this land was mutated in the name of Shadi at the instance of Musammat Sultan Bibi, who stated that her husband had left his property by Will to Shadi. Since that date Fateh Din's land has been shown in Shadi's name in the revenue papers. This land represented $\frac{1}{4}$ th share of the joint holding belonging to the descendants of Ashiq (see the pedigree table); the remaining $\frac{3}{4}$ ths of the holding stood in the names of the sons of Dost Muhammad, who, however, had been absentees for a very long time. By order, dated the 1st December 1899, the names of the absentees, sons of Dost Muhammad, were struck out, and the name of Shadi was entered as owner of the $\frac{3}{4}$ ths share of the holding as well as of the $\frac{1}{4}$ th share which had been bequeathed to him by his father-in-law Fateh Din. The widow Musammat Sultan Bibi died in 1906.

The present suit was brought in March 1913 by the plaintiff Alia for possession of the entire family holding on two grounds; *firstly*, because as the sole surviving representative of Dost Muhammad's branch of the family he is entitled to the possession of $\frac{3}{4}$ ths of the holding, inasmuch as Dost Muhammad's sons are not shown to have abandoned their share of the family land, and further as the heir of Fateh Din he is entitled to the $\frac{1}{4}$ th share left by him; *secondly*, because, assuming that Fateh Din became owner of the entire family hold-

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ing by reason of the descendants of Dost Muhammad having abandoned their $\frac{3}{4}$ ths share in it, the plaintiff, as the sole heir of Fateh Din, is entitled to succeed to that holding by custom to the exclusion of Fateh Din's son-in-law Shadi.

Both the Courts below have decreed the plaintiff's claim conditional on payment by him of a sum of money found to be due to the defendant Shadi in respect of certain improvements and of certain payments made by him to the creditors of Fateh Din. The defendant has appealed to this Court, and on his behalf it has been contended (1) that the suit of the plaintiff is barred by limitation as regards $\frac{3}{4}$ ths share of the holding which belonged to the descendants of Dost Muhammad, because they had abandoned the said share in the lifetime of Fateh Din and also because their names were finally struck out of the revenue records in 1899 and the name of Shadi substituted in their place; (2) that, if the suit is not so barred by time, it is not maintainable, because by the custom applicable to the parties Fateh Din was empowered to bequeath the whole of the land in his possession, which included the $\frac{3}{4}$ ths of the holding which stood in the names of the descendants of Dost Muhammad, in favour of his resident son-in-law, the present defendant. In the view that we take of the case it is unnecessary for us to consider and decide the question of limitation. We are, however, inclined to hold that the $\frac{3}{4}$ ths of the family holding had been abandoned by the descendants of Dost Muhammad long before the death of Fateh Din; that Fateh Din had by reason of this abandonment become the sole owner of the entire holding, including his own $\frac{1}{4}$ th share; that the defendant obtained possession of the whole of the holding as the sole legatee under Fateh Din's Will, dated the 5th December 1887, that this possession became adverse to the present plaintiff only in 1906, when Fateh Din's widow, *Musammât* Sultan Bibi, died, and that consequently the plaintiff's suit which was brought in 1913 was within time.

The crucial question in the case is as to whether by the custom applicable to the parties the plaintiff, as a collateral of Fateh Din in the 4th degree, has a right to succeed to the land in suit to the exclusion

of the defendant. As we have said above, Fateh Din made a Will in favour of the defendant on the 5th December 1887, and we have no hesitation in holding the factum of the Will proved; the Subordinate Judge was of the same opinion, and though the Divisional Judge entertained some suspicion regarding the genuineness of the Will from the fact that it was not mentioned in the course of the mutation proceedings of March 1888 after the death of Fateh Din, his finding on the whole was the same as that of the Subordinate Judge. From March 1888 up to the date of the suit, a period of about 25 years, the plaintiff did not challenge the validity of the Will, and his silence is significant as showing that the alienation by Fateh Din was not considered as a flagrant departure from the rule of custom applicable to the parties, though we recognise that the plaintiff was within his rights in waiting till the widow *Musammât* Sultan Bibi died before bringing the suit for possession of the land. It is, however, noteworthy that since her death he has waited for seven years before instituting the present suit. The parties are Virak Jats of Manza Harar in Tahsil Gujranwala; and since Fateh Din's Will in favour of the defendant, who was his resident son-in-law, can be treated, so far as Fateh Din's power of disposition is concerned, as a gift for the benefit of his daughter and her issue, the question for decision is whether among the tribe of the parties a male proprietor is empowered to make a gift in favour of his daughter to the exclusion of his agnates in the 4th degree. The *riwaj-i-am* of the Gujranwala Tahsil compiled at the Settlements of 1868 and 1892 contains entries opposed to the validity of a gift in favour of a daughter in the presence of collaterals, but no instances are cited in support of those entries, nor have such instances been given by the plaintiff in the present suit. He has produced no oral evidence; and the only judicial precedent relied upon by him—the case of *Hayat v. Gehna* which was decided by Lala Atma Ram on the 15th August 1907, Exhibit P.-6—is hardly of any value. In that case a gift had been made by a Virak Jat of Tahsil Gujranwala in favour of his daughter's son in the presence of his own son, and after the

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death of the son, upon a suit brought by the donor's nephew, the gift was set aside on the strength of entries in the *wajib-ul-arz* of the village, the *riwaj-i-am* of the Tahsil and certain instances cited by the plaintiff's witnesses. In the present case not only are no instances cited by the plaintiff in support of his position; but on the contrary there is a distinct provision in the *wajib-ul-arz*, prepared at the Settlement of 1853, of village Harar to which the parties belong, and in which the land in dispute is situated, to the effect that a male proprietor has power to make a gift of his property by a written document in favour of his daughter's issue in the presence of his collaterals. This provision in the *wajib-ul-arz* is presumptive evidence of custom, and it is supported by a well-authenticated instance of a daughter's succession to the exclusion of collaterals in the family of the parties. Fazil, son of Ali Kuli, the founder of the family, was succeeded by his daughter Musammât Rahmat Bibi; and it appears from the settlement pedigree table, as proved by the Patwari, that her descendants are up to the present moment in possession of the land which once belonged to Fazil. Other instances of daughters' succession to the exclusion of collaterals have been given by some of the defendants' witnesses; they are not, however, of much evidential value as all the particulars relating to them have not been clearly brought out, and they may be disregarded for the purposes of this case. Taking it for granted that the initial burden of proof lay on the defendant as regards the power of Fateh Din to make a gift of his ancestral property in favour of his daughter, to the exclusion of the plaintiff, we are of opinion that the entry in the *wajib-ul-arz* of the village above referred to, taken in conjunction with the instance of Musammât Rahmat Bibi's succession to the property of her father, was sufficient to shift the onus on to the plaintiff; and we have no hesitation in holding that he has failed to discharge that onus.

For the foregoing reasons we accept this appeal, and setting aside the decree of the Divisional Judge we dismiss the plaintiff's suit with costs throughout.

Appeal accepted.

MADRAS HIGH COURT.

CIVIL APPEAL No. 63 OF 1917.

April 2, 1918.

Present:—Sir John Wallis, Kt., Chief Justice, and Mr. Justice Spencer.

Sree BHANIREDDI VENKAN

DORAGARU AND OTHERS—PLAINTIFFS—
APPELLANTS

versus

THE SECRETARY OF STATE FOR INDIA
IN COUNCIL. REPRESENTED BY THE COL-
LECTOR, GODAVARI DISTRICT, AND
OTHERS—DEFENDANT NO. 1 AND LEGAL REPRESENTATIVES OF DEFENDANT NO. 2—RESPONDENTS.

Madras Revenue Recovery Act (II of 1864), s. 59—Sale for arrears of revenue, suit to set aside—Illegal levy of cess—Limitation—Pleadings—Statement of facts taking case out of s. 59.

A suit to set aside a sale, which purports to have been held under the provisions of section 59 of the Madras Revenue Recovery Act by an officer competent to conduct it under the authority of the Act, should be brought within six months from the date of the sale as provided in the section. [p. 846, col. 1.]

Vadlur Chinna Nagi Reddi v. Devineni Venkat-râmaniah, 45 Ind. Cas. 653; 23 M. L. T. 231; (1918) M. W. N. 224; 7 L. W. 463, *Venkata v. Chengadu*, 12 M. 168; 4 Ind. Dec. (N. s.) 467 (F. B.), *Secretary of State v. Radha Kishore Manikya*, 38 Ind. Cas. 379; 44 C. 328; 14 A. L. J. 1205; 18 Bom. L. R. 1027; (1917) M. W. N. 25; 21 C. W. N. 291; 5 L. W. 570; 25 C. L. J. 425 (P. C.), *Raman Naidu v. Bhassoori Sanyasi*, 26 M. 638 and *Raman v. Chandan*, 15 M. 219; 5 Ind. Dec. (N. s.) 503, considered.

If the plaintiff challenges the right of the Government to sell the property by showing that the provisions of the Act could not be legally applied and that his case is out of the scope of section 59, he should set forth the necessary facts in the plaint and prove them. [p. 846, col. 1.]

Appeal against the decree of the Court of the Additional Subordinate Judge, Rajahmundry, in Original Suit No. 49 of 1916 (Original Suit No. 100 of 1914, on the file of the Court of the Sub. Judge, Cocanada).

Messrs. A. Krishnasawmi Aiyar and P. Somasundram, for the Appellants.

The Government Pleader, for Respondent No. 1.

Mr. P. Narayanamurti, for Respondents Nos. 2 to 5.

This appeal coming on for hearing on the 8th of February 1918 and having stood over for consideration till this day, the Court delivered the following

JUDGMENT.—The plaintiffs brought this suit against Government for a declaration that the sale of the villages of Poddipalun and Ankampalun in their Poddipalun

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Mokhasa for arrears of revenue was illegal and to recover the property from the 2nd defendant, who purchased it at the revenue sale. The Subordinate Judge dismissed the suit because he found that the plaintiffs had no case on the merits and because the suit was, in his opinion, barred by limitation. The plaintiffs appeal.

There is no dispute about the fact that this Mokhasa was held by the grantees and their heirs upon a favourable *jodi* or quit rent on condition of rendering military service and that it was liable to be subjected to the payment of full assessment in case of any alienation of the land; that in December 1906 the Government imposed full assessment on the ground that there had been such alienation, and that in March 1907 these villages were sold by an officer of Government purporting to act under the sections of Madras Revenue Act II of 1864, which provide for sales of immoveable property for default in payment of the revenue on the due dates.

There can be no doubt that this suit, which was instituted in July 1914, is barred by section 59 of Act II of 1864, if that section which allows only 6 months' time for "parties deeming themselves aggrieved by proceedings under this Act" to institute suits in a Civil Court is applicable to it. Mr. A. Krishnaswamy Ayyar for the appellants argues that if the Government acted illegally in imposing the full assessment there were legally no arrears of revenue and that the revenue sale was consequently held without any jurisdiction and must be treated as void *ab initio*.

This question has recently been considered by this Court in *Vadlur Chinna Nagi Reddi v. Devineni Venkatramaniah* (1), where it was held, following the Full Bench decision *Venkata v. Chengadu* (2) and distinguishing *Secretary of State v. Radha Kishore Munikya* (3) and other decisions of the Judicial Committee, that if there are

no arrears or if the land in respect of which the arrears are due is not included in the holding of the alleged defaulter, that constitutes a want of jurisdiction which will render section 59 inapplicable, but if the proceedings are *intra vires* though irregular, this section applies. This distinction between sales which though wrongful or irregular are substantially sales under the Act and sales which are *ultra vires* was observed in *Raman v. Chandan* (4) and in *Raman Naidu v. Bhassoori Sanyasi* (5), which were not considered in the case in *Vadlur Chinna Nagi Reddi v. Devineni Venkatramaniah* (1).

Now in this case, the Subordinate Judge has found that the arrears for which the revenue sale in 1907 was held "was for the non-payment of the usual *jodi*, not to speak of the enhanced amount levied by the Collector under the special circumstances." It is, in our opinion, unnecessary to consider the evidence upon which this conclusion is based because, if the plaintiffs' case was that the sale was without jurisdiction because there were no arrears at all due upon the land, it was their duty to allege and prove it.

If we refer to the pleadings, it does not appear from the plaint that the plaintiffs ever set up such a case. Their main contention was that the Government was not justified in treating, as a breach of the conditions as to alienation, a sale *in invitum* held in execution of the money-decree in Original Suit No. 29 of 1900, which was in a subsequent suit declared by a competent Court to be an invalid sale. In their written statement the Government admitted the allegation that they levied full assessment on the ground that the Court sale in Original Suit No. 29 of 1900 was a breach of the terms upon which the grant was made. At the trial in the lower Court the question was raised whether the Government were entitled to justify their action by relying upon the alienation made by the plaintiffs, which they had not mentioned in their written statement and as to which we cannot say on the evidence on record

(1) 45 Ind. Cas. 653; 23 M. L. T. 231; (1918) M. W. N. 224; 7 L. W. 468.

(2) 12 M. 163; 4 Ind. Dec. (v. s.) 467 (F. B.).

(3) 38 Ind. Cas 379; 44 C. 328; 14 A. L. J. 1205; 18 Bom. L. R. 1027; (1917) M. W. N. 25; 21 C. W. N. 291; 5 L. W. 570; 25 C. L. J. 425 (P. C.).

(4) 15 M. 219; 5 Ind. Dec. (n. s.) 503.

(5) 26 M. 638.

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whether or not they were relied on when the enhanced assessment was imposed.

It is unnecessary to consider this question. The revenue sale purported to be one which was authorised by Act II of 1864 and it was conducted by an officer competent to conduct sales for arrears of revenue under the authority of that Act. If the plaintiffs intend to challenge the right of the Government to bring this property to sale by showing that the provisions of this Act, including section 59, could not be legally applied, they should have alleged and proved the necessary facts to take the case out of its scope. As they have failed in this respect we must agree with the lower Court in regarding the suit as barred.

The appeal is dismissed with costs (two sets).

M. C. P.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 2522 OF 1914,

May 27, 1918.

Present :—Mr. Justice Scott-Smith and
Mr. Justice Martineau.

MUNSHI RAM AND OTHERS—DEFENDANTS—
APPELLANTS

versus

MAYA AND OTHERS—PLAINTIFFS—
RESPONDENTS.

Wajib-ul-arz, entry in, construction of—Shamilat—Grazing rights, claim to, by tenants—Tenants, whether members of village community.

An entry in the *wajib-ul-arz* of a village provided that proprietors and non-proprietors could graze cattle on their respective *pattis* in the *shamilat* of the *pattis*. Plaintiffs, who were tenants cultivating land in the village, claimed the right of grazing cattle in the *shamilat* of their *pattis*:

Held, that the plaintiffs were members of the village community and were, therefore, entitled under the terms of the *wajib-ul-arz* to the right claimed by them. [p. 847, col. 1.]

Second appeal from the decree of the Divisional Judge, Hoshiarpur, dated the 23rd July 1914.

The Hon'ble Mr. Fazl-i-Husain and Sheikh Umar Bakhsh, for the Appellants.

Bakshi Tek Ohand, for the Respondents.

JUDGMENT.—The parties are residents of the village of Posi in the Hoshiarpur District. The plaintiffs sue the defendants, who are proprietors in the village, to establish their rights of grazing cattle in the *shamilat* land. The first Court held that plaintiffs were entitled to graze horned cattle capable for agricultural purposes in 302 *kanals* 16 *marlas* of *shamilat* land and granted an injunction accordingly. The learned District Judge on appeal has excluded Khasra Nos. 679 and 1629 from the area allowed for *charand*, thus reducing the area to 273 *kanals* 1 *marla*.

The defendants have filed a second appeal and the plaintiffs have put in cross-objections. The *wajib-ul-arz* of 1852 provides that proprietors and non-proprietors can graze cattle on the *shamilat deh*. In the *wajib-ul-arz* of 1884 it is stated that proprietors and non-proprietors can graze cattle on their respective *pattis* in the *shamilat* of the *pattis*. From this the learned District Judge infers that the *shamilat deh* had been divided into *pattis* between 1852 and 1884, and he holds that that does not affect the grazing rights of the non-proprietary body. It is now argued for the appellants that the partition of the *shamilat deh* had taken place before 1852. There is nothing on the record to support this, and we have declined to allow the learned Counsel for the appellants to support his argument by a document of 1852 which is not on the record. In any case the question when the partition took place does not seem very material.

It is next argued that the plaintiffs' claim relates to the *shamilat deh*, and that as there is no *shamilat deh* but only *shamilat pattis*, the suit should be dismissed. But the contention that the plaintiffs claim grazing rights in the *shamilat deh* does not seem to be correct. They distinctly refer in the plaint to the *banjar* land belonging to the several *pattis* in which they claim right of pasture. Moreover they refer in paragraph 3 of the plaint to the conditions of the *wajib-ul-arz* and have attached to the plaint a copy of the entry in the *wajib-ul-arz* of 1884 relating to the grazing rights in the *shamilat pattis*.

The third contention is that plaintiffs are not entitled to grazing rights under the *wajib-ul-arz* of 1834 because they were

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not parties to it, and *Munshi Ram v. Rulia Ram* (1) is relied on in support of this argument. But in that case the plaintiffs were mostly shopkeepers and were neither proprietors nor tenants, and it was found that they were in no way connected with the settlement of the land revenue, being outside the pale of the village community properly so called. It is on a consideration of these facts, taken along with the fact of the plaintiffs not having been parties to the agreement entered in the *wajib-ul-arz* that the Court held that the entry did not entitle the plaintiffs to the rights they claimed. The present case is clearly distinguishable, for here the plaintiffs are apparently members of the village community and are said to be tenants cultivating land in the village. Moreover, the finding of the first Court was that the plaintiffs had a right of grazing cattle in the *shamilat* by custom. This finding was not challenged in the appeal to the District Court, and it cannot be challenged in second appeal without a certificate.

Another contention is that certain land has been included in the decree in which the plaintiffs have not exercised grazing rights during the six years preceding the suit as there is Kharkana growing on it. As to this it is sufficient to say that the lower Appellate Court finds as a fact that the cattle have been grazing on that land, and this finding cannot be questioned in second appeal.

The remaining contention of Mr. Fazl-i-Husain is that the suit is bad for misjoinder of parties and causes of action inasmuch as under the *wajib-ul-arz* of 1884, the plaintiffs have not got a right of grazing over the *shamilat* of all the *pattis* but the proprietors and non-proprietors can graze cattle only on their own *pattis*. In the suit as framed, however, there is no misjoinder, and there is no necessity to require the plaintiffs to split up their suit into three. The areas of the several *pattis* and of the different Khasra numbers in each *patti* are given in the judgment of the first Court, and the decree can, without the case being remanded, be modified so as to give the plaintiffs the relief to which they are entitled.

(1) 24 Ind. Cas. 980; 95 P. R. 1914, 228 P. L. R. 1914, 126 P. W. R. 1914.

With regard to the cross-objections, the learned Counsel for the respondents presses only ground No. 4, in which he urges that certain numbers should not have been excluded from the *charand*. As to this the lower Appellate Court's finding is that the proprietors have been in effective possession of those numbers, and its finding on this point cannot be questioned. We see no reason, therefore, for allowing the plaintiffs a larger area for grazing than has been allowed by the lower Appellate Court.

We dismiss the cross-objections, and we accept the appeal and modify the decree of the lower Appellate Court to the extent only of directing that out of the area of 273 *kanals*, 1 *marla* allowed by that Court as a grazing ground, the plaintiffs belonging to Patti Kalian will be entitled to graze cattle only in 125 *kanals* 1 *marla* out of the *shamilat* in that *patti*; those of Patti Nabri only in 103 *kanals* 11 *marlas* out of the *shamilat* land in that *patti*, and those belonging to Patti Pakwerian only in 44 *kanals* 9 *marlas* out of the *shamilat* land in that *patti*. The decree of the lower Appellate Court having been upheld except for this slight modification, the appellants will pay the respondents' costs in this Court.

Appeal partly accepted.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 7 OF 1916.

June 6, 1918.

Present :—Mr. Justice Piggott and
Mr. Justice Walsh.

KUNJ BEHARI LAL—DEFENDANT—
APPELLANT

versus

LALTU SINGH AND OTHERS—PLAINTIFFS—
RESPONDENTS.

Hindu Law—Alienation—Widow, gift made by, for spiritual benefit of husband, validity of.

There is no authority for the proposition that gifts for religious or charitable purposes made by a Hindu widow cannot be recognized under the Hindu Law as calculated to confer any benefit upon the soul of her deceased husband unless they be made in connection with a particular *sraddh* ceremony. [p. 850, col. 2; p. 854, col. 1.]

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A gift made by a Hindu widow of a reasonable portion of the property inherited by her from her husband, whether through her sons or not, for religious purposes with a view to the spiritual welfare of her deceased husband, is valid under the Hindu Law and is binding upon the reversioners. [p. 851, cols. 1 & 2; p. 854, col. 2.]

There are ceremonies and duties incumbent upon a Hindu widow, in the sense that their performance is regarded as indispensable to the spiritual welfare of her late husband. These duties she is under an obligation to perform and these ceremonies she must carry out, and for this purpose she has a power of alienation in respect of the *corpus* of the property in her hands, independent altogether of the proportion which the property alienated may bear to the whole. In the case of an alienation for a purpose regarded as indispensable to the spiritual welfare of the late husband, the question will not be, what proportion does the property alienated bear to the entire estate, but only was the alienation a reasonable one under the circumstances, in the sense that the expenditure incurred was such as might be regarded as suitable to the position of the family. [p. 851, col. 1.]

First appeal from a decree of the Additional Subordinate Judge, Moradabad.

Mr. B. E. O'Connor (with him Mr. Iqbal Ahmad), for the Appellant.

The Hon'ble Dr. Tej Bahadur Sapru (with him Mr. Radha Kant Malaviya) for the Respondents.

JUDGMENT.

PRISORT, J.—The suit out of which this appeal arises was brought on the following state of facts:—One Raja Gur Sahai died in the year 1868 possessed of immoveable property of considerable value in the districts of Moradabad and Bulandshahr. He left him surviving two sons and a widow. The sons died in 1273, while still minors and leaving no issue. The widow Rani Kishori Kuar thereupon entered into possession of the estate, strictly speaking in succession to her sons, or rather to that one of her two sons who survived the other. For practical purposes it is sufficient to say that she took possession of the property with the estate of a Hindu widow. Shortly afterwards she went on a pilgrimage in the course of which she visited Allahabad, Benares, Gaya and Jagannath. At the last named place she made an oral gift, or I should perhaps say the promise of a gift, to certain priests of the temple of Jagannath, and this transfer of property was carried into effect by a deed of the 8th of January 1876, executed by Rani Kishori Kuar after her return to Moradabad

and registered on the admission of her agent (general-attorney) Ajab Singh. The question whether the donees under this deed of gift had any right to transfer the property thus taken by them does not arise in the present suit. There have been transfers, and the contesting defendant in this case, Kunj Behari Lal, acquired so much of the gifted property as consisted of shares in four villages for good consideration, under a sale-deed of the 27th of September 1903. Prior to this Rani Kishori Kuar had died, namely, on the 15th of August 1907; and after much litigation the plaintiff Laltu Singh succeeded in establishing his claim to succeed as the nearest reversioner to the estate of the late Raja Gur Sahai. The object of the present suit is to obtain a decision that the transfer purporting to be effected by the deed of gift, dated the 8th of January 1876, either passed no title at all, or at any rate conveyed no estate lasting beyond the lifetime of Rani Kishori Kuar, and thereupon to recover possession of the gifted property. It is alleged in the plaint that the Pandas of Jagannath had colluded with Ajab Singh already mentioned and with other Karindas and servants of Rani Kishori Kuar and had obtained the execution of this document without the lady's understanding what she was assigning or even comprehending the contents of the deed or its effect upon her interests. Any one reading the plaint would be disposed to assume that this was the main point of the plaintiff's case. The learned Subordinate Judge, however, has lumped the question raised by these pleadings into a single issue along with the wholly different question of the capacity of Rani Kishori Kuar, as a Hindu widow in possession of the property of her late husband, to make a gratuitous transfer of this sort. The result is that the evidence produced on what should have been the main question for trial in the case is scanty and unsatisfactory and that this issue has not been decided at all by the trial Court. The learned Subordinate Judge says that he will presume that the deed of gift was really executed by Rani Kishori Kuar after fully understanding its nature and effect; but he holds that she had no authority as a Hindu widow to make a gratuitous transfer

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of this property beyond her lifetime. We have had to consider the question of the intelligent execution of the document and it is necessary for us to come to a finding upon the point. The transaction is an old one, and such oral evidence as the parties endeavoured to produce amounts to little and does not seem worth discussion; but I am impressed with the evidence given by the witnesses Shiam Sarup and Nathu Ram as to Rani Kishori Kuar's business capacity and the manner in which she looked after her estate. The lady was illiterate, but she seems to have possessed a considerable degree of intelligence and business capacity. She did not remain shut up in her residence in Moradabad but went about visiting different portions of her property and personally superintending the management of the same. Under such circumstances the mere fact that she never challenged this alienation in her lifetime would warrant the presumption that she fully understood the transaction at the time when she executed the deed of gift. Fortunately the defendant-appellant has been able to bring on the record in this Court a piece of documentary evidence which carries the matter a good deal further. In the year 1893 Rani Kishori Kuar was examined on commission in connection with another litigation. She there stated that she had a distinct recollection of having made the gift now in question to the Pandas or officiating priests of the temple of Jagannathji. She mentioned from memory the most essential portions of the contents of this document, naming the village of Sherpur which formed the principal item of property transferred. Under all the circumstances, and in view of the manner in which this particular point was litigated in the Court below, I think we need have no hesitation in coming to the finding that Rani Kishori Kuar executed this deed of gift with full knowledge and adequate understanding of its contents and of its effect upon her interests.

In the Court below various alternative lines of defence were relied on by the present appellant, but most of the pleas embodied in the memorandum of appeal before us have not been pressed. Now that we have already found in favour of

the defendant upon the question of the intelligent execution of the document, the only further point for our consideration is the authority of Rani Kishori Kuar to make this transfer. The question of law thus raised is discussed at considerable length in the judgment under appeal and has been very completely argued out before us with reference to a large number of authorities. I think I may say that very little attempt has been made before us to support the decision of the Court below on the line of argument on which it proceeds. The learned Subordinate Judge would seem to have misunderstood the pronouncement of their Lordships of the Privy Council which forms the foundation of the subsequent case-law on the subject, and he has throughout discussed the question of the validity of this gift as if it were in some way connected with the question whether Rani Kishori Kuar would have been entitled to alienate any portion of her late husband's estate in order to meet the expenses of her pilgrimage to the holy places of northern India. The latter question does not arise at all. The lady would seem to have met the expenses of this pilgrimage out of the income of her husband's estate over which income she had full disposing power. We have simply to consider whether she had or had not a right to make this particular gift in favour of the idol worshipped in the temple of Jagannath and the attendant priests. The foundation of the case law on the subject is the decision referred to and misrepresented by the learned Subordinate Judge, namely, the case of *Collector of Masulipatam v. Cavalry Vencata Narrainapah* (1). The important passage frequently quoted in subsequent decisions is to be found at page 551 and may be quoted once more in this place: "For religious or charitable purposes or those which are supposed to conduce to the spiritual welfare of her husband she (*i.e.*, the Hindu widow) has a larger power of disposition than that which she possesses for purely worldly purposes." In the present case the gift to the temple and to the attendant priests appears on the face of it to be an alienation for religious and charitable purposes. The immediate object of the alienation as cited

(1) 8 M. L. A. 529; 2 W. R. (P. C.) 61; 1 Suth P. C. J. 470; 1 Sar. P. C. J. 820; 19 E. R. 631.

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in the deed itself is "for the salvation of my husband and his family members and for my own salvation." In a recent case before the Calcutta High Court, *Khub Lal Singh v. Ajoahya Misser* (2), the question of law now under consideration was discussed at great length. Previous authorities were reviewed and a decision was pronounced by a Bench which included one of the most distinguished Hindu Judges who adorned the Bench of that Court. The important principles laid down by him I take to be the following: "There is a distinction between legal necessity for worldly purposes on the one hand and the promotion of the spiritual welfare of the deceased on the other hand. A gift of a moderate portion of the property of her husband by the widow with a view to his spiritual benefit is valid. Whether an alienation covers a 'reasonable portion of the property of her husband is a question which must be determined with reference to the circumstances of each particular disposition." The point which has been pressed upon us with great learning and ingenuity on behalf of the respondent to this appeal turns upon the meaning to be attached to the words "with a view to his spiritual benefit" in the principle above laid down. It was contended that those proceedings by means of which a Hindu widow may seek to promote the spiritual welfare of her late husband can be ascertained with certainty from authoritative text books accepted by Hindus generally and that the question whether a particular gift, made under certain circumstances, would or would not be accepted by Hindu opinion as conferring a spiritual benefit upon the deceased husband of the donor was a pure question of law which could be settled upon authority, independently altogether of the question whether the object of the gift was or was not one which any ordinary persons would accept as fulfilling a religious or charitable purpose. When this argument came to be further pressed, with reference to the particular authorities and texts on which it proceeded, it proved to amount to this:—that it is only by means of those rites and ceremonies connected with the funeral of the deceased

or with the subsequent commemoration of his death, generally known under the name of Sradh, that the spiritual welfare of a deceased Hindu can be promoted. Consequently it was contended that the only gifts made for religious or charitable purposes by which a Hindu widow could be regarded as promoting the spiritual welfare of her late husband would be gifts made in connection with some Sradh ceremony. The argument is an ingenious one; but the question can scarcely be regarded as coming before us at this stage of its history as purely *res integra*. There is a mass of case-law on the subject, a great deal of which has been expounded to us on behalf of the parties to the present appeal. It is impossible to point to a single case in which an alienation by a Hindu widow has been set aside only on the ground that it was not made in connection with a Sradh ceremony of the deceased. It is quite true that there are at least two decisions of the Madras High Court in *Lakshminarayana v. Dasu* (3) and in *Vappuluri Tatayya v. Gattinalla Ramakrishnamma* (4); in which the fact that the alienation was made in connection with a Sradh ceremony is insisted upon in such a fashion as to show that it was of considerable importance in the minds of the learned Judges. The question whether this is an indispensable condition to the validity of a gift can be tested by examining a few cases in which such alienations have been set aside. Take for instance the case of *Rama v. Ranga* (5). The learned Judges set forth the objects for which the particular alienation which they were considering had been made. Now that alienation, on the face of it, had nothing to do with a Sradh ceremony of the deceased; but it was not set aside on that ground. It was pointed out that the ceremonies for the sake of which the widow in that case had sold a portion of her late husband's estate were not of the kind regarded by the Hindu religion as indispensable for the spiritual benefit of her late husband, such as funeral obsequies and ceremonies incident to those obsequies. They then pro-

(3) 11 M. 288; 4 Ind. Dec. (N. S.) 201.

(4) 6 Ind. Cas. 240; 34 M. 258; 20 M. L. J. 796; (1910) M. W. N. 222; 8 M. L. T. 79.

(5) 8 M. 552; 9 Ind. Jur. 383; 3 Ind. Dec. (N. S.) 378.

(2) 31 Ind. Cas. 433; 43 C. 574; 22 C.L.J. 845.

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ceeded to hold that they could not justify the alienation, "unless such sale is reasonable in the circumstances of the family and the property alienated is but a small portion of the property inherited from her husband." The principle underlying the decision appears to be that there are ceremonies and, I may add, duties incumbent upon a Hindu widow, in the sense that their performance is regarded as indispensable to the spiritual welfare of her late husband. These duties she is under an obligation to perform and these ceremonies she must carry out, and for this purpose she has a power of alienation in respect of the corpus of the property in her hands, independent altogether of the proportion which the property alienated may bear to the whole. In the case of an alienation for a purpose regarded as indispensable to the spiritual welfare of the late husband, the question will not be, what proportion does the property alienated bear to the entire estate, but only, was the alienation a reasonable one under the circumstances, in the sense that the expenditure incurred was such as might be regarded as suitable to the position of the family. The learned Judges, however, recognised the possibility of alienations made by a Hindu widow for the purpose of doing pious acts for the benefit of her late husband which are not in the nature of spiritual necessities; and with regard to alienations made for such a purpose as this, they say that they would be prepared to take into consideration such questions as the proportion borne by the property alienated to the value of the entire estate. The same sort of principle seems to be implied in *Ram Kaval Singh v. Ram Kishore Das* (6), where the learned Judges finally came to the conclusion that the alienation which they were considering could not be supported, either on the ground that it was a religious necessity (that is to say indispensable to the spiritual welfare of the husband) or that, being for a pious purpose, the property alienated was small in value and represented only a very small portion of the estate inherited. The same may be said of the latest pronouncement of the Bombay High Court in *Panachand Ohhotalal v. Manoharlal Nandlal*,

(6) 22 C. 506; 11 Ind. Dec. (N. S.) 338.

(7). We have been referred to two decisions of this Court, (1) in *Puran Dai v. Jai Narain* (8). There stress was laid upon the fact that the alienation which the Court had to consider had been made without any reference whatever to the idea of conferring spiritual benefit upon the deceased husband, but apparently for the spiritual benefit of the widow alone. The other case of this Court is that of *Balkishan Bharthi v. Sat Ram Singh* (9). This case is of considerable importance as containing a review of the previous case-law by the learned Hindu Judge of this Court who is still with us. The principle he desired to affirm is to be found in the Tagore Law Lectures, 1879 at page, 309: "A gift by a widow of the whole of her husband's estate is invalid; but a gift of a moderate portion of the property made by the widow for the spiritual benefit of her husband may be valid." In the case then before him the learned Judge found that the gift which he had to consider, comprising as it did practically the whole of her late husband's estate, was one which the widow was not justified in making. On the line of reasoning which he followed it seems clear that he would have affirmed the gift, if it had affected property forming only a small fraction of the entire estate.

In this connection we were also asked on behalf of the respondent to attach considerable importance to the fact that Rani Kishori Kuar had taken the estate in succession to her son, and not immediately on "the death of her husband." Under the circumstances of the case, I do not think this fact is of serious importance. To begin with, the recital in the deed of gift itself, setting forth that the donor desired to confer spiritual benefit upon her late husband and upon his family members, is quite sufficient to include the spiritual welfare of these two boys who died before attaining majority. Apart from this I do not think it would be just to take too rigid and technical view of the position of a Hindu widow who had entered into possession of her late husband's estate

(7) 43 Ind. Cas. 729; 42 B. 136; 20 Bom. L. R. 1.

(8) 4 A. 432; A. W. N. (1882) 115; 2 Ind. Dec. (N. S.) 1092.

(9) A. W. N. (1908) 202.

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after a short interval, during which her two minor sons died. She naturally treated the estate as that of her husband and regarded herself as being in possession in virtue of her rights as his widow. It could scarcely be suggested that her power of alienation for the spiritual benefit of the former owner of the estate is so rigidly limited that in all circumstances the person whose spiritual benefit is sought must have been the last male owner. In the present case for instance, it could scarcely be contended that no alienation of property by way of gift would be valid unless expressly made for the benefit of that particular one of the two sons of Raja Gur Sahai who survived the other and who was, therefore, for a brief interval the sole owner of the estate.

Leaving this question for the present, we have to go on to consider what was after all the value of the property transferred under this gift in comparison with the entire value of the Raja's estate. That gentleman executed a Will in the year 1864 to which he appended a specification of his property, showing that he had Zemindari rights in more than 80 villages and a great deal of house property in Moradabad and in Amroha. Two years later, that is to say in 1863, he received from the Government a formal Sanad granting him Zemindari property bringing in a total revenue of Rs. 10,195 13-4 for his mutiny services. I think this must have been to some extent a confirmation of a grant previously made; for I find some of the properties included in this Sanad, at page A23, also included in the specification given at the foot of the Will, at pages 19A and 20A. It is clear, however, that the grant received under the Sanad was much less in value than the property dealt with under the Will. Taking the land revenue assessment as a rough test, it would seem that the proprietary rights in the four villages affected by the deed of gift in suit amounted to little more than 1/40 of the property granted to Raja Gur Sahai under the Sanad. Taking the house property into consideration, and forming such rough estimate as seems reasonably possible, I should feel no hesitation in holding that the value of the property in suit cannot have amounted to more than

1/80th part of the entire estate. There is another line of reasoning leading to very much the same conclusion. There was evidence given that the income enjoyed by Rani Kishori Kuar from the entire estate was at least Rs. 6,000 a year. The income derivable from the Zemindari property included in the deed of gift would seem to have varied considerably from time to time, if we are to judge from different leases which have been produced in evidence by the two parties. The Government land revenue assessed upon this particular property has apparently risen from Rs. 280 in 1862 to Rs. 545. The plaintiff has proved two leases of the years 1862 and 1865. Under the former the property in question was leased out at a net profit of Rs. 635 a year. Under the latter the net profit must have been Rs. 870. There is certainly no evidence on the record which would justify us in putting the net annual profits derivable from the villages in question at more than Rs. 800. Taking it at that figure, it amounts to about 1/75 of the annual income enjoyed by Rani Kishori Kuar. I think we may come without serious hesitation to a finding that the value of the property dealt with by this deed of gift was not more than 1/75th of the entire estate of Raja Gur Sahai as it passed into the hands of Rani Kishori Kuar. There has been something said in argument about that lady's management of the estate during the entire period covered by her possession. On the one hand the appellant relied upon an admission made by the principal plaintiff, to the effect that the income of the property had gone up by something like 25 per cent. since the death of the Raja; and I was disposed at first to assume that this increase represented the result of purchases made by the lady out of the surplus income of the estate. That such purchases were made by her seems to be true, as there is a statement to that effect by the lady in her deposition of the year 1893, which does not seem to have been challenged at the time. On the other hand something has been said on behalf of the plaintiff-respondent that this is not the only alienation by the lady which he has been compelled to challenge. It was no part of the case set up in the plaint that there had been other

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alienations. As a matter of fact, the only evidence is to the effect that the lady, not long before she died, tried to dedicate permanently for the benefit of a temple built by her husband in Moradabad two shops the income of which had always been spent on the temple by the orders of her husband. On the whole this lady's management of the estate does not seem to have been in any way extravagant, and on the evidence as it stands the finding seems to be justified that, even allowing for the alienation contested in the present suit, the lady must have passed on to the reversionary heir an estate certainly not less in value than that which she had received on the death of the survivor of her two sons, while the probability is that it had increased in value. Under these circumstances I think we need have no hesitation in holding that the gift now in question was a gift of a moderate portion only of the property of her late husband, that it was a gift for religious and pious purposes, and that it was made by the lady, not solely with a view to her own spiritual benefit, but in order that the spiritual merit likely to accrue from the same might benefit herself, her late husband, and her sons. It is obviously impossible to ask a Court of justice to record a finding that any particular act done by the surviving widow either did or did not benefit her late husband in that changed environment to which he may be presumed to have passed after that episode in life which men call death; nor can we accept the contention on behalf of the respondent that gifts for religious or charitable purposes made by a Hindu widow cannot be recognized under the Hindu Law as calculated to confer any benefit upon the soul of her deceased husband unless they be made in connection with particular funeral ceremonies. I think the present alienation should be affirmed as a gift for religious and charitable purposes, reasonable under the circumstances, and effected by the donor in good faith for the spiritual benefit of the late owners of the property as well as for her own. These findings are sufficient to dispose of the appeal, which I would allow accordingly; and setting aside the decree and order of the Court below, would dismiss

the plaintiff's suit with costs throughout, including fees in this Court on the higher scale.

WALSH, J.—Three questions arise for decision in this case, one, a question of law, whether a gift by a Hindu widow of property, inherited from her husband, whether through her sons or not, made for religious purposes, whether with a view to the welfare of her deceased husband's soul or not, is binding upon the reversioner. Secondly, the question of fact whether under the circumstances of this case the gift which is attacked was in excess of what has been regarded by the law as a reasonable proportion of the whole estate. Thirdly, whether the deceased lady understood and intended to carry out the terms of the deed.

It is clearly established that in or about 1876 when she made this gift she was a Pardanashin and illiterate lady possessed of "great managing power." It is proved that she managed her affairs with great ability. She took tours to the various villages which comprised the substantial estate which her husband had left. She received and considered applications from her tenants. She met their wishes and endeavoured to remove their grievances. She made purchases by way of accretion to the estate out of the savings at her disposal. She gave on oath in 1893 a fairly clear account of this part of her business, saying that her agents were acquainted with the details. No lease of the estate was made without her sanction, and the plaintiff in this case admitted on oath that the property while in her hands in one way or another increased in value by at least 25 per cent. The evidence clearly shows her to have been, in spite of lack of education, a woman of character and capacity.

The terms of the deed attacked are remarkably simple and clear. They have all the appearance of genuineness. She declared in the only way possible that she, as an honest and religious woman, executed this deed of transfer in performance of a promise she had previously given to the Pandas when on a pilgrimage of her own and that she was doing so for the salvation of her husband, his family and herself. She seems to have taken every

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precaution that there should be no possibility of doubt as to the reality and legality of the transaction and as to the value of the property of which she was so disposing. This deed, according to the first argument presented to us on behalf of the successful plaintiff, is one which the Hindu Law does not permit under any circumstances. I am bound to say that nothing surprises me more than the contrast between the veneration with which these pious acts for the welfare of a departed soul are regarded by the Hindu community and the vehemence and determination with which they are attacked by individual members of that community. The plaintiff in this case is himself a Hindu and would presumably suggest to, if not inculcate upon, the members of his own family the very conduct which he asks us as a matter of general Hindu Law to declare to be invalid. If he cares to know my opinion, conduct of this kind seems to me more calculated than anything else to discourage the carrying out in practice of the precepts which the Hindu community teaches. The attempt has hopelessly failed. To my mind the law is well-settled, and if it had not been so earnestly argued by Dr. Sapru for the respondent, I should have said it was absolutely unarguable. Whether it is necessary to establish that the intention of the donor was to confer spiritual benefit upon the soul of the departed, or whether it is sufficient in given circumstances that the object of the deed itself is shown to be religious (the latter proposition seems to have been laid down by the Privy Council when they used the word "or" in the passage which has already been referred to) does not matter in this case, because the lady clearly put the benefit to her husband's soul and the salvation of the other members of his family before her own. In my opinion the matter is as clearly settled as anything can be by a consistent course of authority from 1861 when the case already referred to was decided by the Privy Council and reported in 8 Moore Indian Appeals [*Collector of Masulipatam v. Cavaly Vencata Narterramaph* (1)] down to the recent decision in 1915 by Mr. Justice Mookerji, reported as *Khub Lal Singh v. Ayodhya Misser* (2). It so happens that the last decision was delivered

six days before the judgment in this particular case and was no doubt not known to the learned Subordinate Judge. But I do not think that it contained anything new, and the intermediate cases between those two termini, although they may be cited to justify the statement of the law as contained in Mr. Justice Mookerji's judgment, do not add anything to it or take anything from it. The judgment of Mr. Justice Mookerji is an amplification of, and an admirable commentary upon, the judgment of the Privy Council in 8 Moore Indian Appeals [*Collector of Masulipatam v. Cavaly Vencata Narterramaph* (1)]. It shows how accurate the language used in the judgment of the Privy Council was and it may be cited as a correct statement of the old law with a full exposition calculated to remove ambiguity, and I, therefore, cite from it the following passage as a correct statement of the law on the first question in this appeal: "The true rule thus appears to be that there is a distinction between legal necessity for worldly purposes on the one hand, and the promotion of the spiritual welfare of the deceased on the other hand, and that, within proper limits, the widow may alienate her husband's property, for the performance of religious acts which are supposed to conduce to his spiritual benefit." He cites also a passage from the judgment of Lord Gifford in *Cossinaut Bysack v. Cummo-money Dossee* (10), showing further the settled and ancient character of this well-known rule of Hindu Law: "It is absolutely impossible to define the extent and limit of the power of the widow to dispose of her husband's property for religious purposes, because it must depend upon the circumstances of the disposition." Mr. Justice Mookerji goes on to point out that a question of fact has always to be determined, namely, whether the alienation covers a reasonable portion of the property of the husband, with reference to the circumstances of the particular disposition, and he cites other authorities which may be found on page 555 of his (Mr. Justice Mookerji's) judgment, one goes back to the year 1826, indicating that 3/16 of the entire estate had been held not

(10) 2 Morley's Digest 193; 3 Ind. Dec. (p. s.) 907.

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excessive, and in another case a gift of property between $\frac{1}{4}$ and $\frac{1}{3}$ of the whole had been upheld. Many of the authorities cited to the learned Subordinate Judge and referred to in his judgment seem to have been relied on rather for the purpose of confusing him than for any legal purpose which I can discover. He has unfortunately in his judgment confused the question of legal necessity with the question of the validity of a gift made for religious purposes. It may be that the defendants contributed to this confusion by pleading "legal necessity" in paragraph 8 of their defence. To my mind no authority bearing upon the question of legal necessity ever had any relevance to this suit and should never have been cited in the Court below. At one time the learned Subordinate Judge in his judgment said that the point raised was fully concluded by authority. At another time he found as a question of fact that the pilgrimage of the lady was absolutely unnecessary, and finally he says: "To sum up the lady had no necessity to transfer the property as she had ample means to defray the expenses for pilgrimage to holy places and for any offerings she may have desired to make." As my brother has pointed out, this has nothing to do with the deed of gift in suit and possibly explains the error into which the learned Subordinate Judge seems to have fallen. As I have said above, the point is well-settled and is unarguable.

There may be on occasions a serious question upon the point whether the gift could be described as religious or charitable at all. This question was not raised in this case; but it has been determined and it is obviously a most important question. The only question about which the reversioner need trouble himself is whether the *quantum* in proportion to the whole estate is excessive. I am satisfied that this suit was never launched on that basis at all and that the idea never occurred to the plaintiff. The defendant, who seems to have been fully advised as to his legal position, did in paragraph 8 of the written statement open the door to the contention. There is a suggestion that the plaintiff professed to attack the transaction on that ground in issue No. 7 as framed. I do not think that at the trial it was ever

relied on at all. I think the *quantum* was treated as immaterial. There is a case decided by Mr. Justice Karamat Husain in this Court in which he lays down (the case is not on all fours with this case) that it is unnecessary to find out the income and value of the property. I think the learned Subordinate Judge in this case laid that down at the instance of the plaintiff, the plaintiff knowing that he had no materials to establish the fact. At any rate the onus is upon the person having special knowledge of the alienated property. I do not propose to travel over the ground my learned brother has travelled. I think it is sufficient to say that in this case no suggestion of any kind is made even now at the 11th hour that the evidence shows anything approaching $\frac{3}{16}$, and no authority of any kind has been quoted to us which discredits in any way the authority of 1826 in which it was held that $\frac{3}{16}$ might be disposed of.

There is one further question, the 3rd question argued in support of this decree before us by Dr. Sapru, whether the lady understood and intended to carry out the terms of the deed. It is really covered by the uncontradicted evidence to which I referred at the commencement of this judgment, and it is finally set at rest by the deposition which has been put in evidence sworn to by the lady in another suit in 1893. It is quite true that there is no evidence that this document was explained to her at the time and that she was made to understand it. It is difficult to see how there could be. In my experience of cases of this kind where a *Pardanashin* lady is concerned, certainly where the transaction is dubious, there is generally direct evidence of a number of people who shouted out the contents of the document to her. In this case the circumstances speak for themselves. The deed itself has a ring of genuineness about it. The simplest woman in the world would have no difficulty in understanding it as dealing with her own property if it was read to her at all, and 17 years afterwards, when advanced in years and suffering according to her own account from defective memory and embarrassment in appearing behind the *Pardah* before a large number of people, she was able to give a fair and honest account of the transaction.

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On that occasion she showed intelligence of a high order. She was asked an almost impossible question for anybody to answer, certainly for an owner of a large estate of this kind to answer, with reference to the profits of a village she had had nothing to do with for 17 years. "What is the profit of the village you gave?" Being behind the *Pardah* she wanted to know whether it was her own or her opponent's Pleader who was asking this question. I do not suppose that she was prepared to tell an untruth if it was her opponent's Pleader. She could have known nothing about the subject at all. What was passing in her mind was that it was an impertinent question. Her conduct on that occasion seems to me to be that of an intelligent and capable woman such as is described by the uncontradicted evidence. I am satisfied that this was as genuine a gift for religious purposes as any gift of the kind that was ever made. I agree in the order proposed by my brother.

By THE COURT.—The appeal is allowed, the decree and order of the Court below are set aside and the plaintiff's suit is dismissed with costs throughout.

Appeal allowed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1470 OF 1916.

July 31, 1918.

Present:—Mr. Justice Phillips and

Mr. Justice Kumaraswami Sastri.

CHINNASWAMI REDDI—PLAINTIFF—

APPELLANT

versus

KRISHNASWAMI REDDI AND OTHERS—

DEFENDANTS—RESPONDENTS.

Contract Act (IX of 1872), s. 64—Guardian and ward—Sale of minor's property by guardian—Consideration, application of, in purchase of other properties for minor—Sale declared not binding on minor—Right of vendee to properties purchased—'Benefit', return of, scope of doctrine of—Limitation Act (IX of 1908), Sch. I, Art. 44—Claim by ward barred under Art. 44—Plea of invalidity of sale, whether available in suit for possession by vendee—Decree, form of.

Where a sale of a minor's properties by his guardian is declared to be not binding on the minor, the vendee is not entitled to claim other properties which were purchased for the minor with the sale consideration, as a 'benefit' which the minor is bound to restore under section 64 of the Contract Act when he elects to avoid the sale, if the latter purchase was not contemplated at the time of the original sale. [p. 857, col. 2; p. 858, col. 2.]

Rabia Bi v. Angappan, 28 Ind. Cas. 714; 2 L. W. 369, *Sinaya Pillai v. Munisami Ayyan*, 22 M. 289; 9 M. L. J. 64; 8 Ind. Dec. (N. S.) 205, *T-ejpal v. Ganga*, 25 A. 59; A. W. N. (1902) 192 and *Eastern Mortgage and Agency Co. Ltd. v. Rebati Kumar Ray*, 8 C. L. J. 260, distinguished.

Per *Kumaraswami Sastri, J.*—Ordinarily, the benefit which a party receives when he sells the property is the price which the vendee pays. Any profits which the vendor might make with the moneys would be too remote in estimating what he has to return, in case he is entitled to avoid the sale and elects to do so. Where, however, for the protection of a purchaser contracting with a guardian or a qualified owner, a particular dealing with the money was in the direct contemplation of the parties, such as the purchase of other lands with the consideration, and the money is so applied, the benefit which the other party obtains will be the land or other property acquired with the consideration. There must be something more than a mere application of the consideration in a particular way in order to entitle the purchaser to claim restoration of the properties acquired with the consideration paid by him. [p. 858, col. 1.]

In a suit by the vendee for possession brought after the expiry of 3 years after attainment of majority by the ward, the latter is entitled to plead the invalidity of the sale though he could not actually sue to set it aside. [p. 859, col. 1.]

On the expiry of the period specified in Article 44 of Schedule I of the Limitation Act the purchaser from the guardian is not of right entitled to the properties in the possession of the ward. [p. 859, col. 1.]

The proper decree to pass in such a case is to order possession to be given to the vendee if the consideration is not returned within a specified time. [p. 859, col. 1.]

Second appeal against the decree of the District Court of Chingleput, in Appeal Suit No. 304 of 1914, preferred against the decree of the Court of the District Munsif of Poonamalle, in Original Suit No. 67 of 1912.

FACTS appear from the judgment.

The Hon'ble Mr. *S. Srinivasa Aiyangar*, Advocate-General (with him Mr. *A. C. Sampathu Aiyangar*), for the Appellant.—The sale was effected to plaintiff with the object of purchasing other lands for the minors. In fact, the consideration was so applied. The vendor cannot elect to avoid a voidable transaction, and, at the same time, retain the benefit he has acquired by the sale. Under section 64 he should restore

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such benefit to the vendee before electing to avoid the sale. There is a distinct recital as to the object of the sale in the sale-deed, that other lands were to be purchased for the minors with the sale price. The lower Appellate Court was in error in thinking that it was not sufficient to put the vendor on equity. The vendee is entitled to pursue the course of the sale consideration. *Rabia Bi v. Angappan* (1), *Sinaya Pillai v. Munisami Ayyan* (2), *Tejpal v. Ganga* (3), *Eastern Mortgage and Agency Co. Ltd. v. Rebati Kumar Ray* (4).

The 1st defendant's suit for cancellation of the deed of sale and for possession of other than the suit properties covered by the sale, was dismissed as barred. The right of 1st defendant has become extinguished and he cannot be heard to plead the invalidity of the sale in this suit of the plaintiff. The plaintiff is, therefore, entitled to possession of the suit properties.

Mr. G. S. Ramchandra Aiyar, for the Respondents.—The actual finding by the lower Courts is that, at date of sale to plaintiff, it was not in the contemplation of the parties to purchase other lands for the minors with the sale price. As a matter of fact plaintiff executed a promissory note for the consideration on which he could be sued summarily. The finding, moreover, is that it was at his pressure and owing to his refusal to pay the sale amount that other lands were purchased. The 'benefit' contemplated by section 64 of the Contract Act does not refer to a remote contingency. The benefit received by the vendor and which he is bound to restore should be part of the same transaction. The cases cited by the Advocate-General do not apply.

The fact that 1st defendant's suit to avoid the sale was barred under Article 44 of the Limitation Act is no impediment to his urging that plea in defence in plaintiff's suit. The 1st defendant's right to continue in possession of the properties not delivered to the plaintiff, the vendee, remains unaffected. Article 44 operates only as a bar to the ward

actively agitating his rights of avoidance of a voidable transaction, but it does not entitle the vendee *per se* to recover properties in the former's possession.

JUDGMENT.

PHILLIPS, J.—Apart from the fact that the plaintiff has by his action precluded the Court from ordering an exchange between the parties of the lands sold to plaintiff by the mother of defendants Nos. 1 and 2, and the lands purchased by her in Sriperumbudur, I think that it follows from the finding that the purchase of the lands in Sriperumbudur was not contemplated at the time of the sale to plaintiff, that those lands do not constitute the benefit received by defendants Nos. 1 and 2 from plaintiff within the meaning of section 64 of the Contract Act. I, therefore, agree in the order proposed.

KUMARASWAMI SASTRI, J.—The plaintiff is the appellant. He sued for possession of the house site specified in the plaint. The case for the plaintiff is that the mother of the 1st and 2nd defendants acting as their guardian sold to him certain properties consisting *inter alia* of the site specified in the plaint for the purpose of purchasing other properties, that the defendants have not put plaintiff in possession of the property claimed by demolishing the building on the site as agreed upon. Defendants Nos. 1 and 2 contested the suit on the ground that the sale deed executed by their mother is invalid and inoperative and would not bind them and that plaintiff has no right to the relief claimed. The defence of the 3rd and 4th defendants, who claimed an interest in the buildings on the site, is not material for the purpose of this appeal.

The District Munsif held that the sale by their mother as their guardian was not binding on the defendants Nos. 1 and 2 and dismissed the suit on this ground. He was of opinion that the purchase of the lands subsequently purchased was not settled at the time of the sale by defendants' mother and that it is probable that the plaintiff prevailed upon the defendants' maternal grandfather to enter into the transaction.

On appeal, the District Judge held that the sale was not binding on the defendants Nos. 1 and 2 as it was not neces-

(1) 28 Ind. Cas. 714; 2 L. W. 369.

(2) 22 M. 289; 9 M. L. J. 64; 8 Ind. Dec. (N. S.) 205.

(3) 25 A. 59; A. W. N. (1902) 192.

(4) 3 C. L. J. 260.

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sary or beneficial and dismissed the appeal.

The contention for the appellant is that it was not open to the 1st and 2nd defendant to keep the lands purchased with the sale-proceeds of the family lands and to repudiate the sale by their mother made with the object of purchasing other lands and that under section 64 of the Contract Act, a person who seeks to avoid a voidable transaction should restore any benefit he has received as a condition precedent to such avoidance. It is also argued that the District Judge was wrong in thinking that the recital in the sale-deed by defendants' mother to the effect that lands in Sriperumbudur were to be purchased was insufficient as the particular lands actually purchased were not specified.

There can be little doubt that, under section 64 of the Contract Act, a party seeking to avoid a voidable transaction is bound to restore any benefit he has received from the other party and the question is whether in the present case, lands actually purchased in Sriperumbudur can be said to be the benefit which the defendants Nos. 1 and 2 received in respect of the sale by their mother as their guardian.

Ordinarily, the benefit which a party receives when he sells the property is the price which the vendee pays. Any profits which the vendor might make with the moneys would be too remote in estimating what he has to return in case he is entitled to avoid the sale and elects to do so. Where, however, for the protection of a purchaser contracting with a guardian or a qualified owner, a particular dealing with the money was in the direct contemplation of the parties, such as the purchase of other lands with the consideration, and the money is so applied, the benefit which the other party obtains will be the land or other property acquired with the consideration. There must, in my opinion, be something more than a mere application of the consideration in a particular way in order to entitle the purchaser to claim restoration of the properties acquired with the consideration paid by him. Section 35 of the Transfer of Property Act makes this clear. It requires that the benefit received

should be part of the same transaction and should be direct. The authorities cited by the learned Advocate-General do not support the view that the purchaser is entitled to follow up properties purchased with the consideration irrespective of whether there was any arrangement or not.

In *Rabia Bi v. Angappan* (1) it was held that the guardian of a Muhammadan minor is not entitled to mortgage her properties for the purpose of acquiring other properties but that if the minor disclaims liability to pay the mortgage monies, she must give up her rights in the property so purchased. She was directed to execute a conveyance of the property to the mortgagee. It was assumed that the benefit was the purchase of other lands and there was no discussion of the question. In *Sinaya Pillai v. Munisami Ayyan* (2), *Terpal v. Ganga* (3) and *Eastern Mortgage and Agency Co. Ltd. v. Rebati Kumar Ray* (4) it was held that any benefit received should be restored. In these cases it was the consideration paid that was to be refunded. There can be little doubt that if the purchase of the lands at Sriperumbudur was the benefit contemplated by the parties and arose in connection with the same transaction as the sale of ancestral properties by the minor's mother, the plaintiff would be entitled to a conveyance of the properties so purchased. Otherwise all that he would be entitled to is repayment of the consideration he paid.

The difficulty in the present case is that both the lower Courts do not believe the evidence of the plaintiff and find that the purchase of the lands which were actually purchased was not in the contemplation of the parties at the time of the sale to plaintiff. The District Judge disbelieves the evidence of the plaintiff and his witnesses that there was an understanding at the time of the sale that lands in Sriperumbudur should be purchased with the consideration and believes the evidence of Sami Reddi, the 1st defence witness, that it was only subsequent to the sale that plaintiff refused to pay the consideration unless lands were purchased and that it was at his pressure and refusal to pay that lands were purchased. The plaintiff executed an unconditional demand pro-

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missory note for the consideration and could have been sued on the note and the fact that there is a recital in the sale-deed to plaintiff that it was intended to purchase lands would not entitle plaintiff to withhold payment of the note if the vendor changed her mind, and decided to invest the monies in any other way. The lands were purchased at Sriperumbudur on the 4th March 1908 while the sale to plaintiff was on the 22nd August 1907. I do not think we can say that the findings of the lower Courts were based on no evidence, and on those findings it cannot be said that the purchase of the lands under Exhibit C was part of the same transaction as the sale of lands under Exhibit B. The plaintiff would, therefore, be entitled only to the return of the consideration paid by him.

It has been argued that, as the suit by the 1st defendant to set aside the sale-deed Exhibit B and to recover possession of properties other than the plaintiff properties covered by it was dismissed as barred, the plaintiff is entitled to possession of the suit properties as the right to avoid the contract is at an end owing to the impossibility of placing the parties in *status quo ante*. I do not think there is anything to prevent the plaintiff from giving back the properties in his possession though the suit of the 1st defendant was dismissed as barred. He is the plaintiff and the defendants are, in a suit by him for possession, entitled to plead the invalidity of the sale by their guardian. The fact that they cannot sue to recover an item of property wrongfully alienated by their guardian cannot affect their right to remain in possession of properties not delivered to the possession of the purchaser. There is no authority for the proposition that on the expiry of the period specified in Article 44 of the Limitation Act, the purchaser from the guardian is of right entitled to possession of properties in the possession of the ward.

No doubt the right to avoid a contract depends on the power of the Court to put the parties in the same position as they would have been if the transaction had not been entered into, but the plaintiff cannot be heard to say that he will not do something which is within his compe-

tence and claim the enforcement of a voidable transaction on the ground that the parties cannot be put in *status quo ante* because of his unwillingness to do equity.

The plaintiff is in possession of other properties conveyed to him; he values the site at Rs. 250 and the value is not disputed in the written statement or in the evidence. I am of opinion that the plaintiff is entitled to a return of Rs. 250 in case the defendants elect to keep the house site claimed. I would set aside the decrees of the lower Courts and direct that, on payment by the defendants Nos. 1 and 2 of Rs. 250 in three months, the plaintiff's suit be dismissed, each party bearing his own costs, and that in default a decree be passed for possession as prayed with costs throughout.

Appeal allowed.

M. C. P.

MADRAS HIGH COURT.

CIVIL APPEALS NOS. 354, 355 AND 368 OF 1916.

February 18, 1918.

Present :—Justice Sir William Ayling, Kt,
and Mr. Justice Seshagiri Aiyar.

IN APPEAL NO. 354 OF 1916

THE AMERICAN BAPTIST FOREIGN
MISSION SOCIETY, BY ITS ATTORNEY
R.V. W. L. FERGUSON—DEFENDANT NO. 1
—APPELLANT

versus

AMALANADHUNI PATTABHI-
RAMAYYA—PLAINTIFF—RESPONDENT.

IN APPEAL NO. 355 OF 1916

JALADI AYYAPPASETTI AND ANOTHER—
DEFENDANTS NOS. 16 AND 17—APPELLANTS

versus

AMALANADHUNI PATTABHIRA-
MAYYA AND ANOTHER—PLAINTIFF AND
DEFENDANT NO. 15—RESPONDENTS.

— IN APPEAL NO. 368 OF 1916

GURRAM SESHIAH AND ANOTHER—
LEGAL REPRESENTATIVES OF DEFENDANTS
NO. 11 AND 15—APPELLANTS

versus

AMALANADHUNI PATTABHI-
RAMAYYA AND OTHERS—PLAINTIFF AND
DEFENDANTS NOS. 30 AND 31—RESPONDENTS.

*Transfer of Property Act (IV of 1882), s. 61—
Purchase in good faith from limited owner—Improve-*

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ment effected by purchaser—Purchaser, position of—Recitals in deed, evidentiary value of—Civil Procedure Code (Act V of 1908), O. XX, r. 1, O. XXII, r. 6—Death of party before conclusion of arguments—Judgment, delivery of, after death, effect of.

The principle of section 51 of the Transfer of Property Act applies to a purchase from a Hindu widow, where the purchaser believing in good faith that he has acquired an absolute title to the property, effects improvements on it, but it is afterwards held that there was no necessity for the sale. [p. 861, col. 1.]

In such a case the person seeking to set aside the sale is entitled to the market value of the property at the time of suit, excluding the value of the improvements effected by the purchaser. [p. 861, col. 1.]

The recitals in a deed of sale as to the object of the sale or the intended appropriation of the consideration therefor, are evidence, especially where the document is an old one, of the representation made to the purchaser. [p. 860, col. 2.]

Where a party to a suit died after arguments were partly heard and judgment was pronounced on a subsequent day when the arguments were closed without the legal representative of the deceased being brought on the record:

Held, that the judgment was a nullity and was not binding on the deceased's representative. [p. 864, col. 2.]

Order XX, rule 1, Civil Procedure Code, contemplates that all arguments should be heard before the case can be regarded as ripe for judgment. [p. 864, col. 2.]

Appeals against the decree of the Court of the Temporary Subordinate Judge of Guntur, in Original Suit No. 99 of 1914.

Appeal No. 355 coming on for hearing on the 9th August 1917 and Appeal No. 354 coming on for hearing on the 9th and 10th of August 1917, the Court delivered the following

JUDGMENT.

APPEAL NO. 354 OF 1916.

This appeal relates to item No. 1. It was purchased by Dr. Clough in December 1884 and was subsequently sold by him to the present appellants. The plaintiff as reversioner to the estate of Kesavulu Naidu sues to recover possession of this and other properties, on the ground that the alienations by Kesavulu's widow Lakshmi Devi are not binding on him. It is in evidence that on the death of Kesavulu, his mother created disturbances and that suits were brought to establish Lakshmi Devi's right. The litigation ultimately ended in favour of the widow. This was between 1874 and 1878. During this period and subsequently, the widow was alienating her husband's properties piecemeal. In 1884, she executed two documents (Exhibits XIX

and XX), the one being an agreement to sell and the other the actual conveyance. The plaintiff contends that this conveyance Exhibit XX is not binding on him. The Subordinate Judge has held that necessity was not proved and has directed the appellant to remove the materials within a fixed time.

We are unable to uphold the decree. There can be no question on the evidence that the purchaser paid full and adequate consideration for the sale. We see no reason to disbelieve the evidence of defendant's 1st witness. The deed of sale refers to two previous documents as having been discharged, Exhibits XVI and XVIII. In Exhibit XVI it is recited that Rs. 300 was borrowed to execute repairs to the bungalow standing on item No. 1. This recital is evidenced, after the lapse of nearly 30 years from the date of the sale, of the representation that was made to the purchaser. See *Nanda Lal v. Jagat Kishore Acharjya* (1). That recital is corroborated by the evidence of defendant's 1st witness. We see no reason for holding that the sum of Rs. 300 was not paid for effecting the repairs upon the bungalow which was let out for rent to the Municipality. To this extent we hold that necessity has been proved. The Subordinate Judge was inclined to take this view, but he did not act upon his inclination, because the widow derived benefit by the improvement. We are unable to follow him in this. As regards the rest of the consideration, we have reluctantly come to the conclusion that its binding character has not been made out. Exhibit XVIII, which refers back to Exhibit P, deals only with the personal debts of the widow. There is no evidence to connect these debts with liabilities binding on the estate. It is true that the purchaser seems to have taken legal advice before purchasing. The extent of the advice given and the amount of the information disclosed to the legal adviser have not been spoken to by any one. We are unable to say, therefore, that the necessity for the remainder of the purchase-money has been made out.

(1) 36 Ind. Cas. 420; 44 C. 186; 20 M. L. T. 335; 31 M. L. J. 563; (1916) 2 M. W. N. 336; 4 L. W. 458; 18 Bom. L. R. 868; 14 A. L. J. 1103; 24 C. L. J. 487; 1 P. L. W. 1; 21 C. W. N. 225; 10 Bur. L. T. 177; 43 I. A. 249 (P. C.).

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The only question now is how should the equities between the parties be adjusted. We are not satisfied that section 51 of the Transfer of Property Act is not applicable to the present case. *Raj Kishore Das v. Jaint Singh* (2) gives no reason for holding that transferees from limited owners are not within the purview of the section. There is nothing in the language of it to lead to such a conclusion. We are, therefore, inclined to hold that section 51 is applicable. Even if the section is not applicable in terms, we think the principle of it is applicable to the case. We feel no hesitation in holding that the purchaser acted honestly in believing that he secured an absolute right by the transfer from the widow. He took legal advice and secured some documents showing that there were previous debts. We accept the reasoning in *Mathunsa Rowthan v. Apsa Bin* (3) and hold that where the purchaser acts honestly and to the best of his information, he is protected by section 51 of the Transfer of Property Act. It is found that the purchaser spent nearly Rs. 10,000 in putting up a bungalow on the premises. Under these circumstances the proper decree to be passed will be to direct the appellant to pay the reversioner the difference between the present market value of the land without taking into account the building thereon and the sum of Rs. 300 which we hold is binding on the estate. We feel no doubt that the plaintiff ought to have intervened to prevent the costly building being put up on the premises. He may not be bound to sue for declaration, but his failure to sue is an element to be taken into account in considering whether the present holder should not be allowed to retain the property. We think that under the circumstances of the case, it would be highly inequitable to turn the appellant out of the property.

The Subordinate Judge must be asked to report to this Court within six weeks from this date the present market value of item No. 1, eliminating from his consideration the value of the building existing on it. Ten days will be allowed for filing objections.

(2) 23 Ind. Cas. 334; 35 A. 397; 12 A. L. J. 717.

(3) 12 Ind. Cas. 444; 36 M. 194; 21 M. L. J. 969; 10 M. L. T. 373; (1911) 2 M. W. N. 425.

We agree, with the Subordinate Judge that it is not shown that the sale of item No. 4 by Lakshmi Devi under Exhibit B to Bapayya was for necessity or for the benefit of the estate. We must, therefore, uphold his decree in so far as it directs defendants Nos. 15, 16 and 17 to deliver possession of that property. It is clear that these defendants added to the original extent by purchasing from others. The Subordinate Judge has held that as the property sold under Exhibit B could not be conveniently enjoyed by the plaintiff without the added property, the plaintiff should be given possession of the whole plot and that the appellants should be paid Rs. 45 as compensation. We think the Subordinate Judge is wrong in this. Plaintiff claimed and is only entitled to the properties of Kesavulu. No question of equitable adjustment by asking defendants to give up their property can arise in this suit. We must modify the decree by deleting the portion relating to compensation and by directing that plaintiff be put in possession only of the properties purchased under Exhibit B. Each party will bear his own costs in this Court.

In compliance with the order contained in the above judgment in Appeal No. 354, the Temporary Subordinate Judge of Guntur submitted the following

FINDING.—I have been directed by the High Court to report the present market value of item No. 1, eliminating from consideration the value of the bungalow existing on it. The total extent of the site is acres 5 26 cents. The plaintiff alleged in the plaint that at the date of the sale to Dr. Clough in 1884, the suit site with the building which then stood on it was worth Rs. 3,000. The value of the building having been estimated in the plaint at Rs. 1,600, the site, according to plaintiff, was worth Rs. 1,400 at the date of the sale. It was pleaded by the 1st defendant in his written statement that the site was worth at that date, including the building on it, only the price paid for it, namely, Rs. 1,600. The building having been valued in the written statement at Rs. 600, the value of the site, according to the

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defendant, was Rs. 1,000 at the date of sale. My predecessor held that the building was worth only Rs. 600 as alleged by the defendant. It follows from that finding, that the site without the building was worth at the date of the sale Rs. 1,400 according to the plaintiff and Rs. 1,000 according to the defendant. Bearing that in mind, we have to see what its present market value is.

2. The plaintiff has now examined 9 witnesses, and the 1st defendant, besides recalling and examining Mr. Baker (D. W. No. 9), has examined three witnesses. While the plaintiff's witnesses value the suit site at one rupee or one and a quarter rupee per square yard, Mr. Baker, who represents the Mission, and his 2nd witness Punnayya depose that the suit site is worth only about Rs. 600 per *gorru* and that the whole site does not, therefore, exceed in value Rs. 1,000. The plaintiff's witnesses state that, if the suit site is parcelled out and sold for building purposes, it would fetch about Rs. 25,000 at Rs. 1 to Rs. 1-1-0 per square yard. Mr. Baker and his 2nd witness depose that the suit site, being situated at the northernmost extremity of Ongole Town, is not likely to be taken up for building purposes at all. Mr. Punnayya, the witness examined by the Mission, was for a long time Municipal Councillor and for nearly 4 years Chairman of the Ongole Municipality. He corroborates Mr. Baker's statement that the Town of Ongole has extended east, west and south but has shown no tendency to extend and will not extend northwards for several reasons and that ordinary dwelling-houses will never be constructed on the suit site, as those reasons are specially applicable to it. They are:—(1) its vicinity to cemeteries and Panchama quarters, (2) its vicinity to exposed beef and meat stalls, (3) its situation in the midst of cultivated lands, (4) its isolation and consequent liability to attack from thieves and (5) its proximity to the tank into which all the village water is drained. It is admitted on behalf of the plaintiff that the suit site is within a very short distance of the Municipal market which was constructed about 25 years ago, and that the northern and eastern portions of the market measuring about acre 1 and odd have been

lying absolutely vacant. It is proved by Mr. Punnayya that the Municipal market, which was constructed for the sale of both vegetables and meat, ceased to be a vegetable market on account of its distance from the dwelling-houses and its vicinity to exposed beef stalls. The few houses west of the Municipal market are mostly occupied by Mahomedans. The two Telaga residents in that locality occupy very humble positions in life being school masters. It is not denied that there is a large stretch of nearly 80 acres of land east of the Donka which forms the eastern boundary of item No. 1. There has been admittedly no attempt to build houses in all that area. A few cattle-sheds and houses have no doubt been built on Survey Nos. 80 to 86 marked in the Commissioner's plan Exhibit EE, but it is elicited from P. W. No. 3 that those houses and cattle-sheds are owned by persons whose cultivable lands lie immediately behind them.

3. In support of his contention that the suit site is worth one rupee per square yard, the plaintiff's Vakil relies upon 4 sale-deeds which relate to sites not far off from the suit site. Exhibit HH is a sale-deed taken by P. W. No. 3 of 6 *gadis* or 48 square yards of land for Rs. 90 for constructing a cattle-shed. P. W. No. 3 admits that the sale-deed was executed in his favour recently and that the price fixed thereunder was not intended to be the real price. It is elicited from him that the adjacent site belonging to his vendor has been proposed to be acquired by the Municipality for public purposes and that the price of the land covered by his sale-deed, Exhibit HH, was more or less fixed with a view to claim from the Municipality a high price for the land proposed to be acquired. Exhibits GG and GG-1 relate to Survey No. 214. Exhibit GG is a sale deed executed in 1909: It shows that a portion of Survey No. 214 measuring 30 *gadis* or 240 square yards fetched a price of Rs. 10). Exhibit GG 1, dated 5th January 1917, relates to a site immediately west of the site covered by Exhibit GG. It shows that $6\frac{3}{4}$ *gadis* equal to 50 square yards were purchased under it for Rs. 44. It is elicited from P. W. No. 2 who proves those sale-deeds that Survey No. 214 is in the

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vicinity of Brahmin quarters. Survey No. 214 is situated at a fairly long distance from the suit site and, in view of the admitted fact that it lies within the vicinity of Brahmin quarters, the price paid under Exhibits GG and GG-1 cannot be accepted as a standard for fixing the value of the suit site. The next sale-deed on the basis of which the plaintiff's Vakil urges that the suit site should be valued at Re. 1 per square yard is Exhibit JJ, dated 20th June 1917. Under it, P. W. No. 4 purchased 26 *gadis* of site for Rs. 200 in the Mahomedan quarters west of the Municipal market. The purchaser is admittedly a contractor from the Municipality of the slaughter house situated in the vicinity of the site comprised in his sale-deed. From the standpoint of his business, it is an advantage to him to own a site in the vicinity of that slaughter house. The price paid by him cannot, therefore, be accepted as a standard for determining the value of the suit site. P. W. No. 5, who recently purchased a site in that locality, has not chosen to produce his sale-deed which would throw light on the value of a site in that locality. He says that he paid Rs. 350 for that site but conveniently states that he does not know the extent comprised in his sale-deed.

4. It is urged on behalf of the Mission that the suit site is not worth more than Rs. 1,000 and in support of that contention reliance is placed on Exhibits XXIX and XXX filed by the 3rd and 4th witnesses examined on remand. Exhibit XXIX is a sale-deed, dated the 21st January 1917, relating to 17 cents of land immediately north of the suit site. That extent was purchased under that sale-deed, for Rs. 50 as proved by D. W. No. 3. Exhibit XXX is a sale-deed, dated 25th June 1917, relating to one acre and 29 cents of land immediately west of the suit bungalow. That extent was purchased under that deed for Rs. 200. If the value of the suit site is to be fixed with reference to the price paid under Exhibits XXIX and XXX, the present market value of the suit site would, no doubt, not exceed Rs. 1,000. It is, however, elicited from Mr. Punnayya, the Ex-Chairman of the Municipal Council, that the sites north and west of the suit site are certainly inferior in value to the suit site for building pur-

poses. It is admitted that both these sites are situated at a lower level than the suit site, *vide* also the Commissioner's plan and report, Exhibits EE and EE-1. In this connection, the admission of the Mission that the suit site was worth Rs. 1,000 even in 1884 when it was purchased by Dr. Clough has to be borne in mind. It is a matter of common knowledge that the prices of lands have risen considerably within recent years.

5. The evidence recorded at the original trial shows that the building which stood on the suit site at the date of the sale to Dr. Clough fetched a monthly rent of Rs. 15. It is admitted by Mr. Baker that the Municipal Hospital was located in that building. In fixing the present value of the suit site, the existence of that building and the rent which was realised from it cannot be ignored. My predecessor was of opinion that the income from the fruit bearing trees which stood on the suit site at the date of sale was sufficient to cover the expenses of the repairs to that building. On a full consideration of the evidence adduced by both the parties, I am clearly of opinion that the claim made by the plaintiff at Re. 1 per square yard is grossly exaggerated and that the Mission's estimate of the present market value of the suit site at Rs. 1,000 is unduly low. I accepted the evidence of Mr. Baker and Mr. Punnayya that the extension of the town northwards is, for the reasons mentioned by them, highly problematical and that the construction of any houses on the suit site which is situated at the northernmost extremity of the town is utterly unlikely, but at the same time I am not prepared to accept their statement that the suit site is not worth more than Rs. 600 per *gorru*. Taking into consideration the fact that the suit site, with the building which stood on it at the date of the sale, yielded an annual income of not less than Rs. 180 and taking also into account the admissions of the plaintiff and the 1st defendant that, at the date of the sale in 1884, the site without the building (which was valued by my predecessor at Rs. 600) was worth Rs. 1,400 and Rs. 1,000, according to the plaintiff and the 1st defendant respectively, and the rise in the price of land since that date, I fix the present market value

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of that site at 20 times the aforesaid income and find that the present market value of item No. 1, eliminating from consideration the value of the existing building, is Rs. 3,600.

Appeal No. 354 came on for final hearing after the return of the report of the lower Court upon the issue referred by this Court for trial, and Appeal No. 368 came on for hearing this day.

Messrs. *Grant and Quatorez*, for the Appellant in No. 354.

Mr. V. Ramadoss, for the Respondent in No. 354.

Mr. Venkatasubramiah, for the Appellant in No. 368.

Mr. V. Ramadoss, for the Respondent in No. 368.

JUDGMENT.

APPEAL No. 354.

We accept the finding of the Subordinate Judge and in modification of his decree direct that the 1st defendant be allowed to retain possession of item No. 1 in the plaint schedule and that he be directed to pay to the plaintiff-respondent the sum of Rs. 3,600, less Rs. 300 found binding on the plaintiff, with interest thereon at 6 per cent. from the date of the plaint till the date of payment. Each party will bear his own costs in this Court, including the costs of the finding called for. Plaintiff is entitled to his costs against the 1st defendant in the Court below. In other respects the decree of the Subordinate Judge is confirmed.

APPEAL No. 368.

On the merits we think the Subordinate Judge has come to the right conclusion. The evidence has been discussed by him fully and we see no reason to differ from him. At the last moment an argument was advanced to the effect that the decree against the appellant is a nullity. The facts bearing on this point are these: The case was argued after evidence was let in on the 15th of April 1916. It was adjourned to the 26th for further arguments. On the 20th, 14th defendant died: no legal representative of his was brought on the record and judgment was delivered on 3rd May, holding among other things that the alienation in favour of the 14th defendant was not binding on the plaintiff. The present

2nd appellant is the legal representative of the deceased 14th defendant. It is contended on her behalf that the decree passed behind her back after her husband's death was without jurisdiction and we are constrained to uphold this contention. Before Order XXII, rule 6, was enacted it was held by this Court in *Raghunatha Thatha Charier v. Venkatesa Tawker* (4) that a judgment pronounced after the argument was closed must be taken to speak not from the date on which it was actually pronounced but from and on the date that the judgment was reserved after argument. Order XXII, rule 6, gives legislative sanction to this view of the law. After the new rule was enacted, it was held in *Subramania Aiyar v. Vaithinatha Aiyar* (5) that a judgment pronounced under similar circumstances would be a nullity: *Vide* also *Vishvanath Dnyanoba v. Lallu Kabla* (6) and *Narendra Bahadur Chand v. Gopal Sah* (7). Mr. Ramadoss contended that the spirit of Order XXII, rule 6, will be satisfied, if the 14th defendant's arguments were heard before his death although the other parties had not concluded their arguments. We are unable to accept this contention. Order XX, rule 1, to which the learned Vakil for the appellants drew our attention, contemplates that all the arguments should be heard before the case can be regarded as ripe for judgment. The view of the Judicial Committee in *Radha Prasad Singh v. Lal Sahib Rai* (8) is also to the same effect. We must, therefore, hold that the decree passed against the 2nd appellant was made without jurisdiction. That decree must be set aside and the case should be remanded to the Subordinate Judge so far as the 2nd appellant is concerned. The lower Court will have to deal with any application that may be made to it to bring in the legal representative of the 14th defendant. The costs will abide the result. The appeal so far as the 11th defendant is concerned is dismissed with costs.

M. C. P.

Order accordingly.

(4) 26 M. 101; 12 M. L. J. 435.

(5) 31 Ind. Cas. 198; 38 M. 682.

(6) 4 Ind. Cas. 187; 11 Bom. L. R. 1070.

(7) 20 Ind. Cas. 506; 17 C. L. J. 634.

(8) 13 A. 53; 17 L. A. 150; 5 Sar. P. C. J. 600; 7 Ind. Dec. (N. S.) 33.

BALWANT SINGH v. EMPEROR.

PUNJAB CHIEF COURT.

CRIMINAL APPEAL NO. 142 OF 1918.

July 3, 1918.

Present:—Mr. Justice Shadi Lal and Mr.
Justice Martineau.BALWANT SINGH AND ANOTHER—CONVICTS
—APPELLANTS

versus

EMPEROR—RESPONDENT.

Jurisdiction, territorial, of British Courts—Subject of Native State, whether can be tried for abetting within State offence committed in British India—Arrest by British Police of subject of Patiala State on Railway lines within Patiala territory, legality of—Approver, evidence of—Corroboration, whether necessary.

Where a subject of a Native State is charged with abetting an offence committed in British India and the alleged abetment consists entirely of what the accused did or said at a place within the State territory, he cannot be tried in a Court in British India for such abetment. [p. 870, cols. 1 & 2.]

Reg. v. Pirtai, 10 B. H. C. R. 356, followed.

Emperor v. Chhotatal Babar, 14 Ind. Cas. 970; 14 Bom. L. R. 147; 13 Cr. L. J. 428; 26 B. 524, distinguished.

The accused, a subject of the Patiala State, was arrested in a Railway carriage at Bhatinda by the British Police:

Held, that the arrest was lawful as full and exclusive power and jurisdiction of every kind over the Railway lines and over all persons within those lines had been ceded by the Patiala State to the British Government. [p. 870, col. 1.]

Muhammad Yusuf-ud-din v. Queen-Empress, 6 P. R. 1897 Cr.; 25 C. 20; 24 I. A. 137; 2 C. W. N. 1: 7 Sar P. C. J. 239; 13 Ind. Dec. (N. S.) 14 P. C.), distinguished.

An approver giving his evidence under a promise of pardon cannot be believed unless he is corroborated by independent evidence. [p. 867, col. 1.]

Appeal from the order of the Sessions Judge, Ferozepore, dated the 24th January 1918, convicting the appellants.

Mr. Beechey and Mr. Ghulam Rasul for Mr. Kehr Singh, for the Appellants.

Lala Mul Chand, R. S., Public Prosecutor, for the Respondent.

JUDGMENT.—Gajjan Singh, Arjan Singh and Mahla Singh have been convicted under sections 302/149, Indian Penal Code, of having murdered Santa Singh and Nathal, residents of Dina in the Ferozepore District, and under section 395, Indian Penal Code, of having committed dacoities at the houses of Santa Singh, Banta Singh and Kala Singh, and Balwant Singh and Jot Ram—have been convicted of abetting those offences. All the convicts have been sentenced to death. They have appealed, and the case is also before us under section 374, Criminal Procedure Code, for confirmation of the sentences.

The offences were committed at Dina at about midday on the 18th September 1916, Gajjan Singh, Arjan Singh and Mahla Singh are residents of Khota, a village about 5 kos. from Dina, and are said to have joined with Bhanga Singh and his brother Ganda Singh, residents of Dina, in committing the offences.

The deceased Santa Singh and Nathal were descendants of Baja, a great uncle of Bhanga Singh and Ganda Singh, and there was, as the learned Sessions Judge has shown, bitter enmity between Bhanga Singh and Ganda Singh on the one hand and Santa Singh and his brother Banta Singh on the other. There is also evidence that Gajjan Singh, Arjan Singh and Mahla Singh were associates of Bhanga Singh and Ganda Singh, and that Gajjan Singh and Arjan Singh used often to go to Dina.

On the morning of 18th September 1916 Sucha Singh (P. W. No. 34), *lambardar* of Khota, saw Gajjan Singh, Arjan Singh and Mahla Singh leaving the village and going towards Pattoke, which is in the direction of Dina. Gajjan Singh had a gun and the other two had *chharis*. Mahla Singh, who was under orders of internment in his village, called out to Sucha Singh to report to Kirpal Singh *lambardar* that he was going away and would not return. The witness informed Kirpal Singh (P. W. No. 35), who on the same morning made a report P. D at the *thana*.

Thakur Singh (P. W. No. 27) says he saw Gajjan Singh, Arjan Singh and Mahla Singh going from Pattoke to Dina armed in the manner described by Sucha Singh.

Sub-Inspector Lehna Singh (P. W. No. 54) on receiving Kirpal Singh's report went to Khota and thence to Pattoke and from there towards Dina. But on the way he was met by a *lambardar* and *chaukidar* of Dina, who told him that murders and dacoities had taken place. He sent reports P. E and P. U to the *thana*, in which he stated that the offences had been committed by Ganda Singh, Bhanga Singh and three *Jats* of Khota.

The dacoits on assembling in Dina had first tried to catch Santa Singh's son Bakhtawar Singh, who, however, succeeded in escaping. They then went into Nathal's house, killed Santa Singh who was in a

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room in the house with *chhavis*, and shot dead Nathal who was in the verandah. They went after Banta Singh, but he escaped and hid in a field. After this they looted the houses of Santa Singh, Banta Singh and Kala Singh. Finally Musammatt Kishni, the sister of Bhanga Singh and Ganda Singh, told her brothers that they should kill her. A funeral pyre was prepared, on which she lay down, and then her brothers shot her and set fire to the pyre. The dacoits absconded after the commission of these crimes, and it was not till the following May that Gajjan Singh, Arjan Singh and Mahla Singh were arrested, while Bhanga Singh and Ganda Singh are still at large.

The evidence shows that at the time of the murders and dacoities Ganda Singh was armed with a gun, Bhanga Singh with a revolver, and Gajjan Singh, Arjan Singh and Mahla Singh with *chhavis* and a stick. That there were the five men who committed the crimes is proved by the evidence of P. Ws. Nos. 6, 7, 8, 9, 10, 12, 15, 17, 19, 29, 30 and 45, who saw them while the events described above were taking place. All five were known already to P. Ws. Nos. 6, 10, 15, 19 and 45, and all but Mahla Singh were known to P. Ws. Nos. 7 and 30. The evidence of Sub-Inspector Lala Ram Das, P. W. No. 59, also shows that Gajjan Singh, Arjan Singh and Mahla Singh were identified out of a number of other men by P. Ws. Nos. 6, 7, 8, 10, 12, 29 and 30.

In addition to the evidence of the Dina witnesses and of Sucha Singh, Kirpal Singh and Thakur Singh and the report P-D mentioned above, it is proved that some gold earrings P-58, of which Banta Singh's wife Musammatt Atri, P. W. No. 11, was robbed, were pawned by Gajjan Singh, who was accompanied by Arjan Singh, Mahla Singh and two other men to Musammatt Sham Kaur, P. W. No. 37, and that the latter's husband, Jamna Das, P. W. No. 38, pawned them to Sardha Ram, P. W. No. 40, from whom the Police recovered them. It is further shown that Gajjan Singh came with Arjan Singh, Mahla Singh and two other men to Badan Singh, P. W. No. 42, and pawned to him some jewelry P-52 to P-57, which is part of that of which Musammatt Atri was robbed.

No evidence has been produced by Gajjan Singh, Arjan Singh and Mahla Singh, and

the prosecution evidence mentioned above establishes their guilt beyond all doubt. We confirm the sentences of death passed on them and dismiss their appeals.

We have now to consider the case of Balwant Singh and Jot Ram, who live in Patiala State at the villages of Chukerian and Mansa respectively, which are said to be some 60 miles from Dina.

The learned Sessions Judge says that the case against these men is that they assisted Bhanga Singh and his companions in procuring arms with the object of removing some enemy or enemies of their own after Bhanga Singh and his party had murdered their enemies. This, however, is not a correct statement of the case. What Balwant Singh and Jot Ram have been charged with and convicted of is abetment of the murders committed at Dina (*i.e.*, the murders of Bhanga Singh's enemies) and of the dacoities committed there, and not abetment of the murder of their own enemies. The case for the prosecution against Balwant Singh and Jot Ram is what the learned Judge mentions as an alternative case, namely, that they assisted in supplying arms to Bhanga Singh and his friends with the knowledge that these arms would be used for murderous purposes and that in this way they are guilty of having abetted the crimes committed at Dina.

The case against Balwant Singh and Jot Ram rests on the statements of Narsingh (P. W. No. 5), a resident of Dumwali in the Patiala State, and of Fateh Muhammad (P. W. No. 67), a dealer in arms in Delhi. The evidence of these two witnesses was obtained as the result of information given by Gajjan Singh's brother-in-law Gurdit Singh (P. W. No. 4), who on the 20th of April 1917 told the Deputy Superintendent of Police about the dacoits having obtained arms from Fateh Muhammad in Delhi. The Deputy Superintendent of Police on receipt of that information got Gurdit Singh to write a letter to Fateh Muhammad. Fateh Muhammad sent a reply Exhibit P-A, in which the name of Balwant Singh occurs. Fateh Muhammad's house was searched, and in a register in the house the names and addresses of Jot Ram and Narsingh were given. A pardon was tendered to Narsingh, and his statement was taken by the Magistrate on the 27th June. Fateh Muhammad

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was also tendered a pardon in respect of offences under the Arms Act.

Balwant Singh and Jot Ram are first mentioned by Narsingh in his evidence in connection with an incident which is said to have occurred at Bhatinda about May 1916. Narsingh wanted a gun for use against his half brother Atma Singh with whom he had enmity, and Ganda Singh, with whom Narsingh became acquainted, wanted a revolver for dealing with his enemies at Dina. Narsingh says that they were unable to obtain the arms at Patiala, and that then he and Bhanga Singh, whom he had met at Dina, started to go to Mansa where Bhanga Singh intended to see Jot Ram. They had to change trains at Bhatinda and happened to meet Balwant Singh and Jot Ram at the hotel there. Narsingh stayed outside the hotel, and Bhanga Singh went in to speak to them, and then came and told Narsingh that Jot Ram had said that he would supply arms if he (Bhanga Singh) would murder the enemies of Jot Ram and Balwant Singh, and that Jot Ram and Balwant Singh would also pay him Rs. 1,000.

This accidental meeting with Balwant Singh and Jot Ram is somewhat curious. There is no corroboration of Narsingh's statement in regard to the incident, and corroboration is necessary not only because Narsingh has given his evidence under a promise of pardon, but also because he is an interested witness. His half brother Atma Singh (P. W. No. 84), with whom Narsingh is at enmity, (so much so that Narsingh once fired a pistol at him), says that Balwant Singh used to help him in his disputes with Narsingh. The latter has, therefore, a strong motive for giving evidence against Balwant Singh.

Even if the evidence be true it proves nothing against the appellants, as Narsingh's statement as to what Bhanga Singh told him would be no proof of what Balwant Singh and Jot Ram had said to Bhanga Singh. Even if we were to go further and assume that Balwant Singh and Jot Ram had given the undertaking which Bhanga Singh told Narsingh they had given, this would at the most be proof that they had abetted the murder of their own enemies, an offence with which they have not been charged. It would

be no proof that they had entered into a conspiracy with Bhanga Singh to murder Bhanga Singh's enemies, and it is highly improbable that they would have entered into any such conspiracy as they were in no way interested in the feud between Bhanga Singh and his enemies.

Narsingh then goes on to say that a few days later he and Bhanga Singh went to Mansa, where they met Jot Ram, who gave them a card (P.B) on which he drew a sketch to show the position of Fateh Muhammad's shop in Delhi, and who also gave them a letter to Fateh Muhammad. They then went to Delhi, where Narsingh bought a gun and Bhanga Singh a Mauser pistol at Fateh Muhammad's shop. Fateh Muhammad corroborates Narsingh in this matter, and also says that they brought him a letter in which Jot Ram asked him to sell arms to them at low prices.

There is no very clear proof that the words written on the card P.B are in the handwriting of Jot Ram, and it is noteworthy that this document came into the hands of the Police not from Narsingh, but from his half brother Atma Singh, who accounts for his possession of it by saying that Narsingh had left it in a pocket when he gave his clothes to be washed, and that the woman who washed the clothes found it and gave it to Atma Singh's daughter. This explanation is not particularly satisfactory, and it seems strange that Atma Singh should have taken so much care to preserve the document, which was of no use to him, for nearly a year.

The letter which Jot Ram is said to have given to Narsingh for Fateh Muhammad is not produced, although Fateh Muhammad says it was among his papers and was taken by the Deputy Superintendent of Police. If this statement of Fateh Muhammad is true, it may be presumed that the letter, if it had been produced, would not have been favourable to the prosecution; and if the statement is false it would be unsafe to believe that Jot Ram gave any such letter.

But even supposing it to be true that Narsingh and Bhanga Singh went to Jot Ram and told him they wanted to buy arms, and asked him for a letter of

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introduction to Fateh Muhammad, and that he gave them a letter, they cannot by merely so doing be held guilty of abetting the crimes committed at Dina. Narsingh himself does not say that they told Jot Ram that the arms were required for the murder of Bhanga Singh's enemies, and it cannot be assumed without any evidence that he knew that the arms were required for such a purpose.

The third piece of evidence relied on by the prosecution relates to the purchase of two rifles, one by Bhanga Singh and the other by Balwant Singh, from Fateh Muhammad in Delhi. It is alleged that Jot Ram, Balwant Singh and Bhanga Singh went together to Fateh Muhammad's shop and that Balwant Singh bought a rifle P 5 (afterwards produced by his mother) and Bhanga Singh a rifle P-2, which was found in the possession of Gajjan Singh when he was arrested. Narsingh and Fateh Muhammad have both deposed to this transaction, which is said to have taken place on the 29th or 30th July 1916, when Balwant Singh and Jot Ram were staying in Delhi at the Punjab Hindu Hotel, as shown by the hotel register. These witnesses have further deposed that after the rifles had been purchased Balwant Singh and Jot Ram said to Bhanga Singh that now that they had bought rifles for him he should do their business, to which Bhanga Singh replied that he would do his business first. The witnesses cannot, however, be believed on this point, as they made no mention of such conversation in their statements to the Police, nor did Narsingh mention it in the statement which he made on the 27th June 1917 on being tendered a pardon. Had that conversation, which is the most important part of the evidence against Balwant Singh and Jot Ram, actually taken place, it is most improbable that Narsingh and Fateh Muhammad would have made no reference to it in their original statements.

With regard to their evidence as to the purchase of the rifles it is urged that Narsingh had no particular object in taking the journey to Delhi, and that it is remarkable that he should have arrived, as according to Fateh Muhammad he did,

just at the moment when the transaction was taking place. It is also a point in favour of the appellants that Fateh Muhammad says that it was on the 7th or 8th Ramzan that Balwant Singh, Jot Ram and Bhanga Singh came to him. Those dates correspond to the 8th and 9th July, whereas the dates of the appellants' stay in Delhi were the 28th, 29th and 30th July as shown by the hotel register. On the other hand the hotel register shows that one Bhanga Singh son of Kahan Singh had come with Balwant Singh and Jot Ram and was occupying the same room. Although he is entered as a resident of Atla and a servant of Balwant Singh, the parentage agrees with that of the absconding Bhanga Singh of Dina. It is difficult to believe that this can have been a mere chance coincidence, and we agree with the learned Sessions Judge in thinking that the Bhanga Singh who was in the company of Balwant Singh and Jot Ram at Delhi was Bhanga Singh of Dina. This fact makes it probable that the statements of Narsingh and Fateh Muhammad that the appellants and Bhanga Singh came together to Fateh Muhammad's shop and that the rifles P-2 and P-5 were bought at the same time, are true. The discrepancy in regard to the date may be due to want of recollection on the part of Fateh Muhammad.

But granting that the evidence as to the purchase of the rifles is true, this does not advance the case for the prosecution. What the prosecution have to prove is that the appellants intentionally aided the commission of the Dina murders and dacoities. How does their presence at the time of the purchase of the rifle P-2 by Bhanga Singh show that they rendered such aid? Bhanga Singh bought the rifle himself and supplied the money, which he had got from Gajjan Singh (see the evidence of Gurdit Singh). He obtained no help from either of the appellants in the matter, nor did he need their help, as he had already been introduced to Fateh Muhammad and had bought a pistol from him at his previous visit with Narsingh in May. The Delhi transaction, therefore, which is the one mainly relied upon by the prosecution, does not really prove anything against Balwant Singh and Jot Ram.

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There is one other incident mentioned by Narsingh. He says that after the purchase of the rifles he went with Jot Ram, Balwant Singh and Bhanga Singh to Mansa, and thence with Balwant Singh and Bhanga Singh to Chukerian. They tried the rifles in Balwant Singh's garden, and Balwant Singh then asked Bhanga Singh to state clearly his intentions, and Bhanga Singh said he intended to kill Santa Singh and Banta Singh, upon which Balwant Singh said he would show him the house of his own enemies, and the two men went off together. On their return the witness went back to his village.

The statement of Narsingh on this matter, like his statement about the incident at Bhatinda, is uncorroborated and its truth is questionable, as it does not appear what object Narsingh had in going to Chukerian and why he should not have gone straight home from Delhi. But here again, assuming the statement to be true, how does it help the prosecution? It proves nothing against Jot Ram, who is not alleged to have been present on the occasion, and all that it could prove against Balwant Singh would be that he instigated the murder of some enemy of his own—an offence which is not the subject-matter of the present case. Not only does it not show that Balwant Singh had been abetting the murder of Bhanga Singh's enemies, but it would tend to exonerate him so far as that offence is concerned, as the very fact of his asking Bhanga Singh what his intentions were would suggest that up to that time he was unaware that Bhanga Singh intended to use the rifle for killing his (Bhanga Singh's) enemies.

The statements of Narsingh and Fateh Muhammad discussed above appear to be the only evidence against Balwant Singh and Jot Ram. The lower Court has referred to some other evidence of the dealings which Balwant Singh and Jot Ram have had with Fateh Muhammad. We do not doubt the existence of those dealings, but they do not help to establish the charges on which the appellants have been tried.

The learned Sessions Judge has also referred to some evidence indicating a connection between the appellants and the

dacoits. He says that the evidence of Mr. Donald (P.W. No. 61) and of Major Tara Chand, Inspector-General of Patiala Police, (P.W. No. 68) shows that Balwant Singh, when suspected by the Police of being connected with the dacoits, offered to assist in their arrest, and that it is curious that Jot Ram, who is a mere cloth merchant, should have volunteered to assist in the arrest of these dacoits, with whom he says he was not even acquainted. We do not, however, find from the evidence of Mr. Donald and Major Tara Chand that Jot Ram volunteered to assist in the arrest of the dacoits. Mr. Donald's evidence shows only that he tried to get Balwant Singh and Jot Ram to find out the dacoits, not that they made an offer to do so. In any case the fact that there may have been some connection between the appellants and the dacoits would not serve to show that the appellants helped the dacoits to obtain arms for committing the murders and dacoities which are in question.

The learned Sessions Judge then refers to the fact that Balwant Singh produced a rifle P.102 before Major Tara Chand and stated that he had borrowed it from Bhanga Singh ostensibly for *shikar* purposes, but really to facilitate Bhanga Singh's arrest. That rifle had been bought by Balwant Singh from Fateh Muhammad, and the learned Judge remarks that the fact that a rifle bought by Balwant Singh from Fateh Muhammad had come into the hands of Bhanga Singh is strong evidence that Balwant Singh was providing arms for Bhanga Singh. But here he has wrongly assumed that Balwant Singh's statement to Major Tara Chand that he had borrowed the rifle from Bhanga Singh was true. Evidently that statement was not true. Balwant Singh seems to have falsely pretended that he had borrowed the rifle in order to account for his possession of it, not wanting to admit that the rifle was his and that he had bought it from Fateh Muhammad.

Towards the end of his judgment the learned Sessions Judge says that he thinks there is no doubt that the appellants knew for what purpose Bhanga Singh required arms. There does not, however, appear to us to be any

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evidence of such knowledge, apart from the uncorroborated statement of Narsingh in regard to the incident of Chukerian, and even that statement (if believed) would show only that Balwant Singh came to know of Bhanga Singh's purpose after Bhanga Singh had bought the rifle.

There is a further difficulty in the way of the prosecution in this case, *viz.*, in connection with the question of jurisdiction. This question has arisen in two ways. It is argued, *first*, that Balwant Singh and Jot Ram were arrested in Patiala territory and that consequently they cannot be legally tried in a Court in British India; and *second*, that they cannot be tried in British India for anything which they are alleged to have said or done except in respect of the transaction at Delhi. We overrule the first contention. We agree with the finding that Jot Ram was arrested in Jullundur and Balwant Singh in a railway carriage at Bhatinda, and we also agree that the arrest of Balwant Singh by the British India Police was lawful as full and exclusive power and jurisdiction of every kind over the railway lines and over all persons within those lines had been ceded by the Patiala State to the British Government. As pointed out by the learned Sessions Judge in his order of the 29th October 1917, this case is distinguishable from the case reported as *Muhammad Yusuf-ud-din v. Queen-Empress* (1), which relates to jurisdiction on the line of railway in the Hyderabad State as the cession by that State of jurisdiction along the line of railway was only for the purpose of enabling the British Government to deal with offences committed on the railway or connected with the administration of the railway, whereas the cession by the Patiala State was not of that limited character.

But the second contention put forward by the defence, appears to be correct. With the exception of what took place at Delhi in July 1916, the alleged abetment consists entirely in what the appellants did or said at places in the Patiala State, and for offences of abetment committed in those places they cannot legally be tried

in a Court in British India. *Reg. v. Pirtai* (2) is an authority on this point. *Emperor v. Chhotalal Babar* (3), which is cited on the other side, does not apply, as that was a case in which the abetment was begun outside, but completed within British India. The present case is not one of that nature. The appellants could, therefore, be legally tried in the Ferozepore Court only in respect of what occurred at Fateh Muhammad's shop at Delhi in July 1916. The evidence in regard to that incident, as we have pointed out above, does not in any way establish the case for the prosecution.

The Police were themselves perhaps conscious of the weakness of the case against Balwant Singh and Jot Ram, for although all the evidence against these appellants had been obtained by the 2nd June 1917, when Fateh Muhammad made his statement, it was not till the end of August that Mr. Donald decided to arrest them, and the reason for arresting them then was, as he admits, that they did not seem to exert themselves to find Bhanga Singh and Ganda Singh which he had been trying to get them to do.

Balwant Singh and Jot Ram may possibly have committed offences under the Arms Act, but it has not been proved that they abetted the murders and dacoities committed at Dina.

We, therefore, accept their appeal, set aside the convictions and sentences, and acquit Balwant Singh and Jot Ram.

Appeal accepted.

(2) 10 B. H. O. R. 356.

(3) 14 Ind. Cas. 970; 14 Bom. L. R. 147; 13 Cr. L. J. 426; 36 B. 524.

(1) 6 P. R. 1897 Cr.; 25 C. 20; 24 I. A. 137; 2 C. W. N. 1; 7 Sar. P. C. J. 239; 13 Ind. Dec. (N. S.) 14 (P. C.)

KRISHNAYYA v. EMPEROR.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 77-B OF 1918.

June 4, 1918.

Present:—Mr. Kotwal, Offg. A. J. C.

KRISHNAYYA—ACCUSED—APPLICANT

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 234—Joinder of charges—Offences against different individuals committed by one person, whether can be tried together—Procedure.

The conviction of an accused person at one trial for three acts of misappropriation committed against three different persons is not illegal.

Section 234 of the Criminal Procedure Code is not limited to cases where the offences have been committed against the same person.

Revision of the order of the Sessions Judge, East Berar, dated the 20th April 1918, in Criminal Appeal No. 46 of 1918.

ORDER.—I see no reason to interfere in revision. Grounds Nos. 2 and 4 are a repetition of grounds Nos. 1 and 3 of the memorandum of appeal before the Appellate Court and have been properly dealt with by that Court. The 1st ground urges that the 3 acts of misappropriation having been committed against three different persons the conviction of the appellant at one trial for all of them is bad and *Empress of India v. Murari* (1) is relied on. The case has been dissented from in *Manu Miya v. Empress* (2) and also in *Sri bhagwan Singh v. Emperor* (3). The present case is analogous to *Queen Empress v. Juala Prasad* (4). Section 234, Criminal Procedure Code, is not, in my opinion, limited to cases where the offences have been committed against the same person, see also *Ohhatradhari Misser v. Emperor* (5). There is no substance in ground No. 3. The judgment of the Appellate Court gives the points for determination, its decision thereon and the reasons for its decision quite fully and clearly.

(1) 4 A. 147; A. W. N. (1881) 156; 2 Ind. Dec. (N. S.) 735.

(2) 9 C. 371; 11 C. L. R. 522; 4 Ind. Dec. (N. S.) 896.

(3) 3 Ind. Cas. 319; 13 C. W. N. 507; 9 C. L. J. 149; 5 M. L. T. 349; 10 Cr. L. J. 272.

(4) 7 A. 174; A. W. N. (1884) 321; 4 Ind. Dec. (N. S.) 387.

(5) 28 Ind. Cas. 638; 19 C. W. N. 557; 16 Cr. L. J. 332; 43 C. 13.

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I do not see any illegality or impropriety in the Appellate Court's decision. The sentences are not severe. This application is dismissed.

Application dismissed.

BOMBAY HIGH COURT.

CRIMINAL REVIEW No. 415 OF 1917.

April 3, 1918.

Present:—Mr. Justice Shah and

Mr. Justice Marten.

EMPEROR—PROSECUTOR

versus

MADHAV LAXMAN AND ANOTHER—

ACCUSED.

Criminal Procedure Code (Act V of 1898), ss. 197, 215, 234, 239, 532—Sanction to prosecute public servant—Offence, designation of, whether necessary—Joint trial of two accused for cheating—Conspiracy—One transaction—Commitment, whether can be quashed by Sessions Judge.

Where a Collector sanctioned the prosecution of a Kulkarni and a Patil "for cheating or for such other offence with which it may be necessary to prosecute them in connection with obtaining money from ryots."

Held, that the offence or offences which might be established in connection with obtaining money from ryots were sufficiently designated in the sanction, and that the sanction was not invalid on account of vagueness. [p. 872, col. 2; p. 875, col. 1.]

In each case it is a question of fact whether the offences in respect of which more persons than one are charged at the same trial were committed in the same transaction, within the meaning of section 239 of the Criminal Procedure Code, and that question must be determined with reference to the facts of each case. [p. 873, col. 2; p. 874, col. 1.]

Where it was alleged that the accused, the Kulkarni and the Patil of a village, conspired together and cheated certain persons on the same day, by asking them to pay certain sums in excess of what was properly payable by them as assessment:

Held, that there being clear proximity of time and space, clear continuity of action and sufficiently specific community of purpose, the offences committed by the accused must be held to be committed in the same transaction within the meaning of section 239 of the Code of Criminal Procedure, so that the joint trial of the accused under that section was not illegal. [p. 873, col. 2; p. 876, col. 1.]

Under section 215 of the Criminal Procedure Code a commitment can be quashed by the High Court only and only on a point of law. Section 532 of the Code applies only to a case where a Magistrate or other authority purporting to exercise powers duly conferred, which are not so conferred;

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commits an accused person to a Court of Session. It has no application to a case where the Court of Session considers that a commitment made by a competent Court is illegal. [p. 872, cols. 1 & 2; p. 875, col. 1.]

Revision against the order of the Additional Sessions Judge, Dharwar.

Mr. S. V. Palekar, *amicus curiæ*, for the Accused.

Mr. S. S. Patkar, Government Pleader, for the Crown.

JUDGMENT.

SHAH, J.—The facts relating to this case are briefly these. The accused, who are the Kulkarni and the Patil of the village of Bhandiwad, were committed to the Court of Session on the 15th August 1917 on a charge of cheating three persons. They were tried by the Additional Sessions Judge of Dharwar with the aid of Assessors. The evidence and the opinion of the Assessors were recorded. The case was then adjourned for judgment.

On the 10th September 1917 the learned Additional Sessions Judge made an order under section 532 of the Criminal Procedure Code quashing the commitment and directing a fresh enquiry. This order was originally brought to the notice of this Court by the District Magistrate; but the Court refused to entertain the reference made by him against the order of the Additional Sessions Judge. The order made by the Additional Sessions Judge having been brought to the notice of this Court, a Rule was issued with a view to determine the legality of this order.

We have now heard the learned Government Pleader, who contends that the order is illegal. As there was no appearance on behalf of the accused, we requested Mr. Palekar to present the arguments in favour of the order, and we are obliged to Mr. Palekar for having done so.

The order of the lower Court is based on two grounds: *first*, that the sanction under section 197 of the Code is invalid, and, *secondly*, that the joint trial of the two accused for three distinct offences of the same kind is illegal.

In the first place the order is wrong, because section 532 has no application to a case of this kind. That section applies to a case where any Magistrate or other authority purporting to exercise the powers

duly conferred, which are not so conferred, has committed an accused person for trial to a Court of Session. In the present case there is no question that the Magistrate, who committed the accused for trial to the Court of Session, had the power to do so, and consequently, in my opinion, even assuming for the sake of argument that the grounds, upon which the order is based, are valid, the lower Court would have no power to quash the commitment and direct a fresh enquiry under section 532. The proper procedure for the lower Court would have been to make a reference to this Court with a recommendation that the commitment should be quashed, as under section 215 of the Code, a commitment can be quashed by the High Court only and only on a point of law.

In the view, however, I take of the grounds upon which this order is based, it is unnecessary to deal with the order in question on the footing that section 532, Criminal Procedure Code, has no application. The first ground relates to the form of the sanction. The sanction in this case is given by the Collector of Dharwar for the prosecution of Madhavrao Luxman Kulkarni and Ningangowda Dymangowda Patil "for cheating or for such other offence with which it may be necessary to prosecute them in connection with obtaining money from *ryots*." It seems to me that the sanction is not invalid on account of vagueness in the designation of the offences in respect of which the prosecution is sanctioned. The sanction in the present case is in form very much like the sanction that was given in the case of *Imperatrix v. Lakshman Sakharam* (1), where the sanction directed that the accused be "placed on his trial under section 466, Indian Penal Code, or any other section which may seem applicable after farther investigation". This sanction was held by the learned Judges in that case to be sufficient under section 466 of the Code of 1872, corresponding to section 187 of the present Code; and it seems to me that the present sanction is equally valid and proper. Even apart from this authority, I should have taken the same view as to the validity of the sanction.

(1) 2 B. 481; 1 Ind. Dec. (N. S.) 743.

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The case of *Queen Empress v. Samavir* (2), which has been relied upon by the learned Additional Sessions Judge in support of his view, does not seem to me to have any application. There the Board of Revenue sanctioned the prosecution of a Deputy Tahsildar by the Collector of the District "for bribery or such of the charges set forth in the Deputy Collector's report as he thinks likely to stand investigation by a Criminal Court." The judgment in the case shows that this sanction was held to be invalid, because the resolution of the Board of Revenue was read as not sanctioning the prosecution of the accused in that case for any offence designated by itself, but as merely delegating to the Collector the power of selecting out of several such charges as he thought likely to stand investigation.

In the present case in my opinion there is no such delegation. The sanctioning authority has applied its mind to the facts of the case and sanctioned the prosecution of the accused persons and has also, in my opinion, sufficiently designated the offence or offences which may be established in connection with obtaining money from *ryots*. Thus the case of *Queen Empress v. Samavir* (2), which must be taken with reference to the facts in that case, does not show that the sanction in the present case is invalid in any way. It is significant to note that no objection was taken to the validity of the sanction by the accused at the trial.

In this view of the case, it is not necessary to consider the further point, which has been urged by the learned Government Pleader, that no sanction under section 197 is necessary for prosecuting the accused persons on a charge of cheating. Several cases have been referred to in the course of the argument; but, in view of the decision in *Imperatrix v. Lakshman Sakharam* (1), it may not be easy to accept the argument. It is not necessary, however, to express any opinion on this point.

The second ground relates to the joint trial of the two accused persons on the charge of cheating the three persons specified in the charge. The learned Additional Sessions Judge has come to the conclusion that the cheating of these three persons

cannot be said to form part of the same transaction within the meaning of section 239, that section 234 of the Code does not apply to the trial of more persons than one, that consequently there has been a misjoinder of charges and that the joint trial is illegal. It is not necessary to refer to the various cases to which the learned Judge has referred in order to decide this point. The whole question is, whether on the facts alleged by the prosecution, these acts, *viz.*, cheating the three persons mentioned in the charge, were committed in the same transaction or not. The case for the prosecution is that the two accused, the Kulkarni and the Patil, conspired together and cheated certain persons on the 17th of March 1916 by asking them to pay certain small sums in excess of what was properly payable by them as assessment. The case for the prosecution in effect is that the purpose of the two accused was one and the same, namely, to induce the different persons who went to pay the land revenue on that day to pay more than what was legally payable by them to the Government, that they acted in concert and that the purpose was not merely the general purpose of cheating the villagers, but that the scheme adopted by them was a common scheme.

Having regard to the meaning put on the word "transaction" in the various decisions of this Court, it is clear to my mind that according to the prosecution case these offences were committed in the same transaction. There was clear proximity of time and space, there was clear continuity of action, and there was sufficiently specific community of purpose.

Under these circumstances, it seems to me that the charge as framed is in no way illegal, and that there is nothing in the charge which can be properly held to vitiate the trial.

The case of the Sub-Registrar [*Girwar-dhari Lal v. Emperor* (3)] and the case of the Directors [*Ohoragudi Venkatadri v. Emperor* (4)] referred to by the lower Court are clearly distinguishable from the present case. In each case really it is a question

(3) 4 Ind. Cas. 13; 13 C. W. N. 1062; 10 Cr. L. J. 463.

(4) 5 Ind. Cas. 547; 33 M. 502; 20 M. L. J. 220; 7 M. L. T. 299; (1910) M. W. N. 65; 11 Cr. L. J. 252.

(2) 16 M. 468; 3 M. L. J. 227; 2 Weir 220; 5 Ind. Dec. (N. S.) 1033.

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of fact whether the offences in respect of which more persons than one are charged at the same trial are committed in the same transaction, and that must be determined with reference to the facts of the case. In holding at this stage that there is nothing illegal about the charge, I am only taking the story of the prosecution without expressing any opinion as to the merits of that story.

The result, therefore, is that both the grounds on which the lower Court has based its order fail, that neither the commitment nor the trial is illegal, and that the order of the lower Court must be set aside.

The question still remains as to what order we should now make. The trial was all but complete, when this order was made, and ordinarily I should have preferred to direct that the trial should be resumed from the stage where it was left and finished according to law. But the difficulty has arisen in consequence of the delay owing to this order, and the subsequent proceedings which became necessary in consequence of the order. By asking the learned Judge now to write his judgment, we would be practically asking him to weigh the evidence recorded more than six months ago. It is not reasonable to expect the learned Judge to refresh his memory of the evidence without the aid of further arguments: and on principle it is desirable that the course which necessitates the writing of a judgment in a Sessions trial, in which the evidence is recorded more than six months ago, should be avoided. My learned brother is definitely of opinion that under such circumstances, the proper course is to direct a re-trial and under the peculiar circumstances of this case, I have also come to the conclusion that though the trial, so far as it has proceeded, is legal and proper, the best course would be to order a re-trial according to law. The accused have not appeared before us, though the terms of the Rule issued by this Court clearly gave them notice that a re-trial might be ordered by this Court. It is unfortunate that we have to deal with this matter at an interlocutory stage and to direct a re-trial owing to the lapse of time; but it is the best order that could be

made under the circumstances in the interests of justice.

I would, therefore, set aside the order made by the lower Court and direct that the accused be re-tried according to law.

I desire to make it clear that the discretion of the trial Court under the provisions of the Code in framing the charge or charges against the accused and in directing a joint trial is not to be fettered in any way by the view which I have taken as to the legality of the present charge and the trial.

[The rest of the judgment is not reportable.]

MARTIN, J.—The course which the learned Additional Sessions Judge, Mr. Ferrers, took in this case was as unusual as it is embarrassing in the result. The case was heard in the ordinary way, evidence was taken, the Assessors gave their opinions, and then the learned Judge reserved his judgment. So far everything followed a normal course, but apparently in the course of considering his judgment, the learned Judge thought that it was his duty, in following what he conceived to be the English practice, to undertake the conduct of the defence. In fact the time for conducting the defence was over as the hearing had been finished, but in his judgment the learned Judge raised two technical objections, which, as far as I can ascertain, were never put to the Government Pleader or argued before him and which ought to have been taken at the beginning of the trial, if at all. Then having considered those technical objections, he decided that they were good, and having next held that section 532 applied, the learned Judge quashed the commitment and directed a fresh enquiry. In other words, the whole proceedings were to commence *de novo*.

Now in the first place, I think the learned Judge has stated what I have understood to be the English practice far too broadly. He says;—"It is, I believe, the traditional practice of the British Courts of justice that where a prisoner is undefended, the Judge himself undertakes the conduct of the defence. Following what I believe to be the traditional course, I feel it my duty to advert to

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certain particulars which the accused have allowed to pass in silence." Now in England if a prisoner is undefended the Judge very frequently asks a Barrister to conduct the case for the defence. But if that course is not followed, I think it is inaccurate to say that the Judge conducts the case for the defence. That to my mind implies that the Judge, instead of being an independent officer holding the balance even between the Crown on the one side and the prisoner on the other, leaves that position and adopts the position of an Advocate. If he does adopt the position of an Advocate, then at once he is in this danger of thinking that the points he himself has taken are sound ones. I cannot help thinking that the learned Judge arrived at the conclusion, which he eventually did, in this case, largely owing to the mistaken idea of the course that he should adopt where a prisoner is undefended. That all proper points should be brought out on behalf of the prisoner, that if necessary a Judge should closely examine the Crown witnesses, and that he should put the points for the defence to the Jury, is all commonplace, but I protest against the notion that a Judge, whether the prisoner is defended or undefended, should deviate from his position of strict impartiality between the Crown on the one side and the prisoner on the other. I must not, however, be understood as thinking that the Judge erred in taking the objections at that late stage. It was unfortunate that they did not occur to anybody before, but that may happen, however careful Judge and Counsel are. Whenever they did occur, I think it was right to take them.

Next, turning to the section under which the learned Judge acted, viz., 532, I agree with my learned brother that even if the learned Judge's objections were well founded, that section did not enable him to quash the present commitment, so that in any event his actual decision seems to be erroneous.

Next, taking the technical objections which I have referred to, they were two. One was that the sanction given to prosecute was inadequate, because it amounted, as the learned Judge thought, to delegation, and, secondly, that there

was a misjoinder of charges. Now, as regards the first point as to the sanction, the learned Judge seems to have followed the decision in *Queen-Empress v. Samavir* (2), without considering closely enough the facts of the case and the precise sanction given in that case and in this. I think that when the two sanctions are read side by side, there is a clear difference between them. In the case of *Queen-Empress v. Samavir* (2) I think there was a complete delegation to the Deputy Collector to bring any such charges as he, the Deputy Collector, would think likely to stand investigation. That is the way I read the sanction given in the Madras case. But here the words are different, for the sanction given was "for cheating or for such other offence with which it may be necessary to prosecute them in connection with obtaining money from *ryots*." As I read those words, it means this, that cheating was put as what I may call the primary offence, but if for technical reasons it was necessary to add some other offences in connection with the same set of facts, then the proper authority was at liberty to do so. Personally I think, that is allowable. In the decision which my learned brother referred to in *Imperatrix v. Lakshman Saktharam* (1), the sanction is expressed I think in better terms than the one we have got to deal with here. But it amounts to the same thing, namely, that a person is to be put on trial under a particular section or any other section which may seem proper after further investigation. In that respect I agree with what was said in *Girwardhari Lal v. Emperor* (3), that these sanctions are not to be looked upon as if they were the precise charge to be framed. Some latitude must be given to the gentleman who has to frame the legal charge in precise language. At the same time I quite see that the sanction given must be substantially definite, but I do not think it is an objection if some words are added which do enable the accused to be put on trial in conformity with one particular section or with such other sections of the Code as may seem proper under the circumstances and arising out of certain facts referred to definitely in the sanction.

I accordingly think that the sanction given in the present case was sufficient,

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but in saying that I do not mean to say that I think it should be adopted as a precedent. I think the form that was used might very well have been improved upon, but I think it was sufficient under the Act. I express no opinion on the point whether sanction was necessary at all but will assume for the purposes of this case, though without deciding the point, that sanction was necessary.

Then the next point is as regards the misjoinder of charges. Here the three villagers, who are alleged to be the victims of the accused, were all paying the same Government tax on the same day and all together before the two accused. The case for the prosecution, as I understand it, is that there was really a conspiracy between the two accused to defraud each of these villagers in connection with the payment of this tax. In my opinion, on the facts of this case, this amounted to "the same transaction" within the meaning of section 239 of the Criminal Procedure Code. There certainly was the same continuity of purpose as regards the accused and taking the other circumstances into consideration, *viz.*, that all the three accused were there at the same time paying the same tax, I think it does amount to the same transaction. In that view there could be no misjoinder of charges. In this respect I think the decision in *Emperor v. Ganesh Narayan Dikshit* (5) affords a useful guide to what is proper under the circumstances. Personally I feel that a wide meaning ought to be given to the words "the same transaction." Then it will be for the Judge in any particular case at the trial to say that although there is one charge yet he would direct separate trials of certain matters in that charge. That is the remedy if he thinks that any embarrassment may be caused to the prisoners at the trial by joinder of charges.

Then as regards the case that was relied on the other way, *viz.*, *Girwardhari Lal v. Emperor* (3), really no decision was arrived at by the Court. All that the Court did was to say that as it could not ascertain the facts as to what the nature of the offences was they were not inclined to interfere in revision, as no objection had

been made at the trial as to any misjoinder.

The next question is: What course are we to take? Judgment was given seven months ago. Everything was finished except the judgment, and the learned Judge did not take the course which, as at present advised and without hearing arguments on the point, I should have thought he might have taken, namely, to have given an alternative judgment, based on the one hand on the hypothesis that his technical objections were right and on the other hand that they were wrong, and then sent the case up to the High Court. If he had taken that course, we should have been in a position to say finally what should be done. But as it is, it seems to me the only alternatives before us are either to direct in effect the learned Judge to write his judgment on the merits or to have a re-trial. Personally I am opposed to the idea that a proper judgment may be written seven months after the case has been tried, and nonetheless so because the case is of a criminal nature. It is almost impossible to imagine that the facts can remain fresh in the Judge's mind or that he will have any real recollection of the witnesses when he comes to make up his mind on which side the truth lies. I do not think it sufficient to say that the learned Judge can read up his notes of the case and notes of the argument. That won't necessarily bring back the faces of the witnesses and what he thought of them at the trial.

Therefore, I am clearly of opinion that the proper course in the present case is to direct a re-trial. We have got here very unusual circumstances, but I think that when such unusual circumstances do arise, the safest rule ordinarily is to begin *de novo*, and try the matter over again.

I accordingly agree that there should be a re-trial in the present case, and of course the learned Judge's order must be set aside.

At the re-trial it will be in the discretion of the Judge who tries the case to direct separate trials if he thinks fit as regards anyone or more of these villagers who are alleged to have been defrauded. That is a matter for his discretion, but as far as I can see on the facts, so far as they have been put before me, there is no neces-

(5) 17 Ind. Cas. 705; 14 Bom. L. R. 972; 13 Cr. L. J. 833.

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sity for ordering separate trials. But our judgments must not fetter his discretion in any way.

[The rest of the judgment is not reportable.]

Re-trial ordered.

PUNJAB CHIEF COURT.

July 13, 1918.

CRIMINAL APPEAL No. 118 OF 1918.

Present:—Mr. Justice Scott-Smith and

Mr. Justice Martineau.

EMPEROR—APPELLANT

versus

MUHAMMAD SHAH AND ANOTHER—

RESPONDENTS.

Penal Code (Act XLV of 1860), s. 415—Cheating—Offences, ingredients of—Harm, not necessary consequence of act—Offence, whether committed.

In order to constitute the offence defined in the second part of section 415 of the Penal Code:

(1) there must be deception practised upon a person;

(2) by that deception the person must be induced to do or omit to do something which he would not have done or omitted to do, had he not been so deceived;

(3) such act or omission must cause, or be likely to cause, to the person deceived damage or harm in body, mind, reputation or property. [p. 878, col. 1.]

To constitute the offence of cheating under section 415, Indian Penal Code, the damage or harm caused or likely to be caused to the person deceived in mind, body, reputation or property must be the necessary consequence of the act done by reason of the deceit practised, or must be necessarily likely to follow therefrom. [p. 878, col. 2.]

The accused presented certain recruits before a Recruiting Officer, who rejected them. Subsequently the accused offered the same recruits to one M., on condition that the latter would pay Rs. 50 for each recruit. It was arranged, however, that the money would only be paid if the recruits were accepted by the Recruiting Officer. Before the Recruiting Officer it was discovered that the recruits had already been rejected:

Held, that there being only a possibility that M. might suffer annoyance owing to the discovery that the recruits had already been rejected and to the fact that his explanation might not be believed at once by the Recruiting Officer, the accused were not guilty of cheating under section 415 of the Penal Code. [p. 878, col. 2.]

Appeal from the order of the Magistrate, 1st Class, Lyallpur, dated the 31st October 1917.

Mr. C. Bevan Petman, Government Advocate, for the Appellant.

Mr. Badr-ud-Din Qureshi, for the Respondents.

JUDGMENT.—This is an appeal by the Local Government from the order of a First Class Magistrate acquitting Muhammad Shah and Babu Ram of the offence of cheating and of attempting to cheat under sections 417 and 420/511, Indian Penal Code.

The alleged facts of the case are as follows:—Certain recruits were presented by Babu Ram before the Assistant Recruiting Officer at Lahore and were rejected by him as unfit. Muhammad Shah accused met another rejected recruit in the Lahore Bazar and took him to Babu Ram accused. Both of them then brought the rejected recruits to Lyallpur and offered them to Muhammad Kasim Lambardar on condition that he would pay Rs. 50 for each recruit. It was arranged that this money would only be paid if the recruits were accepted by the Recruiting Officer. At the same time Muhammad Kasim asked the accused whether the recruits had already been rejected or not, and they replied in the negative. Muhammad Kasim then presented the recruits to the Assistant District Recruiting Officer, whose orderly Muhammad Shah told them that they had already been rejected in Lahore. When enquiries were made from the recruits themselves, they confirmed this and admitted that they had been rejected. Upon this the District Recruiting Officer made a report to the local authorities and the result was that the accused were *chalaned* under section 420, Indian Penal Code.

Admitting the facts to be as stated, the Magistrate was of opinion that the accused had committed no offence. It was conceded by the Public Prosecutor that there was no offence under sections 420/511, because the money was not to be paid by the Lambardar unless the recruits were accepted. It was, however, contended that the offence of cheating as defined in the second part of section 415, Indian Penal Code, had been committed, because the act of the Lambardar in presenting the rejected recruits to the Recruiting Officer was one likely to cause him damage or harm in his reputation. The Assistant District Recruiting Officer admitted in his statement that the Lambardar

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was not liable to any punishment departmentally, as merely presenting rejected recruits is not by itself an offence unless it is done knowingly. As the *Lambardar* did the act unknowingly he was safe from the wrath of the District authorities. The lower Court says: "Hence that act did not cause him harm in body or property." It went on to say that if it did him any harm in reputation in the eyes of his fellow villagers, the harm was so slight that it would be covered by section 95, Indian Penal Code. It is not now contended by the learned Government Advocate that any offence under section 420/511 has been committed, because Muhammad Kasim was only to pay Rs. 50 per recruit if the recruits were accepted. It is contended, however, that an offence has been committed such as is defined in the second part of section 415, Indian Penal Code. In order to constitute the offence there defined:—

(1) there must be deception practised upon a person;

(2) by that deception the person must be induced to do or omit to do something which he would not have done or omitted to do, had he not been so deceived;

(3) such act or omission must cause, or be likely to cause, to the person deceived damage or harm in body, mind, reputation or property.

Now, assuming the facts to be as stated, the first and second ingredients of the offence exist in the present case. But the question is, as put by the learned Magistrate, whether the act of the *Lambardar* in offering the rejected recruits caused, or was likely to cause to him damage or harm in body, mind, reputation or property. The learned Government Advocate does not say that this act would injure his reputation in the eyes of his fellow villagers. What he urges is, that if the *Lambardar's* explanation to the effect that he did not know that the recruits had been previously rejected had not been accepted, he would then have been reported to the Deputy Commissioner, who might have punished him departmentally. What actually happened was that Muhammad Kasim's explanation was accepted and no action was taken against him. Under the circumstances it cannot, in our opinion, be said that the *Lambardar's* action in present-

ing the rejected recruits, seeing that he presented them not knowing that they had been previously rejected, was one likely to cause him any harm or injury at all. There was, in our opinion, only a possibility that he might suffer annoyance owing to the fact that his explanation was not at once accepted. The possibilities contemplated by the learned Government Advocate are, in our opinion, too remote. In *Mojei v. Queen Empress* (1) it was held that to constitute the offence of cheating under section 415, Indian Penal Code, the damage or harm caused or likely to be caused to the person deceived in mind, body, reputation or property must be the necessary consequence of the act done by reason of the deceit practised, or must be necessarily likely to follow therefrom. We are quite unable to hold that damage to Muhammad Kasim's reputation was the necessary consequence of his offering rejected recruits. There is no reason to assume that there was any likelihood that his explanation would be rejected and we see as a matter of fact that it was accepted. Under the circumstances we are unable to hold that there was any reasonable likelihood of Muhammad Kasim's suffering any damage or harm whatsoever from the fact that he innocently presented rejected recruits to the Recruiting Officer.

We, therefore, dismiss the appeal.

Appeal dismissed.

(1) 17 C. 606; 8 Ind. Dec. (N. S.) 943.

MADRAS HIGH COURT.

CRIMINAL MISCELLANEOUS PETITIONS NOS. 83
AND 349 OF 1918.

August 20, 1918.

Present:—Mr. Justice Sadasiva Aiyar and
Mr. Justice Napier.

ARUNACHALAM PILLAI—RESPONDENT
No. 2—PETITIONER

versus

PONNUSWAMI PILLAI—PETITIONER—
RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 144,

ARUNACHALAM PILLAI v. PONNUSWAMI PILLAI.

195—Disobedience of order under s. 144—Sanction for prosecution granted by District Magistrate—Order, whether administrative or judicial—Appeal, whether lies—'Court' in s. 195 (7), meaning of—Public servant passing orders under s. 195 (1), whether acts judicially—Administrative orders—High Court—Revision, interference in.

An order passed by a Magistrate under section 144, Criminal Procedure Code is a judicial order and the authority issuing the order cannot be separated from the authority granting sanction for prosecution for disobedience of it. [p. 580, col. 2.]

Where, therefore, a Magistrate grants sanction for prosecution for disobedience of an order issued by him under section 144 of the Criminal Procedure Code, he acts as a 'Court' within the meaning of section 195, sub-section 7 of the Code. [p. 581, col. 1.]

The summonses and orders referred to in the group of offences mentioned in clause (a) of sub-section 1 of section 195, when issued by a Magistrate or Judge, are issued judicially and where sanction is given to prosecute for disobedience of such summonses or orders, such sanction is issued by the same authority, namely, the Court. [p. 581, cols. 1 & 2.]

Sankram Aiyar v. Sakkarappa Mudaliar, 2 Weir 155, explained.

The word 'Court' in sub-section 7 of section 195, Criminal Procedure Code, is not confined to clauses (b) and (c) of sub-section 1 of the section. Sub-section 7 is enacted for the purpose of explaining what is subordination within the meaning of sub-section 6, where the authority giving or refusing is a Court, and does not purport to confine its operation to clauses (b) and (c) of sub-section 1. [p. 581, col. 2.]

Where, therefore, sanction is given with reference to an offence against a Court, the appeal is governed by sub-section 7. [p. 581, col. 2.]

The High Court has no appellate or revisional authority over administrative orders of a District Magistrate. [p. 580, col. 1.]

A public servant—*qua* public servant is not subordinate to the authority of the High Court as required by section 195 (6) of the Criminal Procedure Code. [p. 580, col. 1; p. 581, col. 2.]

A Sub-Magistrate having refused to accord sanction for prosecution of the petitioner for disobedience of his order passed under section 144, Criminal Procedure Code, the opposite party appealed to the District Magistrate, who granted the sanction applied for. Against this latter order the petitioner appealed to the Sessions Judge, who refused to interfere with the District Magistrate's order on the ground that it was passed administratively.

Held, that the order of the District Magistrate was a judicial order, against which an appeal lay to the Sessions Judge. [p. 581, col. 2.]

Petitions under section 195, clauses 6 and 7, Criminal Procedure Code and under section 195, clauses 6 and 7, and sections 436 and 439, Criminal Procedure Code, praying that in the circumstances stated therein and in the affidavit filed with Criminal Miscellaneous Petition No. 83 of 1918, the High Court will be pleased to revoke the sanction to prosecute the petitioner herein, granted by

the District Magistrate of Trichinopoly in his proceedings D. Dis. No. 24 of 1918, dated 12th January 1918, (preferred against the order of the Stationary Sub-Magistrate, Trichinopoly, in Miscellaneous Case No. 10 of 1917) and to revise the order of the Sessions Court, Trichinopoly, dated the 1st March 1918, in Criminal Miscellaneous Petition No. 10 of 1918, declining to interfere with the above order of the District Magistrate.

FACTS appear from the judgment.

Mr. R. V. Seshagiri Row, for the Respondent, took the preliminary objection in Miscellaneous Petition No. 83 that no appeal lay to the High Court direct from the order of the District Magistrate without resort in the first instance to the Sessions Court. If the order of the Sub Magistrate refusing sanction should be treated as an executive and not as a judicial order, equally so was the order of the District Magistrate an executive order, over which the High Court had no appellate or revisional authority. If the order was passed by the Magistrate *qua* public servant, section 195 (7), Criminal Procedure Code, would not apply.

Mr. C. Rajagopala Aiyangar, for the Petitioner.—As the order was passed by the District Magistrate as a public servant, petitioner was entitled to come to the High Court in revision. With regard to Miscellaneous Petition No. 399 the order appealed against was one passed by a Court. The original order out of which the sanction proceedings arose was also passed by a Court. The Sessions Judge should not have declined to exercise jurisdiction. If the sanction was accorded by a Court, it attracts the provisions of sub-section 7. Clause (a) of section 195 should not be narrowed or restricted to orders passed by public servants in their character as public servants. Clauses (b) and (c), which refer to Courts, do not exclude orders passed judicially under clause (a).

Messrs. E. R. Osborne and P. R. Narayanaswami Aiyar, for the Crown.

ORDER.

NAPIER, J.—These are two petitions, one to revise an order of the District Magistrate of Trichinopoly of the 12th January 1918, the other to revise the order of the Sessions Judge of Trichinopoly of the 1st

ARUNACHALAM PILLAI-V. PONNUSWAMI PILLAI.

March 1918. The order of the District Magistrate was made on appeal from an order of the Stationary Sub-Magistrate of Trichinopoly refusing to sanction the prosecution of the present petitioner and another for an offence under section 183, Indian Penal Code. The petitions were the result of an order of the Stationary Sub-Magistrate passed on the 8th May 1917 under section 144, Criminal Procedure Code, restraining this petitioner and others from taking the Pidari deity in procession through a lane claimed to be the private property of the present counter petitioners. This order was alleged to have been violated and hence the petition for sanction.

The Stationary Sub-Magistrate declined to grant the sanction on two grounds, one, that the order should not have been passed and that, therefore, disobedience cannot be considered to be an offence; the other, that the petition for sanction was the outcome of previously existing spite. The present counter-petitioner appealed to the District Magistrate of Trichinopoly, who decided that, the order having been passed, rightly or wrongly, disobedience to it was an offence and granted the sanction. This is one of the orders appealed against. The petitioner appealed from that decision to the Sessions Judge, who passed the following order: "The order appears to have been made by the District Magistrate as an administrative officer, and I think, therefore, that no appeal lies to this Court. Petition is dismissed." This is the other order appealed against.

The petitioner before us first argued that the order of the District Magistrate granting sanction against him was passed by him as a public servant, that no appeal lay to the Sessions Judge and that, therefore, he was entitled to come to the High Court. On this petition it is, in our opinion, enough to say that if the order was passed by the District Magistrate administratively, the High Court has no appellate or revisional power. We asked the learned Vakil to invite our attention to any provision either in the Government of India Act or the Letters Patent, or in the Criminal Procedure Code which makes a public servant *qua* such servant and not *qua* Court subordinate to the authority of the High Court as required by section 195,

sub-section 6, and he was unable to show us any. We, therefore, dismiss this petition.

On the second petition by way of what is, for convenience, called an appeal from the order of the Sessions Judge, the petitioner took up the opposite position, namely, that the order was one of a Court and that, therefore, the Sessions Judge was in error in declining to exercise his jurisdiction. We have, therefore, to decide whether the (appeal) provisions in section 195, sub-section (7), Criminal Procedure Code, apply to this order. We are clear that the Stationary Sub-Magistrate, in passing this order refusing sanction, was acting judicially, for the original order which, it was alleged, was disobeyed was an order passed under section 144, Criminal Procedure Code. These orders have always been treated as judicial orders and we cannot separate the authority issuing the order from the authority granting sanction for disobedience of it.

But the more difficult question is whether, on the language of section 195, Criminal Procedure Code, even though the order was passed by a Court, the "appeal" lies to another Court. Section 195, sub-section (1), deals with three classes of offences. The first group are sections 172 to 188 of the Indian Penal Code, which are classed in Chapter X of the Code under the heading "of contempt of the lawful authority of public servants;" the second group refers to section 193 and others, which are classed in the Code under the heading "of false evidence and offences against public justice"; and the third group contains the sections in Chapter XVIII of the Code and classed "of offences relating to documents and to trade and property marks." With regard to the first group section 195, Criminal Procedure Code, provides that no Court shall take cognizance of any such offence except with the previous sanction, or on the complaint, of the public servant or of some public servant to whom he is subordinate. With regard to the second group, the provision is that no Court shall take cognizance of any such offence when such offence is committed in or in relation to any proceeding in any Court, except with the previous sanction, or on the complaint, of such Court, etc. With reference to the third group it is provided that

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no Court shall take cognizance of any such offence when such offence has been committed by a party to any proceeding in any Court in respect of a document produced or given in evidence in such proceeding except with the previous sanction, or on the complaint, of such Court, etc. With reference to the second and third groups, the section provides that the term "Court" means Civil, Revenue or Criminal Court, but not a Registrar. The appeal in all cases is provided for by sub-section 6: "Any sanction given or refused may be revoked or granted by any authority to which the authority giving or refusing it is subordinate." Then sub-section 7 provides: "for the purposes of this section every Court shall be deemed to be subordinate only to the Court to which appeals from the former Court ordinarily lie." The question is whether the word "Court" in sub-section 7 refers to Court mentioned in sub-section (1), clauses (b) and (c), only, or whether it applies also to order made by a public servant as a Court under sub-section (1), clause (a). The Sessions Judge took the former view, following the decision of this Court reported as *Sankaram Aiyar v. Sakkarappa Mudaliar* (1). That decision is, however, no authority for his view, as the High Court held that the order was not one of a Court. It is, of course, clear that the offences grouped in clause (a) include disobedience of orders of Courts, such as contempt of summonses issued by Courts (section 172, Indian Penal Code), refusal to produce documents before Courts (section 175), refusal to take an oath or affirmation before a Court (section 178), giving false information to Court (section 181), obstructing sale of property offered for sale by the lawful authority of the Court (section 184), and disobeying a direction to abstain from a certain act promulgated by a Court under section 188, which is the present case. There can be no doubt that the various summonses and orders referred to in those sections when issued by a Magistrate or a Judge are issued judicially, and as pointed out above, it surely must follow from that that the sanction to pro-

secute for disobedience of such summons or order must be issued by the same authority, namely, the Court.

But this still leaves the other question open, namely, whether sub-section 7 applies to such sanction. I am of opinion that the word 'Court' in sub-section 7 is not confined to clauses (b) and (c). The Legislature must have been aware that offences against the authority of the Courts were covered by Chapter X of the Indian Penal Code and there is, of course, no reason why any difference should be made with regard to appeals between offences against the lawful authority of Courts and offences against public justice in relation to proceedings in Courts. The word 'public servant' was obviously used in clause (a) because it is used in the Penal Code throughout the provisions in Chapter X and 'public servant' is defined in section 21 of the Code as including Judges and Magistrates. Sub-section 7 is, I think, enacted for the purpose of explaining what is subordination within the meaning of sub-section 6, where the authority giving or refusing sanction is a Court, and does not purport to confine its operation to clauses (b) and (c) of sub-section (1), nor do I think that the Legislature had that intention. It seems to me that the word 'Court' was used in clauses (b) and (c) because it was intended to limit the operation of those clauses to proceedings in relation to Courts, thereby constituting a narrower class than is dealt with in clause (a), and I see no reason why, because a narrower class of cases confined to Courts only is provided for in those two clauses, the word 'Court' in sub-section 7 should be confined to those two groups and not read as applicable to the wider group in clause (a), which applies to both Courts and other public servants, both of whom are clearly covered by the word 'authority' in sub-section 6.

In the result I hold that where the sanction is given with reference to an offence against a Court, the appeal is governed by sub-section 7. The order of the Sessions Judge is set aside and he is directed to take the petition on his file and dispose of it according to law.

SADASIVA AIYAR, J.—I agree entirely. It is not essential for the decision of this case

(1) 2 Weir 155.

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to express an opinion on the question whether the particular order of the Sub-Magistrate mentioned in Criminal Revision Case No. 136 of 1903 reported as *Sankaram Aiyar v. Sakkarappa Mudaliar* (1) was rightly held by this Court on the facts of that case to have been passed by that public servant, not as a Criminal Court but as a public servant who was not a Court. It is, however, necessary to guard myself from subscribing to the opinion suggested by a sentence in that decision, that opinion being that a Sub-Magistrate would act as a Court only when he grants sanction for offences mentioned in section 195, clauses (b) and (c), that he could never act as a Court when he grants sanction for any of the offences mentioned in clause (a) and that therefore sub section (7) could never apply to a sanction given by a Sub-Magistrate for such an offence.

Order of Sessions Judge set aside.

M. C. P.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 11 OF 1915.

February 16, 1915.

Present:—Sir Henry Drake-Brookman, J. C.
ABDUL SUTTAR—APPLICANT

versus

THE SECRETARY, MUNICIPAL COMMITTEE, NAGPUR—RESPONDENT.

C. P. Municipal Act (XVI of 1903), s. 86—Notice to erect latrine, contents of—Directions, whether should be given—Committee, duty of.

It is clear from the language used in sub-section (1) of section 86 of the C. P. Municipal Act that a notice under that section is itself to contain the directions as to the nature and position of the required latrine. The law does not contemplate delegation to an individual officer of the power to give the necessary directions, though the Committee are at liberty to guide themselves by the advice of any expert in their employ.

Revision against the order of the Assistant Commissioner and Magistrate, 1st Class, Nagpur, in Criminal Case No. 428 of 1914, dated the 12th October 1910.

Mr. P. O. Kotwal, for the Applicant.

Mr. R. R. Muley, for the Respondent.

ORDER.—The applicant for revision owns a *chul* in the town of Nagpur and has been convicted and fined under section 139, C. P. Municipal Act, 1903, for disobeying a notice issued to him under section 86 (1), *ibid.*, which required him to erect a latrine for the tenants occupying the rooms in the said building.

Certain technical objections taken in the application for revision have been shown by the learned District Magistrate in reporting on the case to be groundless. The only point which now falls to be considered is that the notice was invalid for want of particulars regarding the manner in which the Committee desired the latrine to be provided. The direction given is to apply to the Health Officer of the Municipality and to erect a latrine in accordance with such order as he may give. The power conferred on the Committee by sub-section (1), section 86, of the Act is thus described in that provision:—to require the owner of any building to provide, in such manner as the Committee directs, any privy...which should, in the opinion of the Committee, be provided for the building or the land appurtenant thereto. In my opinion it is clear from the language used that the notice itself is to contain the directions of the circumstances deemed appropriate. The law does not contemplate delegation to an individual officer of the power to give the necessary directions, though the Committee are of course at liberty to guide themselves to a decision by the advice of any expert in their employ. As pointed out in *Ramdularay v. Ohhinduvara Municipality* (1), a Municipal Committee must keep rigidly within the limits of the authority entrusted to it. In the present case, moreover, the time allowed for moving the Health Officer and erecting a latrine was only 10 days, a period which might easily prove insufficient for securing the necessary directions from that official.

I hold that the Committee should have formulated and included in their notice specific directions as to the nature and position of the required latrine and that

(1) 6 Ind. Cas. 431; 6 N. L. R. 53.

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for want of these the notice issued is bad in law. The conviction and sentence in the applicant's case are accordingly set aside and the fine (if paid) will be refunded.

I would add in conclusion that the trying Magistrate has entirely ignored the defence that the applicant has on his own land no site on which to erect a latrine. If this be the fact, the Committee will have to provide a site and the notice under section 86 (1), if again issued, should show the position selected.

Conviction set aside.

PUNJAB CHIEF COURT.

CRIMINAL APPEAL NO. 211 OF 1918.

October 3, 1918.

Present:—Mr. Justice Scott-Smith and
Mr. Justice Broadway.

SIKANDAR AND OTHERS—APPELLANTS

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 99, thirdly, 148, 149; 302—Rioting—Death caused in riot—Parties engaging deliberately in fight—Right of private defence—Public authorities, protection of, not claimed, effect of—Evidence Act (I of 1872), s. 25—Report made to Police, admissibility of, against person who made it.

There is no right of private defence where two parties arm themselves for a fight and deliberately engage in one. [p. 886, col. 1.]

A dispute arose over the possession of a plot of land between two parties of villagers. After an altercation each party retired to their own well and armed themselves with spears, hatchets and *dangs*. One party then advanced to attack the other and the latter came out to meet the attack. In the fight which ensued, one man on each side was killed and others received injuries. The *thana* was only a mile away and each party had ample time to send word to the Police and claim the protection of the Police Authorities, but neither of them did so:

Held, that the members of each party were guilty of offences under section 302 of the Penal Code, inasmuch as the common object of each party was to cause injury and hurt to those they attacked and they must have known that the use of the formidable weapons they used would in every likelihood result in the causing of death. [p. 884, col. 2; p. 885, col. 1.]

A report made to the Police which amounts to a confession is not admissible in evidence against the person who makes it. [p. 885, col. 2.]

Appeal from the order of the Sessions Judge, Attock, at Campbellpur, dated the 26th February 1918.

Dr. Shuja ud Din, for the Appellants.

Mr. C. Bevan Petman, Government Advocate, for the Respondent.

JUDGMENT.—The facts of the cases out of which this and Criminal Appeal No. 219 of 1918 have arisen are given in ample detail in the judgment of the learned Sessions Judge. It is, therefore, unnecessary to repeat them at length here. Briefly they are as follows:—On the 4th July 1917 a serious fight took place at Mauza Bhangri, some four miles from Hazro. The parties to this fight were Pathans of the said village, to the north of which there is some *barani* land regarding which there was a boundary dispute between, what may be termed, the parties of Shahzada and Sarwar, respectively. It is said that early in the morning of the 4th July Shahzada together with Sher Bahadur and Hayat Khan attempted to plough up certain reeds growing along the boundary. They were prevented from so doing by Sikandar, Aynb, Shahbaz and Sarwar. An altercation ensued but a fight was averted. Shahzada and his friends then retired to their well known as Sadhuwala, while Sarwar and his companions fell back on to their well known as Gobindawala. These two wells are some 65 *karams* apart, Sadhuwala well being some 30 *karams* away from the village *abadi*. It is said that, at these wells, each side was reinforced and weapons such as spears and hatchets were procured from the village. It soon got bruited about in the village that a fight was imminent and a crowd collected to witness it. At Sadhuwala well were Shahzada, Hajun, Sher Bahadur, Hayat Khan, Az'z Khan, Najim Khan and Shahinchi, while the party collected at Gobindawala well consisted of Sarwar, Sikandar, Shahbaz, Fazal Khan and Mawaz. Both sides are alleged to have been armed with spears, hatchets and *dangs*. As has been said above, the two wells are only 65 *karams* apart and it is easy to understand that a certain amount of abuse must have been exchanged. Finally, it is said that Sarwar led his men to the attack and made for Sadhuwala well. Shahzada and his following advanced to meet their opponents and the two sides met at a distance of some 8 *karams* from

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Sadhuwala well where the fight took place, in the course of which on Sarwar's side Sikandar, Shahbaz and Ayub received simple injuries while Sarwar himself was killed. The medical evidence shows that Sarwar, Sikandar and Shahbaz received injuries from spears or cutting weapons while Ayub received injuries caused by *lathis*. On the other side Shahzada was killed, having received injuries from spears and cutting weapons, while Shahinchi, Najim Khan and Hayat Khan also received hurts caused by *lathis* and cutting weapons as well as by spears. The injuries received by Shahinchi were grievous, as being dangerous to life, while Najim Khan's injuries were also serious though simple. Reports were made at the *thana* by both sides, that on behalf of Sarwar's party being made by Shahbaz and that on behalf of Shahzada's party being made by Shahinchi. The *thana*, it should be noted, is one mile from the scene of the occurrence. The Police reached the spot and in due course sent up both sides for trial on charges under sections 302 and 148-149, Indian Penal Code. The persons tried in the one case were Sikandar, Shahbaz, Ayub, Fazal Khan and Mawaz and in the other Hajun, Sher Bahadur, Hayat Khan, Aziz Khan, Najim Khan and Shahinchi. The learned Sessions Judge acquitted Mawaz, giving him the benefit of certain doubts that he entertained as to his having actually taken part in the fight, but convicted all the other persons in both cases, finding them guilty under sections 148 and 302, Indian Penal Code, and sentencing them all to transportation for life.

Both sides have preferred appeals to this Court and we have heard Mr. Shuja-ud-Din for Sikandar and his party and Mr. Ram Lal for Hajun and his companions, while the learned Government Advocate has addressed us on behalf of the Crown. The trials were held separately, as was necessary, but as the two cases dealt with the same incident, the learned Sessions Judge has written one main judgment and this present judgment will dispose of both the appeals.

The case against the appellants in Criminal Appeal No. 211 of 1918 (Sikandar, etc.) is that they were the aggressors and attacked the opposite party. It has been

abundantly proved that the actual fight took place some 8 *karams* from Sadhuwala well, which shews conclusively that Sikandar and his party were the actual assailants and directly responsible for the fight. For them it was urged that the story for the Crown was incorrect, and that the truth was that Hayat Khan was seen cutting down the reeds early in the morning and was asked by Sikandar not to do so, that a quarrel ensued and the parties separated, Sikandar going back to his well and going about his ordinary avocations; that apparently the other faction had collected at Sadhuwala well and that by chance Sarwar happened to pass within a few paces of it whereupon he was attacked and killed, and that when Sikandar went to the spot he too was beaten. Those of the appellants in this case who received no injuries assert that they were not present. This story has been disbelieved by the learned Sessions Judge and we have no hesitation in holding that he has taken a correct view. The defence story is not supported by any evidence, and the report made by Shahbaz at the Police station shews that it was Sikandar who is said to have passed by the well and to have been attacked, whereas the story now told is that Sarwar was the unfortunate victim.

Mr. Shuja-ud-Din took exception to the admissibility of this report on the ground that it was a statement made to the Police by an accused person, and reliance was placed on *Harji v. Emperor* (1). This case, however, does not afford Mr. Shuja-ud-Din any assistance, as the statement made by Shahbaz is not in the nature of a confession and therefore is not excluded by the Evidence Act or by the principles enunciated in the case cited. It was then urged that in a fight of this nature, when both sides, being equally armed, joined willingly in a fight, a conviction under section 302, Indian Penal Code, could not be legally passed. In this we are unable to agree. When a number of men armed with spears, hatchets and *dangs* deliberately attack another party similarly armed, the attackers, at least, cannot be considered to have any right of self-defence. The common object

(1) 45 Ind. Cas. 273; 4 P. R. 1918 Cr. 19 Cr. L. J. 513.

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of these appellants was clearly the causing of injury and hurt to those they attacked, and they must have known that the use of the formidable weapons they used would in every likelihood result in the causing of death. We accordingly hold that Sikandar and his party have been rightly convicted of murder under section 302/149, Indian Penal Code.

As to the individual appellants there can be no doubt at all that those persons who actually received injuries were in the fight, and, after a consideration of the evidence in the case, which has been very fully described and dealt with by the learned Sessions Judge, we see no reason to differ from his conclusions and hold that all the appellants in this case were concerned in the attack and have been rightly convicted. We accordingly dismiss their appeal.

The evidence in both cases consists of the same witnesses. There seems every reason to believe that the villagers, as well as the various persons concerned in the fight, had agreed to tell as little as possible of what they actually saw. As pointed out by the learned Sessions Judge the witnesses are clearly biased towards one side or the other but their evidence leaves no doubt that all the persons named by them actually were present at the fight and took part in it. We agree with the learned Sessions Judge in thinking that P. W. Ghulam Muhammad Chaudhary is an independent witness, who has substantially spoken the truth. We, therefore, have no hesitation in holding that Hajun and his co-appellants were concerned in this fight and indeed, as far as we understood him, Mr. Ram Lal did not seriously urge that any of his clients were not concerned in the affair. He contended, firstly, that the trial had been vitiated so far as his clients were concerned in that after one of the three assessors had given his opinion, the learned Sessions Judge addressed the remaining two assessors for the second time, and he cited *Nasimuddi v. Emperor* (2) as authority for his contention. What occurred is described by the learned Sessions Judge in his judgment, and it appears that the first assessor had clearly failed to understand the case, for he gave his opinion that the

death of Sarwar had been caused at the place where the reeds had been uprooted, a story that was not alleged by either side. The learned Sessions Judge points out that he had noticed that this particular assessor had been somewhat sleepy during the case and that in re-addressing the remaining assessors he carefully refrained from indicating to them what his own views were. We are unable to hold that the course adopted by him vitiated the trial.

It was next contended that the report made by Shahinchi was not admissible in evidence. Mr. Pritman admitted quite correctly that this contention had force, inasmuch as the statement amounts to a confession. It should be noted here that although the learned Sessions Judge placed this, and the report made by Shahbaz, on the record, he specifically states in his judgment that he excluded them from consideration. Mr. Ram Lal then contended that his clients were entitled to an acquittal on the ground that all they did was to defend themselves. He pointed out that after the first quarrel at the place where the reeds were growing Shahzada and his companions fell back on to their own well Sadhuwala, thus avoiding a conflict. He contended that the statement of Allah Din should not be believed but that in any event, even assuming that Allah Din spoke the truth when he stated that he saw three of this party coming from the village with spears, his clients were perfectly entitled to arm themselves so long as they used those arms only in defence of themselves. We can see no reason for doubting the correctness of Allah Din's story and there can be no doubt that Shahzada and his friends, after the affair at the reeds, took the precaution of procuring arms in order to meet eventualities.

Next it was urged that as the fight undoubtedly took place on lands belonging to the appellants, they were entitled to resist the attack. Emphasis was laid on the fact that on this side while Shahzada was killed Shahinchi and Najim Khan received very serious injuries, while, with the exception of Sarwar, the injuries received by his companions were slight in comparison. Mr. Ram Lal claimed that when the appellants saw the other party advancing towards them armed with spears and hatchets,

(2) 15 Ind. Cas. 541; 40 C. 163; 13 Cr. L. J. 497.

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they undoubtedly had a reasonable apprehension that grievous hurt at least would be caused, and that therefore they were entitled, in exercise of their right of private defence, to go to the length of causing death. He urged that the law imposed no duty on the person assailed to continue to retreat indefinitely, and the fact that his clients went forward to meet the assailants for a few paces did not deprive them of the rights the law gave them. He referred to *Alingal Kunhinayan v. Emperor* (3). Doubtless this is correct but, as pointed out by Mr. Petman, Mr. Ram Lal lost sight of section 99, Indian Penal Code, the third clause of which lays down that there is no right of private defence in cases in which there is time to have recourse to the protection of the public authorities. This clause places an important restriction on the exercise of this right of private defence. There is no right of private defence where two parties arm themselves for a fight and deliberately engage in one. In the present case it is clear that the appellants deliberately armed themselves and collected at Sadhuwala well, knowing full well that owing to what had already occurred at the reeds and also seeing that the opposite party had collected at a well only 65 *karams* away, a *fracas* was imminent. The Police station was only a mile away, and thus they had ample time to send word to the Police and claim the assistance of the public authorities. Instead of doing this they returned to the village, obtained arms and then re-assembled at Sadhuwala well, which is a clear indication of their eagerness for the fight, and in such circumstances we think that it does not really matter which party actually commenced hostilities. In this view we are supported by *Kabiruddin v. Emperor* (4), cited by the learned Government Advocate. We are of opinion that these appellants had no right of private defence and that they are, therefore, guilty of an offence under sections 302 and 149, Indian Penal Code. The evidence on the record clearly shows that all the appellants were present at, and joined in, the fight. The fact that

some of them were armed with spears and hatchets must have caused all of them to realise that death would in all probability be caused and they are, therefore, all equally guilty. We, therefore, maintain the convictions of all of these appellants.

It seems, however, that the appellants were in a lesser degree responsible for this fight and were it possible, we would inflict lesser punishments but as they are clearly guilty under section 302, Indian Penal Code, we are unable to interfere.

We accordingly dismiss both appeals.

In view of the fact that the appellants in Criminal Appeal No. 219 of 1918 (Hajun and 5 others) were attacked at their own well and were not primarily responsible for the fight, we consider that their offence is less heinous and that they are deserving of lesser punishment. As we are, however, unable to award less than transportation for life, we forward the record to the Local Government for such action as may be deemed expedient, under section 401, Criminal Procedure Code.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 24 of 1915.

March 6, 1915.

Present: - Sir Henry Drake-Brookman, Kt.,
J. C.

GAMBHIR CHAND—APPLICANT
versus

THE SECRETARY, MUNICIPAL COMMITTEE, NAGPUR—RESPONDENT.

C. P. Municipal Act (XVI of 1903), s. 159—*Complaint, whether necessary in respect of each accused tried jointly—Master, whether criminally responsible for acts of servant.*

A complaint has to be made as required by section 159 of the C. P. Municipal Act in order to enable a Court to take cognizance of an offence punishable under the Act. But once cognizance has been legally taken of an offence, the Magistrate is seized of the whole matter as to all other accused whose guilt may appear during the trial of the case. [p. 887, col. 1.]

A master is criminally responsible for the acts of his servants if those acts are shown to have been done with his co-operation or under his authority. [p. 887, cols. 1 & 2.]

Local Government v. Lakshmichand, 8 C. P. L. R. 19, followed.

(3) 28 M. 454; 3 Cr. L. J. 43.

(4) 35 O. 368; 7 C. L. J. 359; 12 C. W. N. 384; 7 Cr. L. J. 256; 3 M. L. T. 385.

EMPEROR V. HARNAM SINGH.

Revision of the order of the Assistant Commissioner and Magistrate, 1st Class, Nagpur District, passed on the 3rd November 1915, in Criminal Case No. 253 of 1914.

ORDER.—In this case the accredited prosecutor of the Nagpur Municipal Committee complained against one Narain for introducing within octroi limits dutiable goods without paying the tax leviable thereon. The Magistrate, on hearing Narain's statement taken at the commencement of the trial, joined the present applicant as an accused and eventually convicted and fined the latter, as Narain's employer who had caused Narain to introduce the goods.

It is objected here that no complaint had been laid against the applicant as required by section 159, C. P. Municipal Act, 1903, and that his protest against being tried jointly with Narain was improperly disregarded. With regard to the first contention I observe that a complaint has to be made as required by section 159 of the said Act in order to enable a Court to "take cognizance of an offence punishable under the Act." This provision, however, does not oust the operation of the principle applied in *Sarwa v. Emperor* (1) that once cognizance has been legally taken of an offence, the Magistrate is seized of the whole matter as to all other accused whose guilt may appear. That principle was very recently applied by a Divisional Bench of the Calcutta High Court in *Dedar Bux v. Syamapada Malakar* (2). I hold, therefore, that the Magistrate must be taken to have acted on the complaint against Narain and to have been justified in so doing. The joint trial of the two men is legalised by section 239, Criminal Procedure Code, and in conceding that the alleged protest was lodged, I cannot think the Magistrate was bound to order separate trials. The matter is a petty one and it is difficult to conceive a case in which joint trial would be proper if this is not one.

On the merits I see no reason to interfere. The application does not impeach the Magistrate's finding that the applicant is Narain's employer and there is positive evidence of that relation. That a master is criminally

responsible for the acts of his servants if those acts are shown to have been done with his co-operation or under his authority was recognised in *Local Government v. Lakhmichand* (3). In the present case the applicant and Narain were in the same tonga shortly after the latter removed the bag from the station and the applicant, instead of offering to pay duty when stopped, tried to induce the octroi peon to release the goods. The Magistrate evidently disbelieved the Tongawala, for he writes that the story of how the applicant entered the tonga at the Cotton Market is inherently improbable. In this connection I would observe also that the Cotton Market is only a few yards from the railway station.

I decline to interfere. The application is rejected.

Application rejected.

(3) 8 C. P. L. R. 19.

PUNJAB CHIEF COURT.

CRIMINAL REVISION No. 157 OF 1918.

October 1, 1918.

Present:—Mr. Justice Scott-Smith and
Mr. Justice Broadway.

EMPEROR—PROSECUTOR

versus

HARNAM SINGH—ACCUSED.

Criminal Procedure Code (Act V of 1898), ss. 345, 439—Revision—Composition of offence—High Court, power of, to allow composition.

The High Court sitting as a Court of Revision under section 439 of the Criminal Procedure Code has no power to allow the composition of an offence under section 345 of the Code. [p. 889, col. 1.]

Case reported by the Sessions Judge, Amritsar, with his No. 59-G of 1918.

GROUND.—The accused Harnam Singh applied to have his conviction set aside on revision, while the complainant Bishen Das filed an application for enhancement of sentence. The parties have now come to terms and as the offences of which Harnam Singh has been convicted are compoundable, they ask that the accused should be acquitted by the Chief Court and that the fine should be refunded. The authorities differ as to whether a High

(1) 19 Ind. Cas. 946; 9 N. L. R. 65; 14 Cr. L. J. 230.

(2) 24 Ind. Cas. 954; 41 C. 1013; 13 C. W. N. 921;
15 Cr. L. J. 546.

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Court in the exercise of its revisional jurisdiction can give effect to the composition of an offence after conviction. In *Ram Piyari v. Emperor* (1) it was held that the High Court had this power, but a different view was taken in *Ram Chandra v. Emperor* (2), *Adhar Chandra Dey v. Subodh Chandra Ghosh* (3) and *Sankar Rangayya v. Sankar Ramayya* (4). The Chief Court appears to have held in *Nidhan Singh v. King-Emperor* (5) that this power can be exercised in revision, though I have not been able to obtain a copy of this ruling. I accordingly forward the case on revision for the orders of the Hon'ble Judges. The statement of the complainant to the effect that he has compounded the offence has been recorded here.

ORDER.—The question referred to this Court on the revision side by the Sessions Judge of Amritsar is whether an offence can be compounded by this Court in exercise of its powers of revision under section 439, Criminal Procedure Code. The authorities on the point are conflicting. In *Ram Piyari v. Emperor* (1) it was held by a Division Bench consisting of Knox and Karamat Hussain, JJ., that a High Court can, in the exercise of its powers of revision under section 439, Criminal Procedure Code, give leave for the composition of an offence under section 325, Indian Penal Code. In *Ram Chandra v. Emperor* (2) Knox, J., sitting by himself held that a High Court had no power to allow a case to be compounded in the exercise of its revisional jurisdiction. No reference was made by the Judge to the earlier decision. In Criminal Revision No. 63 of 1903 of this Court Chatterji, J., allowed a case to be compounded, though his judgment shows that he doubted whether he had power to do so. Similarly in the case reported as *Nidhan Singh v. King-Emperor* (5) the same Judge allowed the composition of an offence in revision, though again he expressed his doubt as to whether he had the power to do so. In Criminal

Revision No. 788 of 1900 Mande, J., allowed an offence under section 325, Indian Penal Code, to be compounded, but he did not discuss the question whether this Court had the power to allow such a composition in the exercise of its revisional jurisdiction. In the case reported as *Adhar Chandra Dey v. Subodh Chandra Ghosh* (3) it was held that the parties had no *locus standi* to ask the Judges sitting neither in the Court of Original Jurisdiction nor in the Court of Appeal to treat a compromise which they had made as one coming under section 345, Criminal Procedure Code.

The matter was fully discussed in the case reported as *Sankar Rangayya v. Sankar Ramayya* (4), in which Ayling and Tyabji, JJ., held that an offence cannot be allowed to be compounded when the matter is before the High Court in revision, and that section 345, Criminal Procedure Code, is exhaustive of the circumstances and conditions under which a composition can be effected. Tyabji, J., after referring to the various sub-sections of section 345, Criminal Procedure Code, continued as follows:—

"The section mentions the Court before which the prosecution is pending, to which the accused is committed for trial and before which an appeal is pending. There is no reference to the High Court in its revisional powers. Conversely it is noteworthy that section 439 (which defines the powers and functions of the High Court in revision) does not refer to section 345.

"It would, therefore, seem that if an offence were allowed to be compounded when the matter is pending before the High Court in revision, it could not be said that the composition was as provided by section 345, in two respects (1) as to the stage of the proceedings, (2) as to the Court which, it is provided by the section, must give leave. It follows that the offence cannot now be compounded.

"It was argued before us that we are empowered (sitting in revision) to allow the composition to be made by reason of section 423 (1) (d) read with section 439 (1). For this argument it is contended that the giving of leave to compound is merely a consequential or incidental order, a contention that was accepted in *Ram Piyari*

(1) 5 Ind. Cas. 696; 32 A. 153; 7 A. L. J. 103; 11 Cr. L. J. 203.

(2) 28 Ind. Cas. 103; 37 A. 127; 13 A. L. J. 104; 16 Cr. L. J. 247.

(3) 26 Ind. Cas. 176; 18 C. W. N. 1212; 15 Cr. L. J. 728.

(4) 51 Ind. Cas. 350; 29 M. L. J. 521; 18 M. L. T. 381; 16 Cr. L. J. 750; 39 M. 604.

(5) 67 P. L. R. 1904.

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v. *Emperor* (1), but rejected in *Ram Chandra v. Emperor* (2). Knox, J., who decided the latter case sitting alone was a party to the earlier decision also but his attention was not drawn to it and he does not notice it.

"In connection with this argument I observe that the Code in no place specifically empowers any Court to give permission to compound; nowhere is there any special provision conferring distinct powers to sanction compositions. In section 345 (2) the permission of the Court is referred to as a condition precedent to the act of the parties having any effect; and in section 345 (5) the absence of such permission is mentioned as depriving the composition of any effect; but in each case it is assumed that the Court has power to give permission, provided there is any occasion for granting permission.

"The point of view from which the sub-sections are drafted is, however, that it is the injured person who has to be empowered to compromise and the difficulty in the way of compromise in revision is, in my opinion, not so much that the revision Court has not been specifically authorised to grant permission, but that the parties are not allowed to compound except at the stages when the prosecution is pending, or the accused has been committed for trial, or an appeal is being heard from a conviction. The absence of any power being given to the injured person to compromise when matters are before the revision Court is fatal by reason of section 345 (7)."

Ayling, J., concurred in these remarks. It will be seen that the Allahabad cases were considered and that the Judges were unable to agree with the *dictum* in *Ram Piyari v. Emperor* (1) that an order permitting composition can be treated as an incidental order within the meaning of clause (d), section 423, Criminal Procedure Code. We fully agree with the reasoning of the Judges in this Madras case and in accordance therewith we hold that this Court sitting as a Court of revision has no power to allow the composition of an offence.

We, therefore, reject the petition for revision.

Revision rejected.

NAGPUR JUDICIAL COMMISSIONER'S COURT

CRIMINAL REVISION No. 42 OF 1913.

March 25, 1913.

Present.—Sir Henry Drake-Brockman
Kt., J. C.

MOHAMAD YACUB—APPLICANT

versus

THE SECRETARY, MUNICIPAL COMMITTEE, NAGPUR—RESPONDENT.

C. P. Municipal Act (XVI of 1903), ss. 66, 139—Continuing breach—Daily fines, whether can be imposed for future breaches—Application for permission to build—Delay in passing orders, effect of.

The daily fine which may be imposed under section 139 of the C. P. Municipal Act must relate to a period anterior to the Magistrate's order of conviction. There cannot be punishment under that section for a future breach. [p. 590, col. 1.]

Empress v. Gangaram, 6 C. P. L. R. 32, followed.

Under section 66 (4) of the C. P. Municipal Act, delay in passing orders on a valid notice given under section 66 (1) of the Act may, if followed by a failure to reply to a written reminder, lead to a conclusion that the proposed building has been absolutely sanctioned. [p. 589, col. 2.]

Application for revision of the order passed by the Magistrate, 1st Class, Nagpur, dated the 13th February 1913, in Criminal Case No. 4 of 1913.

ORDER.—The applicant has been fined Rs. 5 for failing to remove an upper storey added to his house in the town of Nagpur without the sanction of the Municipal Committee. The notice to remove allowed only one day for removal, which on the face of it is an unreasonably short period. But apart from this the applicant pleaded before the trying Magistrate that he applied to the Municipal Committee for permission to build. In the face of this plea the trying Magistrate should have inquired and placed on record details of the application relied on. Under section 66 (3), C. P. Municipal Act, 1903, delay in passing orders on a valid notice given under section 66 (1), *ibid.*, may, if followed by failure to reply to a written reminder, lead to a conclusion that the proposed building has been absolutely sanctioned. As pointed by the learned District Magistrate, it is impossible from the trying Magistrate's meagre record to ascertain exactly what the defence set up was, much less to determine whether it is valid or not. Moreover the trying Magistrate is wrong in thinking that it suffices by way of

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giving reasons for conviction as required by section 263, Criminal Procedure Code, to state the bald fact that a notice to remove was disobeyed. That fact being found, it remains to add, as required by clause (h) of the last cited section, "a brief statement of the reasons therefor."

The sentence passed is also illegal: It requires the applicant to pay Re. 1 per diem "until he removes the unsanctioned building," besides mulcting him in the fixed sum of Rs. 5. There is nothing in section 139 of the Municipal Act to justify such an order. That section lays down that in the case of a continuing breach a fine may be imposed for every day after the first during which the breach is proved to have been persisted in. It is clear, therefore, that the daily fine which may be imposed must relate to a period anterior to the Magistrate's order of conviction. There cannot be punishment under the section for a breach still *in futuro*.

The decision in *Empress v. Gangaram* (1), though based on section 97, C. P. Municipal Act, 1889, is in point and should have been followed by the trying Magistrate.

The conviction and sentence are set aside and there must be a fresh trial at which the accused person's defence will be set out in such details as to enable this Court, if again moved in revision, to understand the nature of that defence and to decide whether in spite of it the accused is liable to punishment for not removing the upper storey objected to by the Municipal Committee. The trying Magistrate's attention is directed in this connection to *Emperor v. Bhikia* (2). His omission to examine the complainant has already been brought to his notice.

Retrial ordered.

(1) 6 C. P. L. R. 82.

(2) 13 C. P. L. R. 171.

MADRAS HIGH COURT.

CRIMINAL MISCELLANEOUS PETITION NO. 219
OF 1918.

August 30, 1918.

Present:—Mr. Justice Sadasiva Aiyar and
Mr. Justice Napier:

In re GADDAM PENCHULU REDDI—
PETITIONER

Criminal Procedure Code (Act V of 1898), s. 195 (1) (a), (6), (7)—Arms Act (XI of 1878), s. 25—Penal Code (Act XLV of 1860), s. 182—Information given to District Magistrate of person being in possession of fire-arms without license—Issue of search-warrant by Magistrate—Act, whether judicial or executive—Information found to be false—Sanction for prosecution for giving false information to public servant—Appeal to Sessions Judge, whether maintainable.

A Magistrate directing the issue of a warrant to search premises, on information received that the owner or occupant thereof is in possession of fire-arms without a license, acts as a Court and not merely as a public servant, whether he purports to act under the Criminal Procedure Code or under section 25 of the Arms Act, [p. 892, col. 2.]

Where a District Magistrate accords sanction for the prosecution of an informant on the ground that his information proved to be false, he acts judicially and his order is appealable to the Sessions Judge under section 195 (7). [p. 893, col. 1.]

Sankaram Aiyar v. Sakkarappa Mudaliar, 2 Weir 155, dissented from.

Per *Sadasiva Aiyar, J.*—Every Magistrate acting judicially is a Criminal Court. A Magistrate to whom, as a Criminal Court, a report is made in order that he might take action as a Criminal Court, receives that report as a Court. The terms 'Court' and 'Magistrate,' wherever used in the Criminal Procedure Code, are generally used as convertible terms. [p. 894, col. 1.]

Petition presented under section 195 of the Code of Criminal Procedure, 1898, against the order of the Court of Session of the Nellore District, in Criminal Miscellaneous Petition No. 2 of 1918, dismissing the petition to revoke the order of sanction granted by the District Magistrate, Nellore, for prosecuting the petitioner herein, in No. 1239 D 1 Magl., dated the 23rd October 1917.

FACTS appear from the judgment.

Mr. K. Krishnaswami Aiyangar, for the Petitioner.—The information given to the District Magistrate in this case is virtually a complaint. The object of the informant was that the Magistrate should take action on his information. The issue of a search warrant by the Magistrate was an act done by him as a 'Court,' and not as a public servant. He could only have acted under the statutory power vested in him under the Code of Criminal Procedure. The fact that no formal, sworn statement

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was taken from the complainant does not affect the question. Even if the action taken purported to be under section 25 of the Arms Act, the issue of a search-warrant could only be justified by resort to Chapter VIII (b) of the Criminal Procedure Code, though the special procedure in the Arms Act was followed. The warrant can only be issued by a Court.

The fact that, under section 25 of the Arms Act, the Magistrate should record the grounds of his belief before taking action makes it obvious that his functions are judicial and not merely administrative. The grounds for the proceeding are intended for the benefit of the Tribunal of Appeal. *Clarke v. Brojendra Kishore Roy* (1) and *Clarke v. Brojendra Kishore Roy* (2). The Sessions Judge should have disposed of the appeal on the merits.

The Public Prosecutor, for the Crown.—The information given that a person was in possession of fire-arms is not a 'complaint' within the meaning of that word in the Criminal Procedure Code. The information was given to a public servant so that he might take action under the Arms Act. The sanction given by him was as a public servant and was an executive act. *Sankaram Aiyar v. Sakkarappa Mudaliar* (3). In that case it was clearly laid down that, sanction granted for offences comprised in clause (a) of section 195 is not a judicial sanction and is not appealable.

ORDER.

NAPIER, J.—This is an application for revocation of sanction to prosecute the petitioner for an offence under section 182, Indian Penal Code, in that he gave false information to a public servant. The petitioner wrote to the District Magistrate, informing him that one Soora Chinna Venkata Reddi had in his custody without license 3 pieces of arms and submitted to the District Magistrate that the possession of such weapons "by such a person in our village will be dangerous to our lives and that they are without any license." The house of Venkata Reddi was searched

(1) 2 Ind. Cas. 436; 36 C. 433; 9 C. L. J. 293; 13 C. W. N. 458; 5 M. L. T. 367.

(2) 16 Ind. Cas. 501; 39 C. 953; 23 M. L. J. 32; (1912) M. W. N. 760; 12 M. L. T. 171; 10 A. L. J. 193; 16 C. L. J. 231; 16 C. W. N. 865; 14 Bom. L. R. 717; 13 Cr. L. J. 693; 89 I. A. 163 (P. C.).

(3) 2 Weir 155.

and no arms were discovered. Venkata Reddi then put in a petition to the District Magistrate under section 195 of the Criminal Procedure Code asking for sanction for the prosecution of the person who gave the information for an offence under section 182, Indian Penal Code. The District Magistrate granted the sanction. The petitioner then appealed to the Sessions Judge, who dismissed his petition holding that the order was passed by the District Magistrate not as a Court but as an Executive Officer and that, therefore, no appeal lay to his Court. He expressly followed a decision of this Court in *Sankaram Aiyar v. Sakkarappa Mudaliar* (3). In that case a report had been made by a Village Munsif under section 45, Criminal Procedure Code, to the nearest Magistrate of the occurrence in the village of a death under suspicious circumstances or of the commission of an offence of murder. The High Court held that a report made under this section was not made to a Court and that, therefore, the Sessions Judge had no jurisdiction to entertain an appeal from a sanction granted by a Magistrate for the offence of giving false information to a public servant. With great defence to the learned Judges, I think that this view is incorrect, and if the information in this case had been given under that section, we might have thought it necessary to refer the matter to a Full Bench. But as I think the information is given under a special Act, we feel at liberty to dispose of it.

It is argued that the information constituted a complaint under the Code. But I do not think that it can be so treated. Under section 28 of the Indian Arms Act (Act XI of 1878) every person aware of the commission of an offence shall, in the absence of reasonable excuse, give information of the same to the nearest Police Officer or Magistrate. I have no doubt that the intention of the informant was to act under this section, especially in view of the language of his prayer which states that "the possession is without any license," this being an offence punishable under section 19, clause (f) of the said Act. The informant did not go to the Magistrate to make the complaint, and he was not examined on oath as he would have been if it had been a complaint. It appears that the Magistrate directed the

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issue of a warrant for the search of the house and the Police procured the warrant from the nearest Magistrate. I am not clear whether the Magistrate in directing the issue of a warrant purported to act specifically under the Criminal Procedure Code with reference to an offence which had been brought to his notice or purported to act under section 25 of the Indian Arms Act. If he was acting under the Code of Criminal Procedure, it would be very difficult to argue that the information on which a Court issues a warrant is not information given to the Court, and it would not matter that the action was taken under section 190, sub-section (1), clause (c), of the Criminal Procedure Code and not on complaint. But if he did not think at that stage that it was necessary to take cognizance of an offence, but only acted under section 25 of the Indian Arms Act, the question is more difficult, for if such action is not by a Court, it would necessarily follow, as held by the Sessions Judge, that the information was given to an Executive Officer and not to a Court. Section 25 provides that where a Magistrate has reason to believe that any person has in his possession any arms for an unlawful purpose, or that such person cannot be left in the possession of any such arms without danger to the public peace, such Magistrate, having first recorded the grounds of his belief, may cause a search to be made, and may seize and detain the arms, although covered by a license, in safe custody for such time as he thinks necessary. The information in this case was to the effect that the possession of these arms is dangerous to the lives of the persons in the village, and it may very likely be that the Magistrate was proceeding under section 25 of the Act (Act XI of 1878) as a preliminary to any further proceedings which might be necessary for an offence under the Act. Assuming that he did so, I am still of opinion that he was acting as a Court. It is true that the section does not say he shall issue a warrant. But I know of no procedure by which the Police have a power of search except under the Code, and it would seem to follow that except by a warrant the Magistrate could not authorise the Police to make a search. It would seem to follow, therefore, that the

Magistrate in exercising his powers under this section must have recourse to the powers under Chapter VII (B) of the Criminal Procedure Code of issuing search warrants, subject, of course, to the special procedure contained in section 25 of the Indian Arms Act and such warrants are, of course, under the language of the section, issued by a Court.

There is another reason why I think the Magistrate is acting as a Court, and that is the use of the words "having first recorded the grounds of his belief." If the Magistrate is not a Court when proceeding under section 25, the provision can have no value whatsoever. These words are always inserted where the Legislature intends to provide that a Court shall put on record the information on which it is acting for the benefit of any superior Court having jurisdiction to review its action. I am fortified in this view by the opinion expressed by Brett, J., in *Clarke v. Brojendra Kishore Roy* (1). In that case a District Magistrate, having received information of a formidable riot in which fire-arms were used, came to the spot and, being informed that the fire-arms were being kept in certain houses, searched the houses. It was held by the majority of the Bench that his action was justified neither by the Criminal Procedure Code nor the Arms Act. On appeal to the Privy Council [*Clarke v. Brojendra Kishore Roy* (2)], the first view was negatived, but the latter view was upheld on the ground that he had not recorded his reasons as required by section 25 of the Arms Act. Neither the Privy Council nor the majority of the Bench expressed any opinion on the question whether action under section 25 was the action of a Court, but the dissenting Judge states his opinion on that point definitely. He considers the matter on page 476* and says as follows:—"The distinction between a judicial and an executive act in India is not very clearly drawn, as many acts which are purely administrative are generally described as executive. The main distinction between the two appears to be that judicial acts are those acts done or orders passed in the exercise of the judicial discretion or power with which an officer is vested

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under the law, while executive acts are of a ministerial character either carrying judicial orders into effect or discharging duties not of a judicial nature. In the case of *Hope v. Evered* (4), to which we have been referred, it has been clearly laid down that the issue of a search-warrant is a judicial act and in the case of *Mahomed Jackariah and Co. v. Ahmed Mahomed* (5) and in the case of *Lakshmidas Naranji, In re* (6), a similar view has been taken by the High Courts in India."

I agree with the learned Judge that it is often difficult to say what acts of a Magistrate are administrative and what are judicial. But I think that where, as in the case of a search or the issue of a search-warrant, the action of a Magistrate under a special Act is analogous to his action as a Court under the Code, the better view would be to hold that he was acting as a Court. We have already decided in Criminal Miscellaneous Petition No. 83 of 1918 [*Arunachalam Pillai v. Ponnuswami Pillai* (7)] that sanction by a Court under section 195, sub-section 1 (a), is appealable under sub-section 7. It follows, therefore, that the view of the Sessions Judge is incorrect and that he had jurisdiction to entertain the appeal. The petition is allowed and the case will be remitted to the Sessions Judge, who will take it on his file and dispose of it according to law in the light of the above observations.

SADASIVA AIYAR, J.—I agree with the order proposed by my learned brother and I further agree generally and in substance with the reasons given by him. I wish, however, to add some words of my own. The powers given by section 195 (6) of the Criminal Procedure Code of the superior "authority" to revoke or grant a sanction given by a subordinate "authority" is a specific statutory power. There is no express procedure laid down for the party to follow who wishes to move the superior authority to interfere with the proceedings of the subordinate authority. It seems to be usual to call the application to the superior authority

(4) (1886) 17 Q. B. D. 338; 55 L. J. M. C. 146; 55 L. T. 320; 34 W. R. 742; 16 Cox C. C. 112.

(5) 15 C. 109 at p. 141; 12 Ind. Jur. 259; 7 Ind. Dec. (N. S.) 658.

(6) 5 Bom. L. R. 980 at p. 982.

(7) 48 Ind. Cas. 878; 35 M. L. J. 454; 8 L. W. 422; 24 M. L. T. 396; (1918) M. W. N. 824.

a petition of "appeal," though I am doubtful whether it could be called an "appeal." The mere fact that, under clause 7, the superior authority is (where the subordinate authority is a Court) the Court to which in most cases [though not in all, see sub-clause (c)] appeals "ordinarily lie" is not a complete justification for the use of the word "appeal." However, the description of such an application as an appeal is convenient and I only wish to guard myself against the use of that term tending to mislead the mind in certain contingencies.

With the greatest respect to the decision in Criminal Revision Case No. 136 of 1903 [*Sankaram Aiyar v. Sakkarappa Mudaliar* (3)]. I feel constrained to dissent from that decision. In that case a Village Munsif sent a false report to the Sub-Magistrate accusing a man of murder. It is clear that he did so in order that the Sub-Magistrate might, as a Criminal Court, take cognizance of the alleged offence. The Sub-Magistrate accorded sanction to prosecute the Village Munsif for an offence under sections 177 and 182, Indian Penal Code. The Sub-Divisional Magistrate revoked the sanction. The Sessions Judge "restored" the Sub-Magistrate's order. [According to section 195 (6) of the Criminal Procedure Code, it is not, strictly, a restoration of the Magistrate's order but the fresh granting of the sanction by the Sessions Judge himself. The Sessions Judge in that case treated himself as an appellate authority instead of an authority who was given a special statutory power and, as I have said above, was misled by the use of the term 'appeal' to indicate an application made to a higher authority under clause (6). Then, on revision to the High Court, the learned Judges (Benson and Bashyam Aiyangar, J.J.) held (a) that the sanction to prosecute was granted by the Sub Magistrate of Turaiyur in his capacity as a public servant and not in his capacity as a Court; (b) that he would have acted in his capacity as a Court only if the offence for the prosecution of which sanction was applied for was one of those mentioned in clauses (b) and (c) of section 195 (1) and not if it fell under section 195 (1) (a); and (c) that the

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Sub-Divisional Magistrate did not act as a Court but only as an Executive Officer and the superior authority over the Sub-Magistrate in revoking the sanction granted by the Sub-Magistrate and (d) that the Sessions Judge had, therefore, no jurisdiction to interfere under sub-sections 6 and 7 of section 195.

It seems to me that every Magistrate acting judicially is a Criminal Court. A Magistrate to whom, as a Criminal Court, a report is made in order that he might take action as a Criminal Court receives that report as a Court. The Presiding Officer of the Court is, no doubt, almost always a "public servant" [also section 195, clause (a)] and is also, an "authority" [clause (6)]. When he grants a sanction in respect of an offence falling under sections 177 and 182, Indian Penal Code [which are two of the offences mentioned in section 195, clause (1) (a) of the Criminal Procedure Code], he clearly grants the sanction as a Magistrate, that is, as a Court and clause (7), in my opinion, directly applies. In the case of *Clarke v. Brojendra Kishore Roy* (2) their Lordships of the Privy Council decided that a Magistrate making a search, even in the absence of a complaint and on his own knowledge that an offence had been committed, is acting as a Criminal Court. At page 966* they say: "It would seem that the Trial Judge and both the learned Judges who formed the majority of the Court of Appeal were misled by the use of the word 'Court' in section 96. For the sake of brevity the Code uses the terms 'Court' and 'Magistrate' generally, if not always, as convertible terms. Section 6 headed 'Classes of Criminal Courts' enacts that: 'Besides the High Courts and the Courts constituted under any law under this Code for the time being in force there shall be five classes of Criminal Courts in British India, namely: (1) Courts of Session, (2) Presidency Magistrates, (3) Magistrates of the First Class, (4) Magistrates of the Second Class, and (5) Magistrates of the Third Class.'" Then their Lordships say that a search made by a Magistrate is a proceeding conducted by him when "acting in the discharge of his judicial functions." I think that this *dictum* of their Lordships of the

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Privy Council must be held as overruling the opinion expressed in Criminal Revision Case No. 135 of 1903 [*Sankaram Aiyar v. Sakkarappa Mudaliar* (3)] that a Sub-Magistrate, to whom a report is made as such Magistrate and who grants sanction to prosecute, is not acting as a Court but as a public servant other than a Court.

M.C.P.

*Petition allowed;
Case remitted.*

PATNA HIGH COURT.

CRIMINAL REVISION No. 10 OF 1918.

June 27, 1918.

Present:—Mr. Justice Mullick and Mr. Justice Thornhill.

Sheikh ABDUL SATTAR—PETITIONER

versus

EMPEROR ON THE APPLICATION OF

ADALAT HOSSAIN—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 195, 476—Order under s. 476 made without taking evidence, legality of—Jurisdiction—Court, power of, to order prosecution of person not party to proceedings—S. 476, scope of.

A Court, while proceeding under section 476 of the Criminal Procedure Code, is required to arrive at findings upon some evidence before it. If there is no evidence on the record and the Court proceeds to order the prosecution of a person for forgery in relation to a proceeding before it, the discretion vested in the Court under the section is illegally exercised and the order is liable to be set aside. [p. 895, cols. 1 & 2.]

Section 476 of the Criminal Procedure Code is a self-contained section and the reference to section 195 in that section is only made for the sake of brevity and refers not to the conditions enumerated in section 195 but merely to the offences enumerated in that section. [p. 895, col. 2.]

Section 476 of the Criminal Procedure Code confers jurisdiction upon an executing Court to order the prosecution of a person for forgery, even though not a party to the execution proceedings, if the offence is brought to the notice of the Court in the course of the proceedings. [p. 895, col. 2.]

Revision against an order of the Munsif, Purneah, dated the 27th April 1918.

Mr. E. L. Dutt, for the Petitioner.

Mr. Manohar Lal, Assistant Government Advocate, for the Crown.

JUDGMENT.

MULLICK, J.—This application arises out of an order made by the Munsif of Purneah directing the prosecution of the petitioner for the offence of forgery. The facts appear to be these: A decree was obtained

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by *Musammât Bachah Mayi* against *Adalat Hossain* for a sum of money, and an execution petition was filed on the 30th July 1917, purporting to have been signed by the pen of *Abdul Sattar*. When notice was issued upon the judgment-debtor, he appeared and said that *Bachah Mayi* had died before the 30th July 1917 and that before her death he had paid off the judgment-debt to her. The Munsif thereupon dismissed the execution case, holding that it had been satisfied. Whether that dismissal was correct or not upon the evidence before him, is a matter with which we are not concerned at the present moment, but the judgment-debtor thereupon filed a petition before the Munsif stating that *Abdul Sattar*, the petitioner now before us, was the person who had forged the name of *Bachah Mayi* on the execution petition and praying that proceedings might be taken against *Abdul Sattar* under the criminal law.

Notice was issued upon the petitioner and he appeared and contended that he had had nothing whatsoever to do with the execution petition.

The Munsif thereupon without making any investigation directed the prosecution of the petitioner under section 476, Criminal Procedure Code.

Now it is clear that the Munsif had no materials before him. There is nothing whatever on the record to show that this petitioner had any connection with the execution petition or that he ever took any part in the execution of the decree. The learned Munsif states in his explanation that it is sufficient that he should be satisfied that there is a case against the petitioner and so long as he is satisfied he is competent to make an order under section 476, Criminal Procedure Code. That is doubtless true, but the law requires that the findings of the Court should be arrived at upon some evidence and if in this case there was no evidence, then the discretion vested in the Munsif has been illegally exercised. The learned Munsif is of opinion that the Pleader who filed the execution petition, if examined, is sure to prove the case against the petitioner. On what ground the Munsif has come to this conclusion is not disclosed and we cannot on mere

surmise take for granted that the Pleader, if examined, will support the Munsif.

The proper order, therefore, for us to make is that the order directing the prosecution of the petitioner be set aside and the case be remanded to the learned Munsif for further enquiry.

A point has been raised by the learned Vakil for the petitioner that inasmuch as the alleged forgery in this case was committed by a person who was not a party to the execution proceedings, no prosecution can be directed under section 476, Criminal Procedure Code, and that the person aggrieved should be left to take his remedy by ordinary complaint in the Criminal Court. Reliance is placed on *In re Kallaru Ramalingam* (1), but the ruling of this Court in *Rajkumar Singh v. Emperor* (2) settles this point so far as this Court is concerned. It was decided in that case that section 476, Criminal Procedure Code, is a self-contained section and that the reference to section 195, Criminal Procedure Code, in this section is only made for the sake of brevity and refers not to the conditions enumerated in section 195, Criminal Procedure Code, but merely to offences enumerated in that section. In my opinion section 476, Criminal Procedure Code, confers jurisdiction upon the Munsif to order the prosecution of the petitioner, even though not a party to the execution proceedings, if the offence of forgery is brought to the notice of the Munsif in the course of a judicial proceeding.

THORNHILL, J.—I agree.

Case remanded.

(1) 31 Ind. Cas. 653; 18 M. L. T. 498; 2 L. W. 1135; 16 Cr. L. J. 797; 40 M. 100.

(2) 37 Ind. Cas. 487; 18 Cr. L. J. 135; 3 P. L. W. 83; 1 P. L. J. 298.

BASHIR AHMED v. EMPEROR.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No 96.B OF 1918.

October 5, 1918.

Present :—Mr. Mittra, A. J. C.

BASHIR AHMED—ACCUSED—APPLICANT
versus

EMPEROR—OPPOSITE PARTY.

Railways Act (IX of 1890), s. 122, scope of—Entry, original, lawful—Breaking open lock of waggon without permission, whether renders entry unlawful.

Accused, a *dawal*, entered the Railway goods shed line to take delivery of a consignment on behalf of the consignee and without the permission of the goods clerk broke the seal of a waggon. It was found that *dawals* were allowed to enter the goods shed without express permission from a Railway servant:

Held, (1) that the accused could not be convicted under section 122 (1) of the Railways Act as the original entry being lawful, the subsequent unlawful act did not relate back and render the entry unlawful;

(2) that as the accused never refused to leave the Railway on being requested to do so, he could not be committed under sub-section (2) of section 122.

Sub-section (1) of section 122 of the Railways Act makes an unlawful entry punishable and sub-section (2) provides for cases where the original entry was lawful as well as unlawful.

Revision of the judgment and finding given by the Magistrate; 1st Class, Nagpur, on the 28th June 1918, in Criminal Case No. 43 of 1918.

Mr. M. T. Shareef, for the Applicant.

The Hon'ble Mr. G. K. Dick, Standing Counsel for the Crown.

ORDER.—The applicant has been convicted under section 122, sub-section (1) of the Indian Railways Act. The charge against him is that he unlawfully entered the goods shed line and without the permission of the goods clerk or the unloading foreman broke the seal of waggon number 563 containing 527 bundles of jaggery.

The accused is a *dawal* and came to take delivery of the consignment of jaggery on behalf of one Haji Yusuf Gani. It is in evidence that *dawals* are allowed to enter the goods shed without an express permission from a Railway servant. The Railway Sub-Inspector (P. W. No. 3) says that he advised the goods clerk and the accused that the accused should not enter the goods office without the permission of the Rail-

way authorities. This, however, was not a prohibition but only advice and it is doubtful whether the witness had any authority to pass an order. On behalf of the prosecution the entry of the *dawal* is not complained of. It is the subsequent act of breaking the seal of the waggon which is urged as unlawful.

Section 122 runs thus :—

(1) "If a person unlawfully enters upon a Railway, he shall be punished with fine which may extend to twenty rupees.

(2) If a person so entering refuses to leave the Railway on being requested to do so by any Railway servant, or by any other person on behalf of the Railway administration, he shall be punished with fine which may extend to fifty rupees, and may be removed from the Railway by such servant or other person."

The case does not come under the second class, as the accused never refused to leave the Railway on being requested to do so. Now the original entry being lawful, it is difficult to hold that the subsequent unlawful act related back and rendered the entry unlawful. It seems to me that sub-section (1) makes an unlawful entry punishable and sub-section (2) provides for cases where the original entry was lawful as well as unlawful.

The argument that the applicant should be deemed to have entered with the intention of breaking the seal of the waggon is far-fetched and cannot be accepted, nor do I find that the Magistrate has come to any such finding. The result is that the order of the lower Court is set aside and the applicant is acquitted. The fine, if paid, is ordered to be refunded.

Order set aside.

ZEMINDAR OF KALAHASTI V. GANAPATHI IYER.

MADRAS HIGH COURT.

CIVIL APPEAL No. 68 OF 1913.

November 1, 1916.

Present:—Mr. Justice Abdur Rahim
and Mr. Justice Burn.Raja DAMARA KUMARA THIMMA
NAYANI BAHADURGARU,
ZEMINDAR OF KALAHASTI
AND TRUSTEE OF THE KALAHASTI
TEMPLE—DEFENDANT—APPELLANT

versus

P. R. GANAPATHI IYER,
SECRETARY, DHARMAKSHANA
SABHA, AND ANOTHER—PLAINTIFFS—
RESPONDENTS.

Trust, public—Trustee, hereditary, removal of—Misconduct of trustee—Inefficient management—Accounts, failure to keep—Mixing up trust moneys with private funds—Expenditure in excess of income, credit for, whether can be allowed—Trusts Act (II of 1882), s. 23 (c), applicability of, to public trusts.

The rule laid down in section 23 (c) of the Trusts Act, though applicable only to private trusts, may be adapted in the case of public trusts with such modifications as the circumstances of each case require [p. 898, col. 2.]

The duty of a trustee is to carry out the directions of the founder and not to encumber the trust property by systematically incurring expenditure beyond the limits of its income, nor can he claim credit for such expenditure. [p. 899, col. 1.]

Andrews v. McGuffog, (1886) 11 A. C. 313, explained.

If the continuance of a person who is a hereditary trustee and a descendant of the founder in the office is likely to endanger the interests of the institution, he is liable to be removed. It is not, however, every mistake or neglect of duty or inaccuracy of conduct that will induce a Court to remove a trustee. The acts or omissions must be such as to endanger the trust property or to show a want of honesty, or a want of proper capacity to execute the duties of the office or a want of reasonable fidelity. [p. 899, col. 2; p. 900, col. 1.]

One of the most important duties of a trustee is to keep separate and distinct accounts of the trust property and to keep the trust property separate from his own property. The omission to perform this duty will entail the removal of the trustee. [p. 900, col. 1.]

In order to justify the dismissal of a trustee it is not necessary to show that he has dishonestly misappropriated the trust funds. It is enough if he is a necessitous man who may not resist the temptation to misappropriate trust funds, or that his want of prudence in managing his own affairs does not warrant the hope that he would successfully manage an endowment [p. 900, col. 2.]

Where a trustee is found guilty of misappropriation, the proper course is to dismiss him and not to suspend him till he makes good the amounts misappropriated. [p. 901, col. 1.]

Appeal against the decree of the Court of the Subordinate Judge, North Arcot, dated

the 9th December 1912, in Original Suit No. 19 of 1911.

JUDGMENT.—The suit in which the appeal arises was instituted under section 92 of the Code of Civil Procedure against the defendant, the Raja of Kalahasti, who is the hereditary trustee of the Kalahasti temple and its endowed property. By a preliminary decree the Subordinate Judge who tried the suit ordered accounts to be taken from Faslis 1315—1320 and objections have been taken before us, in the first place, to a number of items in the accounts as finally settled by the Court of first instance. Then there is the important question whether the order suspending the defendant from the office of trustee until he pays certain debts due to the temple is right. The contention of the appellant, the defendant in the suit, is that the order of suspension ought to be set aside altogether, while the plaintiffs contend that the defendant should be removed from his office.

We shall first deal with the items of account to which objections have been taken on one side or the other. It is necessary to state that this temple was founded and endowed by the Raja of Kalahasti, and the properties which formed the endowment are mainly the village of Kalahasti, and half of two other villages. There are also certain *Rasums* and *Merahs* which are payable to the temple by the tenants of the Kalahasti Zemindary. Incorporated with the temple properties are the funds called *Ubhayam* funds, which have been endowed by various persons with the object that certain festivals may be held in their honour in the temple with the income of those funds. There are also the collections made in the temple and the offerings. The entire income may be taken to be about Rs. 10,000 or so a year.

The Zemindary of Kalahasti as well as the trust property in the suit were under the management of the Court of Wards from 1899 till August 1905 on the ground of incapacity of the defendant. It was then handed over to him apparently because the Court of Wards found it a hopeless task to clear the Zemindary from debts. Accounts have been taken from 1905 till 1910; when the Court of Wards made over the trust property to the Rajah, there

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was a sum of Rs. 37,000 due to the temple from the previous trustees, the predecessors of the defendant, and a sum of about Rs. 8,000 in the hands of the Court of Wards on account of Ubhayam. This Rs. 8,000 was handed to the defendant, but it appears that he used the amount for his own personal purposes and executed a mortgage on some of the Zemindary properties for that sum plus Rs. 37,000 which was already due to the trust. The mortgage is Exhibit C and it was executed on the 22nd August 1905. It may be mentioned at once that the Subordinate Judge has acquitted the defendant of all charges of dishonest misappropriation of the trust funds, and in fact those charges at the time of trial were not pressed before him. He has found, however, on taking accounts under various heads that altogether a sum of about Rs. 11,000 or thereabouts was due by the defendant to the temple. At the same time the Subordinate Judge found that the defendant spent something like Rs. 17,800 in performance of ceremonies and festivals in connection with the temple over and above the income of the temple property. He says, however, that the Raja was not entitled to have credit for this amount as against what has been found due from him. In dealing with the accounts an important fact to be borne in mind is that the defendant never kept any separate account of the trust property and the expenditure in connection with the temple except as to the offerings and Hundi collections. So far as the income of the landed property was concerned and especially of what was received by way of *Rusums* and *Merahs*, there was no separate account; what was receivable by the temple was mixed up with the Zemindar's private account. There is also the fact that the defendant did not produce all the books of account, such as they were, which would have shown what was the amount under certain heads to which the temple was entitled as distinguished from what was received by the Zemindar on his own personal account from the Zemindary. The learned *Vakil* for the appellant has emphasized the fact that, if the defendant did not keep any separate account, he was only following the practice of his predecessors and of the Court of Wards which had the

management of the property for several years. But that is no excuse in law for the defendant not keeping the moneys belonging to the temple entirely separate from his own moneys and if any difficulties in taking accounts have arisen owing to this fact, every presumption is to be made against the defendant and in favour of the trust. I shall take the items in the order of the argument before us.

The next objection relates to the interest on the Rs. 8,000 which was borrowed by defendant at the time he received charge of the trust property from the Court of Wards. Exhibit C provides for six per cent. interest with annual rests, and the contention is that it ought to be 9 per cent. compound interest at half-yearly rests or at least six per cent. with half-yearly rests. The question what is the proper interest to be charged against the defendant was in the discretion of the Subordinate Judge and we are not prepared to say that under the circumstances the defendant ought to have been charged a higher rate of interest than six per cent.

Our attention has been drawn to section 23 of the Trusts Act, clause (e). The section itself applies only to private trusts and a rule of that nature can only be adapted with such modifications as the circumstances of each case require. The respondent also urged that compound interest ought to have been allowed instead of simple interest upon the items dealt with in the judgment of the Subordinate Judge in paragraphs 40 and 41. We are not prepared to hold for reasons already stated that the Subordinate Judge's conclusion is wrong.

Then there is the question whether the defendant ought to be given credit for any amount which he has spent on religious worship and ceremonies over and above the income from the temple property. The Subordinate Judge has held that he is not entitled to any credit on this account, and we think he is right.

No authority has really been cited by the defendant for the proposition that a trustee of a public charity, who chooses year after year to spend moneys not required by the terms of the endowment out of his own pocket, should be allowed credit for such expenditure. If such a proposition were

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accepted, it would lie in the trustee's power to put an end to the endowment by extravagant expenditure. The duty of the trustee is to carry out the directions of the founder and not to encumber the trust property by systematically incurring expenditure beyond the limits of the income of the trust property. Reference was made to *Andrews v. McGuffog* (1), but we do not find that the case lays down any proposition to the contrary. As stated by Lord Watson, the money which the trustees there were said to have misapplied had been spent in executing, according to the specific directions of the testator, one of the main purposes of the trust and the only administrative error which they committed consisted in their having honestly mistaken the mode in which the testator's purpose was meant to be attained. It is contended by the learned Pleader for the appellant that there was, as a matter of fact, a surplus left after meeting the expenditure of the Ubhayams and the defendant was justified in spending that surplus for the benefit of the temple. But such a case was never sought to be made and what is found is that the defendant spent about Rs. 17,000 in excess of the income of the temple during the six years that the accounts have been taken, and not that he utilised the surplus of one particular fund for the benefit of the other fund. Further, as it is pointed out on behalf of the respondent, these Ubhayams are special funds which have nothing whatever to do with the ordinary worship in the temple and the expenditure of the income of those funds must be regulated according to the direction of the respective founders of those funds.

The only objection to the scheme of management framed by the Subordinate Judge, which has been taken before us, relates to the question whether, having regard to the facts disclosed, the defendant should be retained at all in the office of trustee and, if so, whether the order suspending the defendant from trusteeship until payment of the amounts due under Exhibit C and what he is found liable for in this case should be upheld or what modification should be made in this connection in the scheme of management.

(1) (1886) 11 A. C. 313.

The amount due under Exhibit C is Rs. 45,000, which is charged upon some of the Zemindary properties belonging to the defendant, and under the decree he is liable for a sum of nearly Rs. 12,000. Having regard to the fact that the defendant's Zemindary is heavily encumbered and his financial affairs are extremely embarrassed, it is open to grave doubt, whether the condition attached by the decree to resumption by the defendant of the duties of Dharmakartha will ever be satisfied. The direction of the Subordinate Judge, therefore, practically amounts to removal of the defendant from the office of trustee, but it cannot be satisfactory in the interests of the trust that there should be no trustee for an indefinite time.

It is argued on behalf of the appellant that the order of suspension is wrong and the provision made for the appointment of a treasurer and for a proper system of accounting will be sufficient to protect the interests of the institution. No doubt these provisions provide some check on the action of the Dharmakartha, but the Dharmakartha has still certain important powers, for instance, the collections are all to be made by him and so also the expenditure, although expenses are to be regulated by a budget prepared at the beginning of every Fasli year. It is argued on the other hand on behalf of the plaintiffs that the defendant has shown want of capacity in managing the institution and its properties. Besides, he owes a large sum of money to the trust and having regard to the facts which have been proved in the case, it will be entirely detrimental to the interests of the trust to permit the defendant to continue as Dharmakartha.

Much stress was laid on behalf of the appellant on the fact that the temple was founded and endowed by his own ancestors and that he is the hereditary trustee according to the terms of the dedication. He is not, however, entitled to any pecuniary benefit from the trust and the law is well established, and this was conceded before us, that if the continuance of a person who is a hereditary trustee and a descendant of the founder in the office is likely to endanger the interests of the institution, he is liable to be removed, *Vide*

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Fakurudin Sahib v. Acken Sahib (2) and also *Anantanarayana Ayyar v. Kuttalam Pillai* (3), and in *Ohintaman Bajaji Dev v. Dhondo Ganesh Dev* (4) the trustee was removed mainly on the ground that he did not keep proper accounts and in *Anantanarayana Ayyar v. Kuttalam Pillai* (3) the trustee was removed because he systematically failed to submit accounts to the committee of management. The grounds which justify a Court in removing trustees are well expressed in Storey's Equity Jurisprudence, section 1289, adopted by the Privy Council in *Letterstedt v. Broers* (5). That was a case of a private trust but the principle enunciated there is applicable a *fortiori* to trustees of public trusts: "But in cases of positive misconduct, Courts of Equity have no difficulty in interposing to remove trustees who have abused their trust. It is not, indeed, every mistake or neglect of duty or inaccuracy of conduct of trustees, which will induce Courts of Equity to adopt such a course. But the acts or omissions must be such as to endanger the trust property or to show a want of honesty or a want of a proper capacity to execute the duties or a want of reasonable fidelity."

There can be no doubt whatever that the defendant's conduct shows a want of capacity to manage the trust properties. He does not appear to have realised the elementary duties of a trustee. He started upon his office by appropriating to his own use a sum of Rs. 8,000 belonging to the trust funds, and no portion of that money has yet been restored. The fact that the previous Rajahs acted in a similar way which resulted in their owing to the institution a sum of Rs. 37,000 does not justify the conduct of the defendant. It only shows that the duties and responsibilities of a trustee were not understood even by his predecessors in office. One of the most important duties of a trustee is to keep separate accounts and to keep the trust property separate from his own

property. Here also the Raja failed in his duty throughout. Then his management of the trust properties cannot be said to have been at all efficient. A sum of nearly Rs. 12,000 is payable by him to the trust on this account. The defendant's own affairs are in a practically insolvent condition. Almost the greater portion of the ancient and valuable Zemindari of Kalahasti is now in the hands of creditors. To what extent this result has been contributed by the defendant himself has not been investigated in this case, nor was it necessary to do so. Our duty is to look entirely to the interests of the trust and we feel convinced that, in the circumstances, it will not be for the benefit of the institution to allow it to remain under the management of the defendant. He admits in his own evidence that he himself never looked into the accounts or the correspondence and was content to leave everything to his Dewan. And that is exactly what one would have inferred from the history of the trust. In the present impecunious condition of the appellant who still must have considerable position and influence in the locality, it would not be fair either to himself or to the institution that he should continue to hold the office of trustee. The appellant has not been found guilty of any dishonest misappropriation and without suggesting any reflection on his honesty we think that the observation of Jessel, Master of Rolls, in *Barker's Trusts, In re* (6), affords a proper guidance to the Court in cases of this character: "A necessitous man is more likely to be tempted to misappropriate trust funds than one who is wealthy and besides a man who has not shown prudence in managing his own affairs is not likely to be successful in managing those of other people." We have also carefully considered whether it would not have been sufficient to safeguard the interests of the temple if we appointed a board of control to exercise proper check and supervision over the management or if a co-trustee was appointed to work conjointly with the appellant. But we have come to the conclusion that any such provision would not tend to the smooth working of the institution.

(2) 2 M. 197; 4 Ind. Jur. 280; 1 Ind. Dec. (N. S.) 409.

(3) 22 M. 481; 9 M. L. J. 203; 8 Ind. Dec. (N. S.) 345.

(4) 15 B. 612; 8 Ind. Dec. (N. S.) 413.

(5) (1884) 9 A. C. 371; 53 L. J. P. C. 44; 51 L. T. 169.

(6) (1875) 1 Ch. D. 43; 45 L. J. Ch. 52; 24 W. R. 204.

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In the result the appeal will be dismissed and the memorandum of objections allowed to this extent, that the decree of the lower Court will be modified by directing that the defendant be removed from the office of Dharmakarthi of the Kalahasti temple and its endowed properties. It will also be declared that the Subba Naidu Tope belongs to the temple and in addition to the amount decreed by the Subordinate Judge the defendant is liable to the temple for Rs. 156-11-0, which is the difference between the profits of the Subba Naidu Tope not accounted for by the defendant and the amount wrongly charged against him on account of straw. The lower Court will be directed to appoint a fit and proper person as trustee in place of the defendant. The appellant will bear the costs of this appeal. Each party will bear his own costs of the memorandum of objections. The costs of the respondents will come out of the trust estate.

M. C. P.

*Appeal dismissed;
Memo. of objections partly allowed.*

ACHHAIBAR SINGH v. JANG BAHADUR SINGH.

JUDGMENT.—I am unable to see any sign of life in this appeal. There is a clear finding of fact that prior to the issue of the second Sanad in the names of both appellant and Chimnaji, a previous Sanad had been granted more than a quarter of a century previously in favour of Chimnaji only, who was separate from his brother Punjaji, the father of appellant. Chimnaji mortgaged this severalty and had lost it by foreclosure absolute before the second Sanad was obtained, whether owing to fraud or error, because it is manifest that where a transferable grant in perpetuity has been made in favour of one person who has transferred the same to a third person, no subsequent Sanad in favour of the transferor or any other person can be legally issued so as to constitute a fresh grant, unless the transfer can be avoided. Moreover, plaintiff's case is not one of fresh but of an original joint grant and as to this the finding of fact is against him. An 1899 Sanad in favour of two persons is no evidence that an 1872 Sanad in favour of one person was intended for two. The appeal is dismissed with costs.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 715 OF 1909.
March 17, 1910.

Present:—Mr. Stanyon, A. J. C.

DAMADAJI—PLAINTIFF—APPELLANT

versus

MARTAND AND ANOTHER—DEFENDANTS—RESPONDENTS.

Grant in perpetuity, transferable—Transfer of grant—Issue of fresh sanad after transfer, legality of.

Where a transferable grant in perpetuity has been made in favour of one person who has transferred the same to a third person, no subsequent sanad in favour of the transferor or any other person can legally be issued so as to constitute a fresh grant, unless the transfer can be avoided.

Appeal from the decree of the Court of the Additional District Judge, East Berar, dated the 4th August 1903.

Mr. M. R. Dixit, for the Appellant.

Mr. J. Mitra, for the Respondents.

OUDH JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL No. 28 OF 1918.
August 14, 1918.

Present:—Mr. Lindsay, J. C.

ACHHAIBAR SINGH AND OTHERS—DEFENDANTS—APPELLANTS

versus

JANG BAHADUR SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Hindu Law—Father, separate property of, nature of, when passing to sons—Oudh Estates Act (I of 1869), s. 2—Oudh Estates (Amendment) Act (III of 1910), ss. 2, 21—Grantee, original, dead before passing of Oudh Estates Act—Heirs of grantee and their descendants, succession of, before passing of Oudh Estates (Amendment) Act—Law governing grant.

Under the Hindu Law when the separate property of a father descends on his death to his sons, it becomes their joint ancestral property. [p. 902, col. 2.]

Where an original grantee died before the passing of the Oudh Estates Act and his estate passed to

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his brother as his heir and after the latter's death, to the latter's sons before the passing of the Oudh Estates (Amendment) Act:

Held, that the estate in the hands of the original grantee's nephew and their descendants was governed by the rules of their ordinary personal law. [p. 903, col. 1.]

Appeal against the order of the District Judge, Rae Bareilly, dated the 20th April 1918, reversing the decree of the Subordinate Judge, Partabgarh, dated the 31st January 1918.

Babu Bisheshwar Nath Srivastava, for the Appellant.

The Hon'ble Pandit Gokaran Nath Misra, for the Respondent.

JUDGMENT.—This is a defendants' appeal against an order of remand made by the lower Appellate Court.

The suit was brought by three plaintiffs, the sons of Sheo Balak Singh, for the purpose of setting aside an alienation of a share in certain property made by their father Sheo Balak Singh on the 30th of May 1906. This alienation was made in favour of the defendants Nos. 1 to 4 or their predecessors-in-title. The case for the plaintiffs was that at the time the alienation was made they and their father constituted a joint Hindu family, that their father had no authority to sell the property and that there was no legal necessity for the sale.

The principal defence was that the property in question was not joint ancestral property and that the plaintiffs had no right to maintain the suit. Various other pleas relating to legal necessity and the like were raised.

The Court of first instance on its construction of the Oudh Estates Act (Act I of 1869) held that Sheo Balak Singh was the sole owner of this property and the plaintiffs (his sons) had no interest in it at the time the sale was made. The suit was accordingly dismissed.

In appeal the learned District Judge has held that the law as laid down in Act I of 1869 did not apply as regards succession to the property. The judgment of the first Court was reversed and the suit was remanded for disposal on the merits.

It is admitted that the property in dispute formed a portion of a grant which was made to one Sheo Lal after the annexa-

tion of Oudh. Sheo Lal's name was entered in List VI prepared under section 8 of Act I of 1869, although it is admitted that he died long before the Act was passed. There seems to be no doubt that Sheo Lal died without issue in the year 1860 and that the property then came into possession of his brother Jai Dayal. Jai Dayal also seems to have died very soon after he succeeded, for we have it that in the *khewat* which was prepared at the first Regular Settlement of 1862, this property was recorded in the names of Jai Dayal's three sons, one of whom was Parmeshar. There is no evidence on the record to show when Parmeshar died, but at any rate it is clear that he must have died before the year 1906 when the alienation now in question was made. Sheo Balak Singh, the man who sold the property, is the son of Parmeshar and the three plaintiffs are Sheo Balak's sons and, therefore, Parmeshar's grandsons.

The learned Judge was of opinion that the provisions of Act I of 1869 relating to succession did not apply in this case because Sheo Lal, the original grantee, died before the passing of the Act. It is quite clear that Jai Dayal who succeeded his brother Sheo Lal was not an heir within the meaning of that expression as defined in Act I of 1869, for according to that definition "heir" means "a person who inherits property, otherwise than as a widow, under the special provisions of this Act." Jai Dayal, therefore, could not have inherited the property under the provisions of the Act; and if this be so it must, I think, be taken that it came to his hands as property governed by the ordinary Hindu Law. So far as Jai Dayal is concerned he took the property as his separate property, but on his death it descended to his three sons of whom one was Parmeshar, and so it appears to me, that in the hands of Parmeshar this property became joint ancestral property under the Hindu Law.

The argument for the appellants is that the learned Judge did not take into consideration the fact that the definition of the term "heir" as used in Act I of 1869 has been altered by the Amending Act which was passed in the year

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1910. Under section 2 of this latter Act "heir" now means "a person who has inherited or inherits, otherwise than as a widow or mother, an estate or a portion of an estate *whether before or after the commencement of this Act.*" Further by the provisions of section 21 of the Amending Act this definition operates retrospectively, and so the contention is that although before the passing of the Amending Act neither Jai Dayal, Parmeshar or Sheo Balak could have been heirs according to the original definition, they nevertheless must now be deemed to have taken as heirs by virtue of the provisions of the new Act. Consequently the argument is that Sheo Balak took this property as an "heir" within the meaning of the Act and, therefore, under section 11 of the Act he had full power to dispose of it as he pleased.

On the other hand the learned Counsel for the respondents points out that although by the terms of section 21 of the Amending Act retrospective effect is given to the definition of "heir", it is nevertheless provided in the saving clause that no rights already vested are to be affected by the alteration made in the definition; and so it is argued that inasmuch as the property had become joint ancestral property before the new Act was passed, Sheo Balak's three sons (the plaintiffs in the present case) had acquired a vested interest in the property by reason of their birth and that this interest cannot be divested or affected in any way by reason of the alteration made in the definition of the term "heir."

I think this argument on behalf of the respondents is correct and must be accepted, and on this ground I hold that the judgment of the Court below must be affirmed. In the circumstances the sons were entitled to set up the case that the property was joint ancestral family property and that their father was not competent to alienate it without some justifying necessity. The appeal fails and is dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

APPEAL No. 371 of 1917.

July 29, 1918.

Present:—Sir John Wallis, Kt., Chief Justice, and Mr. Justice Seshagiri Aiyar.

RIPON PRESS AND SUGAR MILL COMPANY, LIMITED, BELLARY, BY ITS CHAIRMAN OF THE BOARD OF DIRECTORS, MR. VENKATA RAO—
DEFENDANT—APPELLANT

versus

NAMA VENKATARAMA CHETTY—

PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 116—Suit by share-holder for recovery of dividend against registered company, period of limitation for—'Registered,' meaning of—General Clauses Act (X of 1897), s. 3 (45).

A suit by a share-holder for the recovery of dividend against a registered company is governed by Article 116 of Schedule I of the Limitation Act, [p. 904, col. 2.]

The word 'registered' in Article 116 of Schedule I of the Limitation Act must be read as defined in section 3, clause (45), of the General Clauses Act, and the term 'registered' in the latter Act includes documents registered under any special law such as the Companies Act or the Copyright Act as well as registration under the Registration Act. [p. 904, cols. 1 & 2.]

Appeal against the decree of the District Court, Bellary, in Original Suit No. 12 of 1917.

Mr. C. Sambasiva Row, for the Appellant;

Mr. H. Bala Krishna Row, for the Respondent.

JUDGMENT.—This appeal raised an interesting question on the law of limitation as to which, so far as we are aware, there is as yet no authority in India, namely, as to the period of limitation for a suit by a share-holder against a registered company to recover dividends. In England, it is well settled that a dividend is a speciality debt for which a period of 20 years is allowed by 3 & 4 William 4, Ch. 42, section 3. This was first pointed out by Lord Justice Christian in *Smith v. Cork & Brandon Railway Co.* (1), which has been followed in later cases and in England in *Artisans' Land & Mortgage Corporation, In re* (2).

In India, we have to look to the provisions of our Limitation Act. The right to receive a dividend which has been duly

(1) (1870) Ir. Rep. 5 Eq. 65.

(2) (1904) 1 Ch. D. 796; 73 L. J. Ch. 581; 52 W. R. 330; 12 Manson 98.

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declared is one of the rights of every share-holder by virtue of the contract which he is deemed to have entered into with all the members of the Company under section 39 of the Indian Companies Act, 1882. The terms of that contract are to be found in the memorandum of association and in the special articles of association, if any, and if there are no special articles of association and in so far as they are not inconsistent with them, then in table A which is appended to the Act. *Prima facie*, the provisions of Articles 72 to 76 in table A, which deal with the declaration and payment of dividends, are applicable and form the contract under which the dividends are payable. Now, the memorandum of association is required by law to be registered, and the articles in table A, in so far as they are applicable, are by section 38 of the Companies Act to be deemed to be the regulations of the Company, in the same manner and to the same extent as if they had been inserted in the articles of association, so that by virtue of section 38 the debt here must be deemed to have arisen from a memorandum and articles of association duly registered under the Companies Act.

Now, Article 115 of the Limitation Act is 'for compensation for the breach of any contract, express or implied, not in writing registered and not herein specially provided for.' There is no special article for the recovery of dividends, and, therefore, Article 115 will apply, unless Article 116 is applicable. Article 116 is 'for compensation for the breach of a contract in writing registered,' and it is now settled that that means for breach of any contract in writing registered. 'Registered' in the Limitation Act must be read as defined in the General Clauses Act of 1897. Section 3, clause 45, of that Act says, 'registered' used with reference to a document, shall mean "registered in British India under the law for the time being in force for the registration of documents." It has been contended for the appellant that the law for the time being in force for the registration of documents must mean the Indian Registration Act for the time being. That, however, appears to us to be unduly restricting the meaning of that clause. The Companies Act provides

for the registration of the memorandum and the articles of association, which are documents, and there may be other Statutes such as the Copyright Acts, which provides for the registration of other documents. There is, we think, no reason why the term 'registered' within the meaning of the General Clauses Act should not include documents registered under any special law of that kind as well as registration under the Indian Registration Act. We are, therefore, of opinion that the present suit is for compensation for the breach of a contract in writing registered and that the period of limitation, therefore, under Article 116 is six years and the suit is not barred. The other contentions of the appellant also fail.

In the result, the appeal fails and is dismissed with costs.

M. C. P.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 308-B OF 1917.

June 24, 1918.

Present:—Mr. Mittra, A. J. C.

RAJA UDRAM *alias* DEVIDAS—

PLAINTIFF—APPELLANT

versus

KHANBEG AMIRBEG—DEFENDANT—

RESPONDENT.

Notice, registered, sent through post—Refusal, proof of.
Where a defendant denies the receipt of notice alleged to have been sent to him through registered post, it is incumbent upon the plaintiff to call the post-peon to prove that the registered post-card was tendered to and was refused by the defendant. [p. 905, col. 1.]

Appeal against the decree of the Second Additional District Judge, Akola, in Civil Appeal No. 10 of 1917, dated the 14th May 1917.

Mr. M. V. Joshi, for the Appellant.

Mr. G. V. Kakde, for the Respondent.

JUDGMENT.—This second appeal and Second Appeal No. 310-B of 1917 have been disposed by the lower Appellate Court in one judgment, and this judgment will, therefore,

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govern the disposal of both the second appeals.

The plaintiff sues for ejectment of the defendants on the allegation that their tenancy has been determined by a notice to quit under section 79, Berar Land Revenue Code. The suit has been dismissed on the ground that service of the notice has not been sufficiently proved. The defendants denied having refused the notice sent by the plaintiff by registered post. There is an endorsement of refusal on the back of the registered post-card. The dak-peon has not been called as a witness. The address of the addressee given on the post-card is vague. The lower Court has held that as the defendants deny the notice it was incumbent upon the plaintiffs to call the post-peon to prove that the registered post-card was tendered and refused by the defendants. This view is supported by the judgment in *Gobinda Chandra Saha v. Dwarka Nath Patita* (1). On this finding the suit has been rightly dismissed and I can see no error of law in this finding.

The lower Appellate Court has also held that the plaintiff has failed to prove his title by proper evidence. It is, however, unnecessary to examine the correctness of this finding. The decree of the lower Appellate Court is confirmed and the appeal is dismissed with costs.

Appeal dismissed.

(1) 26 Ind. Cas. 962; 19 C. W. N. 489; 20 C. L. J. 455.

MADRAS HIGH COURT.

CIVIL REVISION PETITION NO. 413 OF 1917.

April 24, 1918.

Present:—Mr. Justice Seshagiri Aiyar.

POYYALI NAICKER—DEFENDANT—
PETITIONER

versus

SUBBA NAICKER—PLAINTIFF—

RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 11—Res judicata between co-defendants—Conflict of interests inter se, absence of, effect of—Implied adjudication, whether res judicata.

Actual adjudication on an issue in a suit is not necessary to constitute the decision *res judicata* in a subsequent suit. If the decision come to in the

earlier suit impliedly decides the point which is in issue in a subsequent suit, it would be *res judicata*. [p. 906, col. 1.]

Fakirchand Lallubhai v. Naginchand Kalidas, 33 Ind. Cas. 423; 40 B. 210; 17 Bom. L. R. 1106 and *Sankaramahalisingam Chetty v. Muthulakshmi*, 43 Ind. Cas. 860; 33 M. L. J. 740, followed.

Where the parties to a suit were co-defendants in an earlier suit and there was nothing to show that there was a conflict of interests *inter se* between them, the decision in the earlier suit will not operate as *res judicata* in the subsequent suit. [p. 906, col. 2.]

Kandiyl Cheriya Chandu v. Zamorin of Calicut, 29 M. 515 and *Nallappa v. Vridhachala*, 25 Ind. Cas. 898; 37 M. 270, distinguished.

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the judgment, dated the 11th December 1916, of the Court of the District Munsif, Tuticorin, in Small Cause Suit No. 969 of 1916.

Mr. K. Raja Aiyar, for the Petitioner.

Mr. O. Krishnamachariar, for the Respondent.

JUDGMENT.—The suit is brought by the Karaswan against the defendant whom he alleges to be a subscriber to the chit. The defendant denied he was a subscriber. The District Munsif came to the conclusion that the defendant's plea is barred by *res judicata* by virtue of the decision in Small Cause Suit No. 1400 of 1915 on the file of the District Munsif's Court, Tuticorin. In that suit, a third party who claimed to be a subscriber to the chit fund brought a suit against the present plaintiff and the defendant, who were arrayed as 1st and 2nd defendants respectively, for recovering the amount of the subscription which he had paid. The 1st defendant pleaded that he had asked the 2nd defendant who was also a subscriber to pay the amount and, consequently, he was not liable. The 2nd defendant pleaded that he was not a subscriber at all and that he never undertook to pay the plaintiff. After the pleas were recorded, the plaintiff in the previous suit exonerated the 1st defendant and was content to take a decree against the 2nd defendant alone. The District Munsif states in his judgment in that case: "I find that no reason has been shown why the plaintiff should institute a false suit against the 2nd defendant. If the 2nd defendant and 1st defendant were on bad terms, there is no reason whatsoever why plaintiff

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iff should lend himself to the designs of the 1st defendant." The judgment does not decide any rights *inter se* between the 1st and 2nd defendants. There is nothing in the pleadings to which I have been referred which in terms say that the liability undertaken by the 2nd defendant was as a subscriber. It may be a case of *novatio*. The plaintiff to whom money was due from the 1st defendant might have agreed to take it from the 2nd defendant and to give up his claim against the 1st defendant. The records of the suit are not inconsistent with the view that the 1st defendant was exonerated because there was a new agreement with the 2nd defendant, who undertook the liability which the 1st defendant was under. The conclusion in the previous suit does not necessarily entail the finding that the 2nd defendant was a subscriber. Therefore, in my opinion, the present plea is not barred by *res judicata* on the face of the pleadings and of the judgment in the former suit.

I do not agree with the contention of the petitioner's Vakil that there must be an actual adjudication. If the decision come to impliedly decides the point which is now in issue, it would be *res judicata*. That was recognised even in Bombay. See *Fakirchand Lallubhai v. Naginchand Kalidas* (1). In this Court a Bench, to which I was a party, has held that all findings which are necessary for giving the ultimate decision will be *res judicata*. *Sankaramahalingam Chetty v. Muthulakshmi* (2). But the real difficulty as regards the judgment of the District Munsif arises from the facts that not only was the claim against the 1st defendant withdrawn but that there was no adjudication regarding the right of the 1st and 2nd defendants *inter se*. In *Ramchandra Narayan v. Narayan Mahadev* (3) West, J., stated the law thus:—"But for this effect to arise, there must be a conflict of interest amongst the defendants and a judgment defining the real rights and obligations of the defendants *inter se*." Following the decision,

the Madras High Court in *Narasimha Ammal v. Srinivasa Bagava* (4) say: "The necessity for an active controversy between the co-defendants is uniformly recognised." Applying the principle enunciated by these two decisions, it seems to me that the conclusion come to in the previous case cannot be regarded as *res judicata* because there has been no adjudication regarding the rights of the defendants *inter se*. The learned Vakil for the respondents drew my attention to the decision in *Kandiyil Cheriya Chandu v. Zamorin of Calicut* (5). In that case the learned Judges specifically put the plea of *res judicata* on the ground of active contest. This is what Benson and Bhashyam Aiyangar, JJ., say in that case: "The then 5th defendant not only supported the then plaintiff but took an active part in the controversy and was represented by a Vakil in all stages of the suit, both in the Courts below and in the High Court." They further say that an adjudication is absolutely necessary to decide the rights of the two defendants *inter se*. That case does not help the respondent. The decision in *Nallappa v. Vridhachala* (6) proceeds upon the principle of equitable estoppel, which has no bearing on the present case.

For these reasons I am of opinion that the previous decision does not operate as *res judicata* in the present case and that there must be an enquiry into the facts of the case. I reverse the decision of the District Munsif and remand the suit to him for disposal on the merits. Costs to abide the result.

M. C. P.

Decree reversed; Case remanded.

(4) 5 Ind. Cas. 760; 33 M. 112 at p. 114; 7 M. L. T. 89.

(5) 29 M. 515.

(6) 25 Ind. Cas. 888; 37 M. 270.

(1) 33 Ind. Cas. 423; 40 B. 210; 17 Bom. L. R. 1106.

(2) 43 Ind. Cas. 860; 33 M. L. J. 740.

(3) 11 B. 216 at p. 220, 11 Ind. J. 1; 6 Ind. Dec. (N. S.) 142.

LOBHAJI V. NARAYAN.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 182 OF 1918.

November 6, 1918.

Present:—Mr. Batten, A. J. C.

LOBHAJI—DEFENDANT—APPLICANT

versus—

NARAYAN—PLAINTIFF—NON-APPLICANT.

Provincial Small Causes Courts Act (IX of 1887), s. 25—Revision—Different view of evidence, whether ground for interference.

The fact that the Revisional Court might take a different view of the evidence from that taken by the Court of Small Causes is not a justifiable ground for interference in revision under section 25 of the Provincial Small Causes Courts Act.

Revision of the judgment of the Small Cause Court, Nagpur, passed in Civil Suit No. 1242 of 1917, dated the 25th March of 1918.

Mr. G. L. Subhedar, for the Applicant.

Mr. A. C. Roy, for the Non-Applicant.

JUDGMENT.—It is merely a question of weight of evidence. It is impossible to consider that it has not all been considered. It is quite possible, I might have taken a different view of the evidence, if I had been the Small Cause Court Judge, but this does not justify interference in revision. The application is dismissed with costs.

Application dismissed.

PRIVY COUNCIL.

APPEAL FROM THE MADRAS HIGH COURT.

July 2, 1918.

Present:—Lord Sumner, Sir John Edge, Mr. Ameer Ali and Sir W. Phillimore, Bart.

Raja JAGAVEERA RAMA VENKA-

TESVARA ETTAPPA MAHARAJA

IYEN AVERGAL, SINCE DECEASED

—APPELLANT

versus—

ALAWARASA ASARI AND OTHERS—

RESPONDENTS.

Madras Rent Recovery Act (VIII Mad. of 1865), s. 11—Land law of Madras—Rent, rates of—Custom—Contract, whether paramount to status and usage—Contract implied from payment and acceptance of rent—Consideration for promise to pay enhanced rent, whether necessary.

Under section 11 of the Madras Rent Recovery Act of 1865 the rent payable by a tenant to his landlord is determined primarily by contract,

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which may be either express or implied. Failing such contract, resort is had, when no settlement has taken place, to local usage; but if such usage establishes a proper rent, then either party, if dissatisfied with it, may require resort to the Warum customary in the village for division of the crop. Failing proof of such customary Warum, it is the Collector's duty to fix the rent. All these methods, however, are only applicable in cases where no contract is proved. [p. 509, col. 2.]

The expression "implied contract" in the section is an English term of art, and must be so construed. It involves the legal incident of some consideration moving from the landlord, as that incident is understood in English Law. [p. 509, col. 2.]

A number of *ryots* had for years paid rent at the rate of 4 fanams, which was the prevalent rate for dry lands. At various dates, having dug wells at their own expense, they took up garden cultivation, and were thereafter charged, and for several years paid, rent at the rate of 8 fanams prevailing for wet lands. For Fasli 1912, however, they refused to accept Pattahs at that rate. It was found, in view of the long continuance of payments at the 8-fanam rate, that there was an implied contract to go on paying that rate, but that there was no consideration for the new promise, the land being already held on a contract to pay 4 fanams:

Held, that the implied contract was not legally enforceable, and that the *ryots* were entitled to Pattahs at the old rate. [p. 513, col. 1.]

Consolidated appeals from several decrees of the Madras High Court, dated the 21st September 1910, reported as 8 Ind. Cas. 330, reversing the decrees of the District Judge, Madura, and restoring those of the Sub-Collector, Dindigul.

FACTS of the case will appear from their Lordships' judgment and from the report of the earlier proceedings in *Armugam Ohetty v. Jagaveera Rama* (1).

Mr. De Gruyther, K. C. (with him Mr. Dube), for the Appellant, submitted that the rents were fixed on the kind of crop raised: 8 fanams was the landlord's share of the crop raised. The practice, before cash rents were fixed, was for the Zemindar to take a share of the produce. According to the local usage rent is payable, not according to whether the land is Punja (dry) or Nanja (wet), but according to the crop raised. If there is no contract, the Court will under section 11 of the Madras Act VIII of 1865 fix the rent according to the local usage, but if not satisfied with that, we can resort to the Warum or division in kind.

(1) 8 Ind. Cas. 330; 35 M. 134; 9 M. L. T. 76; (1910) M. W. N. 679.

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The invariable practice in India from time immemorial was for the Zemindar to have a share of the produce. Fifth Report of 1912, Madras part, page 8. When a money rent was fixed, it was fixed with reference to the crop produced. It does not matter to us when the wells were dug, and the nature of the crop changed; we are not enhancing the rent, we have all along been entitled to that rent on that crop. It has never been found that there was any contract that the *ryots* should pay 4 fanams for garden lands. They have raised a more valuable crop, and so we get a higher rent.

The answer to the argument as to want of consideration is that there never was a contract to pay 4 fanams irrespective of the crop, the rate was not permanently fixed at 4 fanams; when the garden crop was raised the Zemindar asked the tenant to pay 8, and the tenant agreed.

The contract to pay that 8 fanams was at first express and is now implied, it is implied from the fact that for years the *ryots* have in fact paid 8 fanams.

The Madras Rent Recovery Act does not prohibit contracts which give the landlord a share in the benefit of the tenant's improvements. *Natesa Gramani v. Venkatarama Reddi* (2), where at page 516 this very case is referred to.

When the Warum is commuted into a money rent, an agreement to pay an increased rent for a particular cultivation is not illegal, nor is a custom to pay such an increased rent. *Suppa Pillai v. Thumbichi Naicker* (3). In the absence of contract the rent is settled every year for that year only: from the fact that the tenants for many years paid 4 fanams there is not to be implied a contract that they were to go on paying only 4 fanams. *Parthasarathi Appa Row v. Chevantra Venkata Narasayya* (4).

Mr. Dube followed. The custom to pay a minimum of 8 fanams for garden cultivation has been abundantly proved. Some of

these tenants have been paying that rate for 40 years.

Mr. J. M. Parikh, for the Respondents, referred to Wilson's Glossary, page 154. "Faisal Tirwai" is there explained as "the rates settled on each field at the time of the original survey assessment (Madras)." As defendant-appellant's written statement admits, the Faisal rates were fixed in Fasli 1210=1803, when the original survey and assessment were made, *vide* also the Fifth Report and *Venkatagopal v. Rangappa* (5). The point is that the assessment was according to the land, not according to the crop grown.

The policy of Government, as set out in Regulation XXX of 1802 (repealed by Madras Act VIII of 1865), was to give the tenants fixity of tenure at a permanent rate of rent.

[SIR W. PHILLIMORE.—I don't understand that what was dry land then was always to be assessed as dry land.]

The assessment was on particular pieces of land, it was made with the tenants on the same lines as the Permanent Settlement with the Zemindars.

The documents, Pattahs and Muchalikas, filed in the case lend no support to the appellant's argument: they show that the same crop might be grown on Punja (dry) land and on garden land.

The appellant now relies upon a custom of enhancement and alternatively, upon an implied agreement to pay an enhanced rate. This was not his case in the lower Courts. Those Courts have assumed that the 4 fanams rate is the permanent rate, and that the burden of proving variation is on the Zemindar. The only evidence of such variation is that the tenants have in fact paid the enhanced rate without protest for periods varying from 2 to 40 years. To have a contract there must be mutual consent; and the tenants must know their rights. The so-called implied contract is a mere inference of law from certain facts found.

[SIR JOHN EDGE.—Surely it is an inference of fact?]

It may be presumptive evidence, but it is rebuttable; it could be rebutted for instance by proving mistake on the part

(2) 30 M. 510; 17 M. L. J. 518; 2 M. L. T. 455.

(3) 31 M. 19; 17 M. L. J. 511; 3 M. L. T. 103.

(4) 6 Ind. Cas. 988; 37 I. A. 110; 33 M. 177; 14 C. W. N. 938; 20 M. L. J. 596; 8 M. L. T. 141; 12 C. L. J. 233; (1910) M. W. N. 466; 12 Bom. L. R. 648 (P. C.).

(5) 7 M. 365 at p. 369; 2 Ind. Dec. (N. S.) 835.

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of the tenant. The High Court say there is very meagre evidence to support the District Judge's finding of an implied contract, I say there is none. Secondly, I say that even if there is such a contract, it is not enforceable for want of consideration.

The three cases cited against us are all distinguishable. In *Parthasarathi Appa Row v. Chevandra Venkata Narasayya* (4) the rent was not fixed permanently. In *Natesa Gramani v. Venkatarama Reddi* (2) the land was unassessed land and no question of consideration was raised, nor was there any question of cancelling the contract on the ground of mistake: there was no mistake. In *Suppa Pillai v. Thambichi Naicker* (3) there is a special finding of fact that there was an express contract, when the Warum was commuted, to pay a special rate for betel cultivation.

There is no such thing in Madras as tenancy from year to year; the *ryots* are permanent, irrespective of the Pattahs they may give from time to time.

To sum up, the land here is permanently assessed land; the burden of proving a variation is on the Zemindar, and there is no proof of such consent as an implied contract requires.

Mr. De Gruyther, K. C., in reply.—As to mistake section 21 of the Indian Contract Act provides that a contract is not voidable for a mistake of law.

The District Judge was justified in finding that there was an implied contract to pay the higher rate in future years; and if that finding is one of fact, it is binding.

JUDGMENT.

LORD SUMNER.—This was a consolidated appeal in suits brought by a number of *ryots* in the Zemin of Gandamanaickanoor against their landlord, the Zemindar of Ettiyapuram, in the district of Tinnevely. He had tendered Pattahs for Fasli 1312, at 8 fanams per guli, at which rate they had paid rent for several years. These the *ryots* rejected, claiming that the proper rate was 4 fanams only; and brought these suits under section 8 of the Madras Rent Recovery Act (VIII of 1865) to obtain such Pattahs as they said they were entitled to receive.

The Act of 1865, though since repealed by the Madras Estates Land Act (I of 1908), was the Act then in force, and in suits "involving disputes regarding rates of rent," section 11 provides that "all contracts for rent, express or implied, shall be enforced." Though this Statute does not define "rent," section 3, which makes the delivery of Pattahs and Muchalikas mutually obligatory, requires that they shall state "the amount and nature of the rent," according as "it is payable in money or in kind or by a share in the produce." Regulation XXX of 1802, which had provided for such written records, and for fixing rents by the rates in the Government assessment, was generally silent as to rents fixed by contract between the parties. *Venkatagopal v. Rangappa* (5) explains the circumstances under which, between 1802 and 1865, it had become necessary to give effect to contracts and not merely to status and usage, and more particularly to such contracts as are implied from bare payment and acceptance of rent at a particular rate or measured in a particular way. Whether the framers of the Act fully appreciated its effect or not, the expression "implied contract" is an English term of art, and must be so construed. It involves the legal incident of some consideration moving from the landlord, as that incident is understood in English Law. Accordingly the scheme of the section was as follows: If a contract, express or implied, and legally enforceable, was once established, the issue was determined, and the proper Pattah was one giving effect to that contract. If, on the other hand, no such contract could be established, then, since in the words of the District Judge on the second hearing in his Court, "it is not pretended that this Zemindari was surveyed by Government before the 1st January 1859," local usage could be proved. If such usage established a proper rent, then either party, if dissatisfied with it, could require resort to the Warum customary in the village for the division of the crop between landlord and tenant (of which no evidence was given or could have been given in these suits, as events happened), and, failing proof of such a customary Warum, it would have been the Collector's duty to fix such rate as he thought just,

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"after ascertaining if any increase in the value of the produce or in the productive power of the land has taken place, otherwise than by the agency or at the expense of the *ryot*." It followed, under this scheme, that if these *ryots* failed to prove an implied contract at 4 fanams enforceable between the parties, and, if the landlord succeeded in proving such a contract at 8 fanams, no further issue arose for decision.

The course which the litigation took was this: Thirty-eight suits were begun in 1903 and, although the *ryots* came from different villages in the Zemindari, and had paid the garden rate for very varying terms, one alone, taken as typical of the rest at any rate so far as concerns the present appeal, was gone into. It was the suit brought by Arumugam Chetti, of the village of Poomalaignundu, in the Zemin of Gandamanaikanoor. The common state of facts was this. At some date, which varied a good deal from case to case, the *ryot* had made a well or tank at his own expense to water the land, which had been "Punja" or dry land before, and thereafter, thanks to the water-supply, he resorted to garden cultivation. No permission for the working of these wells was required on the part of the Zemindar. Rent had previously been paid at the rate of 4 fanams per guli, the usual "dry" rate: thenceforward, it was always demanded and paid at the rate of 8 fanams per guli, which was alleged to be the usual rate for "garden" cultivation. There seems to have been no demur to the 8 fanams rate till 1903, and presumably Pattahs and Muchalikas at this rate were regularly exchanged, in accordance with the Act.

Arumugam Chetti, the selected plaintiff, pleaded, rather indefinitely, that the field in question "was a Punja land, bearing 4 fanams rate of assessment," but that since the well had been sunk "the defendant had been charging garden assessment," without having any right to do so. The Zemindar did not deny the *ryot's* statement quoted above, but, besides relying on the actual payment of rent without dispute at the rate of 8 fanams, pleaded "a long standing custom for the Zemindar to collect Teerva from the *ryots* according to the following rate:

(1) from 8 fanams to 10 fanams per guli for garden cultivation, and that, "in the said Zemindari, the Faisal rates have been fixed in Fasli 1210 at 15 fanams per guli for garden cultivation." The record leaves the actual course taken at the trial on these pleadings somewhat conjectural.

The Sub-Collector rejected the Zemindar's evidence of custom, and made decrees in favour of the *ryots*, observing that their lands were "lands formerly paying Punja rates (4 fanams)." He appears to have understood the custom pleaded by the Zemindar to have been "a general custom to charge enhanced rents for garden crops, when raised by plaintiffs, irrespective of any improvement or alteration in the land made at plaintiffs' expense," and he held such a custom to be bad in law, as being contrary to the policy of the Act, relying on the case of *Venkatagiri Raja v. Pitchana* (6) and *Fischer v. Kamakshi Pillai* (7). There is nothing in his judgment to show, that a contract, existing before the wells were made, for a rent at the dry rate of 4 fanams was either expressly proved on the one hand, or expressly questioned on the other, but there is good ground for thinking that the case could not have taken the course it did, unless the Zemindar had conceded the existence of such a contract before the wells were made, and had alleged its supersession by another contract, since the payments at the garden rate began. In the High Court on the first hearing, Subramania Aiyar, J., says in terms that, "in the lower Courts the parties throughout proceeded in all these cases on the footing, that there were no facts to try, except as to the existence of the alleged custom," and then proceeds to discuss the validity of such a custom, and whether or not the alleged contract to pay at the 8-fanam rate was or was not *nudum pactum*. This is only consistent with his having taken the view above stated of the course of the case at the trial on the arguments presented to the Court. Twenty-seven of these suits were appealed to the District Judge. In these cases the maximum period since the wells were

(6) 9 M. 27; 3 Ind. Dec. (N. S.) 415.

(7) 21 M. 136; 7 Ind. Dec. (N. S.) 452.

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made and payment of the garden rate of rent began was eighteen years. Eleven others, in which the period was over forty years, and therefore went back to a date before the passing of Act VIII of 1865, had been reserved by the Sub Collector for separate trial.

The District Judge allowed these appeals and made an order for a remand. On appeal to the High Court there was a difference of opinion on the first hearing, and on a second, under section 15 of the Letters Patent, the order of the District Judge was affirmed and the cases were sent back to the Sub-Collector. It is important to observe two things: (1) the Zemindar had not appealed against the order as actually made by the District Judge; he appears to have been satisfied with it as it stood, whatever its true meaning and effect might be; (2) the High Court interpreted that order as meaning merely that the Sub-Collector ought to try the question, whether a presumption of the fact of an implied contract arose in any particular case, on the facts of that case, and declared that "Under the order of remand it is not competent to either party to re-open the question of custom raised in the first preliminary issue." Accordingly, neither on the remand nor in the subsequent proceedings until the appeal to their Lordships' Board has this question of custom been further raised. As the now appellant acquiesced in its being thus disposed of, and as the judgment appealed against accordingly does not deal with it, their Lordships cannot now entertain this point as a ground of appeal. It is enough to say that, if the custom was meant to refer to the determination of rates of rent "according to local usage," the evidence was irrelevant, unless and until it appeared that no contract, express or implied, had been made on the subject; and if, on the other hand, it was meant to be, as the Sub-Collector understood, a general custom to enhance rent if the tenant enhanced the value of the land at his own expense, then the Zemindar was asking the Sub-Collector to do what the Act forbade him to do, at any rate when, in the last resort, and in default of proof of contract or of "Warum," he came to fix

a rent which he considered to be just. It never appears to have been suggested that what was meant was a custom of the country, with reference to which the *ryots* or their predecessors must be deemed to have contracted when they began to occupy the land in the first instance, or that the Zemindar's claim was merely to have the original contract applied to new circumstances according to its terms, and was not a claim to alter those terms, and to imply a new contract for that purpose.

The hearing upon the remand took place in 1907. By this time seventeen of the thirty-eight suits of 1903 had been disposed of, or in some way had disappeared; but further suits had been brought for 1904 and 1905, respectively, thirty-one and thirty-eight. Thus ninety suits were eventually dealt with; but again the suit of Arumugam Chetti was treated as typical of all, though he had "paid this enhanced rate for the first and only time in Fasli 1311, the year before suit" (Record page 185). Again the Sub-Collector decided for and the District Judge against the *ryots*, though neither Sub-Collector nor District Judge was the same person who had officiated before. Again, on appeal to the High Court, the *ryots* succeeded, and now it is the Zemindar who appeals to their Lordships' Board.

The judgment of the High Court, now appealed against, says, "in the present suits it is admitted that, prior to the construction of the wells, the tenants had always been paying at the uniform Punja rate of 4 fanams a guli for the suit lands, and this as far back as can be traced." From such facts it would be a legitimate inference that a contract to hold the land at a 4-fanam rate of rent might be implied, and, when this is taken in conjunction with the terms of *ryoti* tenure, such a contract has at any rate an element of fixity, since so long as the *ryot's* rent is paid the Zemindar cannot dispossess him against his will. It need not necessarily be inferred that such an implied contract gives a right of occupation at the Punja rate in perpetuity. It would be enough for the purpose of the present case if its duration is implied to be so long as circumstances affecting the holding remain unchanged, otherwise than

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by the labour and outlay of the *ryot* himself. This is the basis of the decisions in favour of the *ryots*. How then is another and subsequent contract to be implied replacing the contract at the "dry" rate by a new one at the "garden" rate? The District Judge found as a fact, at the second hearing in his Court, that, in view of the long continuance of payments of rent at the garden rate, "in each and every case there was an implied contract to go on paying those rates, if not as long as the relationship of landlord and tenant continued, certainly as long as the conditions remained unchanged," and on this Ayling, J., delivering the judgment of the High Court, which is now under review, says—

"The existence of an implied agreement is deduced mainly from the payment of the enhanced rate by the litigating tenants for a number of years varying from two to forty. The corroborative evidence is meagre, but I am not prepared, in second appeal, to set aside the District Judge's finding in this respect."

The question for their Lordships then comes to be that of consideration for the subsequent agreement at garden rate thus implied. What is this consideration to be? The mere letting of the land by the landlord will not do, for it was let at the dry rate already, and the *ryot* was entitled to continue in occupation at that rate, and no fresh consideration, therefore, moved from the landlord for the *ryot's* assumed promise to pay at the 8-fanam rate. The District Judge appears to have found consideration in the landlord's abstention from exercising his right to resort to the "Warum" system, if the *ryots* refused to consent to pay at the rate of 8 fanams, but, under the Act, if there was an implied contract for the 4-fanam rate, that contract had to be enforced, and there was no question of resorting to the "Warum" system. By the admissions, such an implied contract did exist. As, by consent, all the cases have been treated as typified sufficiently by Arumugam Chetti's case, no point can be made that in the cases where the 8-fanam rate had been paid for over forty years, the question arose before the Act of 1865 was passed; but, even if it could, there is no evidence that there was any "Warum"

in the village in question. If it be said that at any rate the landlord could have put the tenants to the trouble of proceedings in the Sub Collector's Court and forbore to do so, there is no evidence that there was actually any such forbearance. Besides, if he had done so, still by the hypothesis, proof of the implied contract for the dry rate would have promptly defeated him, nor can it be said that a valid consideration can be found for the abandonment of the *ryot's* rights in the Zemindar's submission not to raise a hopeless and groundless dispute of those rights, any more than a promise to pay a sovereign in satisfaction of a debt of a guinea is supportable by the consideration that it saves the creditor the trouble of bringing an undefended action for the larger sum.

The High Court, therefore, concluded that the implied agreement to pay the 8-fanam rate, though found as a fact, could not be enforced for want of consideration and accordingly if the contract to pay the 4-fanam rate still stood, it was enforceable. Some contention was raised that the *ryots* were estopped by their conduct in paying the garden rate, but this estoppel in pais, for what it might be worth, rested on an implied representation of some existing fact, on the faith of which the Zemindar had changed his position, and of this there was no evidence. The contention was really only the implied contract for the garden rate in another form. A further argument has been advanced, turning on the supposed true intent of the original contract for the 4-fanam rate, namely, either that it was a promise to pay the 4-fanam rate so long as the land should remain dry, and then, if garden cultivation should take place, to determine that contract, leaving the parties to make a new one, express or implied, and in default to resort to the "Warum" system, or else, in the alternative, that there never had been two implied contracts, but really from the beginning only one, to the effect that the *ryot* would pay at the 4-fanam rate for the land while dry, and at the 8-fanam rate or some appropriate garden rate for the land when under garden cultivation, no matter at whose expense the water-supply should be procured, and this, as the legal result of this tenure having originated historically, as it is said.

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in a division of the produce of the holding such as it might be from time to time, between *ryot* and Zemindar in accustomed proportions. To both arguments there must be the same answer. The Zemindar throughout contended for a new contract, arising in each case when the 8-fanam rate first began to be paid, and this is what the District Judge found and the High Court accepted. No case was made below, when the facts were examined or admitted, that the question was merely one of applying a very ancient agreement to new circumstances in accordance with its terms; nor would it be easy, to say the least of it, to suppose that any *ryot* voluntarily agreed to have his rent enhanced, whenever his own outlay should have rendered an improved mode of cultivation possible. Furthermore, such a theory, if applicable at all, is of general application and is repugnant to the whole scheme of Act VIII of 1865, which is based on the idea of making contract paramount, even when it is only implied, and of recognising agreed rents in supersession of division of the produce, which is to be resorted to only if no contract for a rent can be proved and if the fixing of rent according to the local rate is objected to.

In the result the whole case now turns on the question whether there was any consideration for the new promise to pay at the rate of 8 fanams for land, which was already held on a binding contract of tenancy at the rate of 4 fanams per guli. Their Lordships agree with the High Court that the answer must be "none." If the cases had been examined separately, if distinctions had been drawn between cases where the higher rate was paid for forty years and cases where it was only paid once or twice, if the possibility of presuming a lost Pattah at 8 fanams or lost proof of consideration had been mooted, if the origin of these tenancies had been investigated and the terms of the original contracts fully discussed, other questions might possibly have arisen. As it is, their Lordships must deal with the case as they find it. They will humbly advise His Majesty that the appeal should be dismissed with costs.

Appeal dismissed.

Solicitor for the Appellant: Mr. Douglas Grant.

Solicitors for the Respondents: Messrs. Watson & Co.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 315 OF 1917.

April 24, 1918.

Present:—Mr. Findley, Offg. A. J. C.

GANGA PRASAD—PLAINTIFF—

APPELLANT

versus

FIDA ALI CHANDABHAI—DEFENDANT,

—RESPONDENT.

Provincial Insolvency Act (III of 1907), ss. 16 (2), 28—"Debt provable under this Act," meaning of—Obligation incurred after adjudication, suit in respect of, maintainability of.

An obligation incurred by an insolvent after the date of his adjudication is not a debt provable in the insolvency proceedings within the meaning of section 28 of the Provincial Insolvency Act, so that a suit in respect of such obligation is not governed by section 16 (2) of the Act.

Appeal from the decree of the District Judge, Nagpur, dated the 10th March 1917, in Appeal No. 35 of 1917.

Messrs. G. L. Subhedar and N. R. Aleker, for the Appellant.

Messrs. Atmaram Bhagwant and S. C. Dutt Chowdhury, for the Respondent.

JUDGMENT.—There can, in my opinion, be no question but that the lower Appellate Court has erred in excluding Rs. 60 relief on account of rent given by the first Court. The learned District Judge failed to notice that this item of rent was not an item which fell under the category of debts provable under this Act alluded to in section 16 (2) of the Provincial Insolvency Act. What are debts provable under the Act is laid down in section 28 *idem*. Now the order of the District Judge declaring the defendant an insolvent, was passed on the 27th September 1913, Exhibit A-1, while the rent note shows that the obligation of debt was incurred on the 18th November 1913. This obligation, therefore, was not an obligation incurred before the date of the adjudication, *vide* section 28 of the Act, and it follows, therefore, that the claim in question is not a debt provable under this Act. Section 16 (2), therefore, did not exclude the lower

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Appellate Court from allowing the decree for rent to stand. The result is that the appeal succeeds and the lower Appellate Court's decree will be modified to the extent of restoring the decree of the original Court as regards the payment of Rs. 60 on account of rent. The respondent must bear the appellant's costs in this appeal as well as his own.

Appeal accepted.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 90 OF 1917.

September 13, 1918.

Present:—Mr. Stuart, A. J. C., and Pandit Kanhaiya Lal, A. J. C.

JAI NARAIN—DEFENDANT—

APPELLANT

versus

Raj BAJRANG BAHADUR SINGH—

AND ANOTHER—PLAINTIFFS—SURAJ DIN

AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Joint family—Alienation—Antecedent debts—Burden of proof—Pious obligation of sons to pay father's debts, whether arises during father's lifetime.

Where a mortgagee sets up a charge in his own favour made by one whose title to alienate he necessarily knew to be limited and qualified, he may reasonably be expected to allege and prove facts presumably better known to him than to an infant member of the family, namely, those facts which embodied the representation made to him of the alleged needs of the estate and the motives influencing his immediate loan. [p. 915, col. 2.]

Hunoomanpersaud Panday v. Musammal Babooee Munraj Koonweree, 6 M. I. A. 393; 18 W. R. 81 (note); *Sevestre* 253n; 2 Suth. P. C. J. 29; 1 Sar. P. O. J. 552; 19 E. R. 147, followed.

Where an alienation of family property made by a Hindu father is questioned by his sons during his life, no question of the pious obligation of the sons to pay off their father's debts can arise. [p. 916, col. 1.]

Sahu Ram Chandra v. Bhup Singh, 39 Ind. Cas. 280; 44 I. A. 126 at p. 131; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 498; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213; 39 A. 437 (P. C.) and *Bharath Singh v. Prag Singh*, 43 Ind. Cas. 291; 20 O. C. 311; 5 O. L. J. 9, followed.

Appeal from the decree of the Subordinate Judge, Rae Bareilly, dated the 27th April 1917.

Syed Ali Mohammad, for the Appellant.

The Hon'ble Pandit Gokaran Nath Misra and Pandit Harkaran Nath Misra, for Respondents Nos. 1 and 2.

JUDGMENT.—The defendant appellant is the son of Suraj Din and seeks to impeach a mortgage of joint family property effected by the latter in favour of the plaintiffs on the 9th January 1913 and two deeds of further charge similarly executed by him in favour of the same persons. The defendant-appellant denied that there was any legal necessity to justify the above transactions, but the Court below found against him and decreed the claim.

It appears from the documentary evidence adduced that the dealings between the plaintiffs and Suraj Din, which have culminated in the deeds of mortgage and further charge above referred to, commenced on the 26th January 1904, when a deed of simple mortgage was executed by Suraj Din in lieu of Rs. 8,000 in favour of the plaintiffs and their deceased brother, Chanderpall Singh, the whole of the consideration having been paid in cash before the Sub-Registrar (Exhibit 10). No necessity was recited in it for the loan.

On the 27th February 1905 Suraj Din executed another deed of simple mortgage in favour of the same persons in lieu of Rs. 3,000, tacking the same to the amount previously borrowed. Out of the sum of Rs. 3,000, Rs. 2,860-2-0 were credited towards certain prior debts and liabilities, including a decree and some arrears of under-proprietary rent said to have been due in respect of Mauza Miran Bisaiya for 1310 to Kharif 1312 Fasli, and the balance was paid before the Sub Registrar (Exhibit 11).

On the 10th January 1908 Suraj Din discharged the two deeds above mentioned by executing a fresh deed of simple mortgage in favour of the same persons for Rs. 15,000, out of which Rs. 1,484-13-0 were paid in cash before the Sub-Registrar and the balance was credited towards the money due on the above deeds and a promissory note of the 1st January 1903 and some arrears of revenue or under-proprietary rent, said to have been due in respect of the village Miran Bisaiya for Kharif 1315 Fasli (Exhibit 4).

On the 16th March 1908 he borrowed Rs. 2,600 and executed a deed of further charge in favour of the said persons,

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receiving Rs. 96-2-0 before the execution of the document and Rs. 6,911 in cash before the Sub-Registrar and crediting the balance in satisfaction of a decree which was then under execution against him (Exhibit 5).

On the 19th June 1909 he again borrowed Rs. 4,000 from the same persons, receiving Rs. 86-13-9 before the execution of the deed and Rs. 1,938 3-6 in cash before the Sub-Registrar and crediting the balance towards the interest due on the mortgage-deed for Rs. 15,000, and the deed of further charge for Rs. 2,600 above mentioned and some arrears of rent said to have been due in respect of the village Miran Bisaiya for 1315 to the end of 1316 Fasli (Exhibit 6).

On the 29th March 1912 he took a further loan of Rs. 13,500; out of which Rs. 3,000 were received by him in cash before the Sub-Registrar and the balance was credited towards the money due on mortgages and some arrears of under-proprietary rent in respect of the village Miran Bisaiya for 1317 to 1319 Fasli (Exhibit 7).

On the 9th January 1913 he consolidated the above loans and executed a fresh deed of simple mortgage for Rs. 35,000 out of which Rs. 31,478-10 6 were credited by him towards the prior debts aforesaid and Rs. 200 were taken for the purchase of stamp and the balance was received in cash before the Sub-Registrar. In this deed it was stated that the mortgagor required Rs. 4,000 to meet the revenue demand and for domestic expenses (Exhibit 1). This is one of the documents now in suit. It was followed by a deed of further charge of the 11th December 1913 for Rs. 3,000 said to have been taken for domestic and private necessities (Exhibit 8), another of the 16th January 1914 for Rs. 1,000 stated to have been similarly taken for domestic and private needs, and a third of the 4th July 1914 for Rs. 2,000 said to have been taken for the payment of arrears of revenue and other necessary expenses (Exhibit 9).

The dealings did not end here. On the 4th December 1914 he executed a deed of further charge for Rs. 15,000, out of which Rs. 4,014 were received by him in cash before the Sub-Registrar and the balance was credited in satisfaction of the deeds of further charge of the 11th December

1913, 16th January 1914 and the 4th July 1914, two promissory notes of the 16th July 1914 and the 27th November 1914 and some interest due on the mortgage of the 9th January 1913. This is the second document now in suit.

On the 23rd April 1915 another deed of further charge was executed for Rs. 2,450, out of which Rs. 2,173 were paid in cash before the Sub-Registrar and the balance was credited towards a promissory note of the 28th January 1915 and some arrears of revenue, said to have been due in respect of the village Miran Bisaiya for 1322 Fasli. This is third document now in suit.

There is no evidence to show whether the antecedent debts, amounting to Rs. 42,914-3-3, credited in the deeds of mortgage and further charge now in suit, were taken for family purposes or for family necessity. The plaintiffs were themselves the creditors in the case of each of these antecedent debts, and as pointed out by their Lordships of the Privy Council in *Hunoomanpersaud Panday v. Musammat Babooee Munraj Koonweree* (1), "where the mortgagee himself with whom the transaction took place, is setting up a charge in his favour made by one whose title to alienate he necessarily knew to be limited and qualified, he may be reasonably expected to allege and prove facts presumably better known to him than to an infant member of the family, namely, those facts which embodied the representation made to him of the alleged needs of the estate and the motives influencing his immediate loan."

The learned Counsel for the plaintiffs-respondents does not contest that in accordance with the decision of their Lordships of the Privy Council in *Sahu Ram Ohandra v. Bhup Singh* (2) read with the decision of this Court in *Bharath Singh v. Prag Singh* (3), no question of pious obligation can arise because Suraj Din is still alive. He asks for an opportunity

(1) 6 M. I. A. 393; 18 W. R. 81 (note); *Sevestre* 253n; 2 Suth. P. C. J. 29; 1 Sar. P. C. J. 552; 19 E. R. 147.

(2) 39 Ind. Cas. 290; 44 I. A. 126 at p. 131; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 493; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213; 33 A. 437 (P. C.).

(3) 43 Ind. Cas. 291; 20 O. C. 311; 5 O. L. J. 9.

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to prove that the antecedent debts in question were taken for family purposes or family necessity, contending that the issues as framed by the Court below did not require him to go behind the antecedent debts and establish the purpose for which they were taken. The decision of their Lordships of the Privy Council in *Sahu Ram Chandra v. Bhup Singh* (2) was in fact delivered after the issues were framed in this case and did not become known in this country till after the case, which is the subject of appeal, was decided by the Court below.

The question of the liability of the defendant-appellant for the sum of Rs. 10,335.12-9, said to have been taken in cash, cannot also be properly determined till the account books of Suraj Din, if any, showing his grain and cloth dealings and the expenses incurred in connection with the marriage of his daughters and the payment of arrears of revenue or underproprietary rent in connection with his estate, from the time when the dealings first commenced, are forthcoming. It was for the defendant appellant to have produced evidence to rebut that adduced on behalf of the plaintiffs. The representations made to the creditor may also be material under section 38 of the Transfer of Property Act.

The Court below is, therefore, directed to determine the following issues, after taking such relevant evidence as the parties may adduce:—

(1) Whether the antecedent debts credited in the deeds of mortgage and further charge now in suit were taken for family necessity or family purposes or for the discharge of a common obligation and if so, to what extent?

(2) Whether the money said to have been taken in cash was similarly taken for family purposes or family necessity or for the discharge of a common obligation or lent in good faith on the strength of the representations, if any, made as to the alleged needs of the estate and family; and if so, to what extent can the defendant-appellant be made liable for its payment?

Three months' time will be allowed for the return of the findings and ten days from the date of the findings will be allowed to the parties for filing objections.

Issues remitted.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 2650 OF 1917.

November 25, 1918.

Present:—Mr. Justice Shadi Lal.

BUDHA AND OTHERS—DEFENDANTS

—APPELLANTS

versus

MUL RAJ—PLAINTIFF AND SAHIB DIAL

AND ANOTHER—DEFENDANTS

—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 135—Mortgage—Puisne mortgagee, suit by, for possession—Cause of action—Limitation—Failure of payment of part of consideration, effect of.

A puisne mortgagee is not bound to file a suit for possession of the mortgaged property within twelve years from the date of his mortgage where the property is not in the possession of the mortgagor but in that of the mortgagee. [p. 917, col. 1.]

Husaini v. Ram Charan, 32 Ind. Cas. 341; 2 O. L. J. 488; 18 O. C. 250, dissented from.

Limitation under Article 135 of Schedule I of the Limitation Act against a puisne mortgagee does not begin to run until the redemption of the first mortgage and he is entitled to bring his suit for possession within twelve years from the date of redemption. [p. 917, col. 2.]

Ghanaya v. Pandit Chhajju Ram, 38 P. R. 1894 and *Narain Singh v. Shimbhoo Singh*, 1 A. 325; 4 I. A. 15; 3 Suth. P. C. J. 357; 3 Sar. P. C. J. 673; 1 Ind. Dec. (N. S.) 223, followed.

Plaintiff, a puisne mortgagee, sued for possession of the property mortgaged after having effected the redemption of the previous mortgage. The mortgage in favour of the plaintiff was made on the 14th February 1895. Although it was nominally with possession, the first mortgagee was in possession through his tenant, the mortgagor. In 1907 the plaintiff brought a suit for redemption against the prior mortgagee and obtained a decree. It appeared that he paid off the previous mortgagee but could not recover possession because the mortgagor succeeded in obtaining possession of the land;

Held, (1) that plaintiff's cause of action arose when the first mortgagee was paid off and that the suit was, therefore, within time; [p. 917, col. 2.]

(2) that the fact that plaintiff had not succeeded in proving the payment of a part of the consideration for the mortgage did not debar him from recovering possession of the property. [p. 918, col. 1.]

Allah Ditta v. Nazar Din, 33 Ind. Cas. 474; 53 P. R. 1916; 51 P. W. R. 1916 (F. B.), followed.

Second appeal from the decree of the District Judge, Gujranwala, dated the 16th July 1917, reversing that of the Munsif, 2nd Class, Gujranwala, dated the 14th March 1917, dismissing the claim.

Dr. G. C. Narang, for the Appellant.

Lala Shamair Chand, for the Respondents.

JUDGMENT.—This second appeal arises out of an action brought by one Mul Raj, the puisne mortgagee of the land in dispute, for possession thereof after having effected

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the redemption of the previous mortgage. The main question for consideration is whether the suit is barred by time under Article 135 of the Indian Limitation Act.

The mortgage in favour of the plaintiff was made on the 14th February 1895; and though it was nominally with possession, it is beyond dispute that the first mortgagee was in possession of the property through his tenant, the mortgagor. In 1907 the plaintiff brought a suit for redemption against the prior mortgagee and obtained a decree in his favour. The learned District Judge finds, and his finding cannot be assailed in second appeal, that the previous mortgagee has been paid off by the plaintiff, but it appears that the latter could not recover possession because the mortgagor succeeded somehow or other in obtaining possession of the land. There is documentary evidence to the effect that the mortgagor cultivated the land as the tenant of the first mortgagee up to 1902, and that the latter then let it to other persons. The application of the mortgagor dated the 8th of May 1914 makes it clear that he again obtained possession sometime in 1911, and there can be little doubt that his possession was then unlawful as against the plaintiff.

Mr. Gokal Chand Narang for the appellants contends that the plaintiff's right to sue for possession accrued in 1895, when the mortgagor's right to possession determined; and invites my attention in support of his argument to certain observations contained in a judgment of the Additional Judicial Commissioner of Oudh in *Husaini v. Ram Charan* (1). A perusal of that judgment shows that the observations with respect to limitation were purely *obiter dicta*. In any case I am not prepared to concur in the proposition that the puisne mortgagee is bound to file a suit for possession within twelve years from the date of his mortgage, even when the property is not in the possession of the mortgagor but is in the possession of the prior mortgagee. It seems to me that a suit of that kind, if filed before the redemption of the prior mortgage, is bound to be

dismissed, as against the mortgagor on the ground that he is not in possession of the property, and as against the prior mortgagee on the simple plea that the mortgage in his favour has not yet been redeemed. Article 135 distinctly contemplates that the possession is with the mortgagor, and that the mortgagee is entitled to hold the property as against the latter. I do not think that the aforesaid Article has any application to a case of this kind.

In *Narain Singh v. Shimbhoo Singh* (2), a case which is on all fours with the present one, their Lordships of the Privy Council made the following pertinent observations:—

"It appears, however, to their Lordships that the plaintiff having a good title when the first mortgagees were paid off in 1870, their cause of action accrued when the defendants (i. e., the mortgagors) after that period entered into possession of the estate to which they had no title."

The learned Counsel for the appellants contends that this judgment was delivered with reference to the Limitation Act of 1871, which provided a period of twelve years from the date "when the mortgagee is first entitled to possession"; and that the Limitation Act of 1877 made the date of the determination of the mortgagor's right to possession as the *terminus a quo* for the period of limitation. Now, it is doubtful whether this change of phraseology has made any real difference in the law; and a Division Bench judgment of this Court reported as *Ghanaya v. Pandit Ohhajju Ram* (3), which was delivered after the enforcement of the Limitation Act of 1877, follows the aforesaid Privy Council ruling, and lays down that the limitation against a puisne mortgagee does not begin to run until the redemption of the first mortgage and that he is entitled to bring his suit for possession within twelve years from the date of redemption. This judgment is binding upon me, and I am not prepared to hold that the rule of law enunciated therein is erroneous. For these reasons I hold that the suit is within time.

(2) 1 A. 325; 4 I. A. 15; 3 Suth. P. C. J. 357; 3 Sar. P. C. J. 673; 1 Ind. Dec. (N. S.) 223.

(3) 38 P. R. 1894.

(1) 32 Ind. Cas. 341; 2 Q. L. J. 488; 18 Q. C. 280.

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The fact that the plaintiff has not succeeded in proving the payment of a part of the consideration for the mortgage does not debar him from recovering possession of the property. As laid down by the Full Court in *Allah Ditta v. Nazar Din* (4), the transfer is perfectly valid, and the question whether the entire mortgage money has or has not been paid does not arise in this case. The observations *per contra* in *Husaini v. Ram Charan* (1) cannot be followed in the face of the judgment of the Full Court in *Allah Ditta v. Nazar Din* (4). As to the contention that the area decreed to the plaintiff is more than what is mentioned in the mortgage-deed in his favour, it is sufficient to say that the learned District Judge after giving his reasons to account for the excess, offered to remand the case, but the appellants declined the offer.

Accordingly I confirm the decree of the District Judge, and dismiss the appeal with costs.

Appeal dismissed.

(4) 33 Ind. Cas. 474; 53 P. R. 1916; 51 P. W. R. 16 (F. B.).

ODDH JUDICIAL COMMISSIONER'S
COURT.

FIRST CIVIL APPEAL NO. 115 OF 1917.
July 8, 1918.

Present:—Mr. Stuart, A. J. C., and Pandit
Kanhaiya Lal, A. J. C.

Pandit PRAG DATT—PLAINTIFF—

APPELLANT

versus

Pandit KANHAIYA LAL AND OTHERS—

DEFENDANTS—RESPONDENTS.

Procedure—Burden of proof, party failing to discharge, through bad advice of Counsel—Re-hearing, whether can be allowed.

The mere fact that a party to a case did not adduce evidence owing to the bad advice of his Pleader, which resulted in a decision against him, is no ground for allowing him a re-hearing of the case. [p. 919, col. 1.]

Appeal from the decree of the Subordinate Judge, Bara Banki, dated the 19th July 1917.

Mr. A. P. Sen holding brief of Mr. St. George Jackson, for the Appellant.

The Hon'ble Pandit Gokaran Nath Misra, Mr. Haider Husain and Pandit Sarju Prasad, for the Respondents.

JUDGMENT.—Prag Datt mortgaged on the 2nd September 1913 certain shares in Bichlinga and Kamai to the mother of Kanhaiya Lal. On the 23rd November 1915 he sold the rights that he retained in the share in Bichlinga to Kanhaiya Lal and Rameshri Prasad. When the vendees applied for mutation in February 1916, Prag Datt opposed the entry of their names on the ground that the whole consideration of the sale had not passed. The vendees failed to obtain mutation. They sued for possession in the Civil Court on the 20th June 1916. On the 15th September 1916, Prag Datt was party to a compromise in Court by which he agreed to the vendees' obtaining possession over the share in question. Prag Datt subsequently filed a suit to have that compromise set aside on the following grounds. He said that he had executed the compromise because he was in abject terror of Kanhaiya Lal and incapable of protecting his own interests owing to the following facts:—

1. That Kanhaiya Lal who is a Pleader by profession had continually acted for him in legal proceedings.

2. That Prag Datt's brother had been prosecuted on the 13th of April 1916 and that he believed that Kanhaiya Lal had been responsible for the prosecution. It is to be noted that the brother was acquitted on that occasion.

3. Because Prag Datt's brother was being prosecuted in a criminal case at the time when the compromise was effected and Prag Datt believed that Kanhaiya Lal was at the bottom of the prosecution.

Issues were framed on these points. Kanhaiya Lal has admitted in the proceedings that he had acted as a Pleader for Prag Datt. But there was on the face of it no close connection between the two. Kanhaiya Lal was in no way Prag Datt's family lawyer, or regular lawyer, or confidential adviser. He had taken up certain cases on his behalf. That was all. It should have been clear to any Counsel, we consider, that

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in view of the nature of the plaintiff's case the burden of proof was on him and on him very strongly to prove, *firstly*, that Kanhaiya Lal had instigated the prosecution of his brother in April and was instigating the prosecution of his brother in September, and *secondly*, that he was really reduced to such hopeless and pitiable terror, by the fact that such prosecution had taken place and his impression that Kanhaiya Lal was responsible for it, as to be unable to defend himself in the previous civil proceedings, and to be ready to accede to whatever Kanhaiya Lal wished. How any Counsel could believe that if he produced no evidence on these points he would succeed in his case, we fail to understand. However, that was the attitude adopted by Prag Datt's Counsel. He refused to produce any evidence. He said that, as Kanhaiya Lal admitted having appeared for Prag Datt in certain legal proceedings, it would necessarily follow that unless Kanhaiya Lal could show that he had not been privy to the criminal prosecutions, Prag Datt's case was bound to succeed. He refused to produce any evidence and the suit was dismissed. The learned Counsel who has represented Prag Datt in this Court has very wisely thrown up practically every point taken in the grounds of appeal and has pleaded simply for compassion for his client. His case is that his client was badly advised, that his client's Counsel took an extraordinarily mistaken attitude, that his client should not be made to suffer because of the mistaken attitude adopted by his Counsel, and that he should be given a re-hearing and allowed to re-open his case from the very commencement. We do not think that if we acceded to this request we should be acting in fairness to the other side, and also we should be, we consider, embarking upon a very dangerous course, for in the period of nearly two years which has elapsed between the hearing of the case and the decision of this appeal, it has been possible to prepare evidence on behalf of the appellant which might not have been forthcoming at the time of the hearing of the suit.

In these circumstances we consider the appeal must and should fail and dismiss it with costs,

Appeal dismissed.

PUNJAB CHIEF COURT.

MISCELLANEOUS FIRST CIVIL APPEAL No. 1489 OF 1918.

July 31, 1918.

Present:—Mr. Justice Shadi Lal.

KUNDAN LAL—APPELLANT

versus

THE OFFICIAL LIQUIDATOR OF THE DIAMOND JUBILEE FLOUR MILLS COMPANY, LTD., DELHI—RESPONDENT.

Companies Act (VI of 1882), s. 169—Appeal—Service of notice after expiry of 3 months—Delay beyond appellant's control—Extension of time—Reasonable cause—Sale by private contract of property belonging to company in liquidation—Interests of creditors and contributories prejudiced—Sale, whether liable to be set aside.

Where a notice of appeal in the matter of the liquidation of a company was served upon the respondents after the expiry of the period of 3 weeks prescribed by Statute and it appeared that the delay was due to a blunder on the part of the copying department and beyond the control of the appellant:

Held, that the time for the service of notice of appeal was rightly extended. [p. 920, col. 1.]

In an appeal against an order sanctioning the sale of the Diamond Jubilee Flour Mills, Delhi, it appeared that the Mills were leased to the vendees for a period of 3 years commencing from 1st January 1917, one of the conditions of the transaction being that the lease could be determined by either party after giving six months' notice to the other, provided that the Liquidator before resuming possession on the expiry of the period of notice should pay Rs. 5,000 to the lessees. In June 1917, the Liquidator served a notice upon the lessees requiring them to quit the premises on 31st December 1917. On the 8th October 1917 the Additional Judge, Delhi, asked the Liquidator to withdraw the notice and even granted the request of the lessees that in lieu of their agreeing to the withdrawal of the notice the Liquidator should be debarred from determining the lease in any case during its continuance for the remaining period. The District Judge rejected a higher offer than that of the vendees on the ground that they were already in possession and that possession could not be given to anybody else till the expiry of six months:

Held, (1) that the order allowing the lessees to remain in possession was wholly without justification, especially when there was no affidavit from the Liquidator that the alleged compromise was beneficial to the persons interested in the winding up; [p. 921, col. 1.]

(2) that the price being wholly inadequate, the sale by private contract to the vendees was detrimental to the interests of the creditors and contributories of the company and ought to be set aside. [p. 921, col. 2.]

Miscellaneous first appeal from the order of the Additional Judge, Delhi, dated the 15th March 1918, sanctioning the sale of the Diamond Jubilee Flour Mills in favour of Behari Lal-Bulaqi Das for a sum of Rs. 1,75,000,

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Bhagat Govind Das and Lala Ganga Ram, for the Appellant.

Lala Moti Sagar, R. S., and Lala Jagan Nath, for the Lessees (Vendees).

JUDGMENT.—This is an appeal against an order of the Additional Judge, Delhi, sanctioning the sale of the Diamond Jubilee Flour Mills in favour of Behari Lal-Bulaqi Das for a sum of Rs. 1,75,000. Mr. Moti Sagar for the respondents raises a preliminary objection that the notice of appeal having been served upon his clients after the expiry of the period of three weeks prescribed by section 169 of the Indian Companies Act, VI of 1882, the appeal should be dismissed *in limine*. Now, an affidavit filed by Lala Dhanpat Rai, Pleader, on behalf of the appellant furnishes an adequate reply to this objection, and leaves no doubt that the delay in presenting the appeal was due to a blunder on the part of the Copying Department, Delhi, and was beyond the control of the appellant. It appears that the vendees were impleaded as respondents some days after the institution of the appeal, but this was obviously the result of inadvertence on the part of the lawyer engaged by the appellant. Taking all the circumstances into consideration I hold that the time for the service of notice of appeal has been rightly extended.

Upon the merits I have, upon a careful consideration of all the proceedings taken by the Official Liquidator and the Judge in relation to the sale of the property, reached the conclusion that the sale by private contract to the vendees is detrimental to the interests of the creditors and contributories of the Company, and that the price is wholly inadequate. It is not seriously contested by Mr. Moti Sagar that the property is worth much more than Rs. 1,75,000, indeed, one firm actually offered Rs. 2,20,000, but this offer and other offers were rejected on the ground that the vendees were already in possession of the Mills, and that "possession cannot under any circumstances be given till the expiry of six months and that it is possible that possession may be indefinitely postponed if the lessees insist on their rights under the amended terms of the lease."

In view of the above argument used by the learned Judge for rejecting the higher

offers, I consider it necessary to set out briefly the relevant facts about the lease and the alleged amendment in the terms thereof. It appears that in September 1916 the Mills were leased to the vendees for a period of three years commencing from 1st January 1917, and one of the terms of the transaction was that the lease could be determined by either party after giving six months' notice to the other, subject to the proviso that the Liquidator before resuming possession on the expiry of the period of notice should pay Rs. 5,000 to the lessees. It is beyond dispute that the Liquidator served in the month of June 1917 a notice upon the lessees requiring them to quit the premises on 31st December 1917. Now, if this notice had remained in force, the lessees would have vacated the premises at the end of the year, and there could have been no conceivable reason for rejecting the offer of Rs. 2,20,000 made in March 1918. It, however, appears that the learned Judge intervened on the 8th October 1917 and asked the Liquidator to withdraw the notice on the ground that on account of stringency of the money market "it would be a foolish proceeding" to sell the Mills at that time.

I have no hesitation in holding that this was a most unfortunate order, and the reason given for making it appears to me to be wholly wrong. Indeed, the subsequent events shew that the order has actually been utilised by the lessees for obtaining a favourable bargain for themselves and causing loss to the persons interested in the liquidation. There cannot be the slightest doubt that the price of the machinery has gone up on account of the war, and it is common knowledge that there is a keen competition among business men for purchasing mills and that this competition has naturally led to a considerable rise in the prices.

The learned Judge did not, however, content himself with the cancellation of the notice, but even went so far as to accord his assent to a grasping request made by the lessees that in lieu of their agreeing to the withdrawal of the notice the Official Liquidator should be debarred from determining the lease in any case during the continuance of the lease for the

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remaining period, but that they should be allowed the option to put an end to the lease by giving six months' notice to the Official Liquidator. Now, it is perfectly clear that the lessees were anxious to remain in possession of the property, that the cancellation of the notice was beneficial to them, and that they would have agreed to the cancellation without any *quid pro quo*. There was, therefore, absolutely no justification for acceding to their demand, more especially when there was no affidavit from the Liquidator that the alleged compromise was beneficial to the persons interested in the winding up.

No formal document has yet been drawn up containing the modified terms, and the question as to whether the alleged modification is binding upon the Liquidator and the parties concerned in the liquidation is not before me and need not be determined. It is, however, to be observed that the Additional Judge himself, in an order passed on the 28th February 1918, made the following observations:—"Circumstances have also arisen which call for a re consideration of the matter before ratifying by formal deed executed by the Official Liquidator the modified terms as to the continuance of the lease. The position in the absence of such a formal deed is governed by the terms of clause J of the lease and under it the Official Liquidator has, in my opinion, power to give the lessees six months' notice to quit subject to their being paid Rs. 5,000." In spite of this expression of opinion it is strange that when certain contributories represented to the learned Judge that the price offered by the lessees was inadequate and that the Mills be sold by public auction, he passed an order of the 12th March referring to the alleged right of the lessees to hold possession for the full period of three years, and called upon the contributories "to produce some person or persons who, fully knowing all the circumstances as I have explained them, is or are still prepared to make an offer of (as the applicants state) $2\frac{1}{2}$ to 3 lacs," and fixed three days for the purpose of their producing the would-be purchasers. I cannot help remarking that this order was unfair to the contributories, and was calculated to frighten persons who were likely to purchase the property. There cannot be the slightest

doubt that it was the learned Judge's action in cancelling the notice of ejection and subsequently according his assent to the proposed modification in the terms of the lease which was availed of for the purpose of granting a concession to the lessees and rejecting an offer made by another firm, which offer would have given the Liquidator Rs. 45,200 in excess of the price for which the property has been sold to the lessees.

I cannot endorse a transaction of this nature and must set it aside. Accordingly I accept the appeal and quashing the order sanctioning the sale direct the parties to bear their own costs in both the Courts. It is open to the lower Court to take proceedings for the sale of the property by public auction after issuing the proper proclamation. It seems to me that in order to realise a proper price it is necessary to adjudicate upon the rights of the lessees and to determine their lease, which has all along operated as an obstacle in the way of the sale of the property for an adequate price.

Some doubt has been thrown upon the competency of an Additional Judge to exercise the special jurisdiction conferred by the Indian Companies Act, the reason of the doubt being that the Statute confers the jurisdiction upon the 'District Court' and does not contemplate an assignment of proceedings by the latter to the Court of an Additional Judge. It is unnecessary to make a pronouncement upon the subject, but it is desirable that the validity of the proceedings should no longer be open to doubt. Accordingly I order that the proceedings in the liquidation of the Diamond Jubilee Flour Mills Co. be hereafter conducted by the District Judge, Delhi.

Appeal accepted.

SHEORAJ BAHADUR SINGH v. GAJADHAR SINGH.

ODDH JUDICIAL COMMISSIONER'S
COURT.

MISCELLANEOUS CIVIL APPEAL No. 23 OF 1917.

July 10, 1917.

Present:—Mr. Lindsay, J. C., and Pandit
Kanhaiya Lal, A. J. C.

SHEORAJ BAHADUR SINGH—DEFENDANT

—APPELLANT

versus

GAJADHAR SINGH—PLAINTIFF AND

RAMAN SINGH—DEFENDANT—

RESPONDENTS.

Mortgage—Redemption, decree for, obtained—Decree, defective—Suit, subsequent, for redemption, whether maintainable.

A decree for redemption once obtained bars a subsequent suit for redemption, although the decree be defective in so far as it neither fixes any definite time for payment of the mortgage money nor provides for the consequences of non-payment. [p. 923, col. 1.]

Bhola Singh v. Jai Gobind, 12 Ind. Cas. 993; 14 O. C. 257, *Ram Dayal v. Raja Rampal Singh*, 6 O. C. 367, followed.

Gur Pershad v. Rattan Singh, 6 O. C. 239; *Raja Partab Bahadur Singh v. Raja Surat Singh*, 8 O. C. 361, distinguished.

Appeal against the order of the Additional Subordinate Judge, Fyzabad, dated the 21st February 1917, reversing the order of the Probationary Munsif, Sultanpur, dated the 23rd October 1916.

Mr. A. P. Sen, for the Appellant.

Babus Bisheshwar Nath Srivastava, Lachhman Prasad Varma and Daya Kishen Seth, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for redemption in respect of a mortgage executed by Kanhaiya Bakhsh Singh in favour of Balwant Singh, the father of the defendant-appellant, on the 12th April 1882. In 1885, Kanhaiya Bakhsh Singh filed a suit for the redemption of that mortgage and got a decree, allowing him to redeem the mortgage on paying Rs. 43 on or before a certain date. The mortgagee appealed and succeeded in getting the mortgage money payable to him raised to Rs. 100. Kanhaiya Bakhsh Singh then appealed to this Court, with the result that on the 19th February 1886 a decree was passed by this Court in accordance with a compromise by which it was provided that "when after three years the mortgagor redeems the property in suit, he shall pay Rs. 100 and if Balwant Singh, the second mortgagee, may pay Rs. 43 to Panchoo Murari and Arjun Singh,

the first mortgagees, then the mortgagor should pay Rs. 57, the remaining sum after deducting Rs. 43, to the mortgagee Balwant Singh, and if Balwant Singh may not pay Rs. 43 to the first mortgagees then Kanhaiya Bakhsh Singh, mortgagor, should pay Rs. 43 to the first mortgagee and Rs. 57 to Balwant Singh."

Kanhaiya Bakhsh Singh did not, however, pay the mortgage money, as directed by the decree. The decree contained no direction that in case of non-payment the mortgagee shall be entitled to bring the mortgaged property to sale. Kanhaiya Bakhsh Singh died, and was, according to the plaintiff, succeeded by Ram Prasad Singh.

On the 28th March 1908 Bhagwant Singh and Raman Singh instituted a suit for redemption of the mortgage, alleging that they were the heirs of Ram Prasad Singh and further stating that Kanhaiya Bakhsh Singh had made a Will in favour of Gajadhar Singh and that the latter had executed a deed of gift in favour of Bhagwant Singh, one of the then plaintiffs. Raman Singh subsequently withdrew from the claim and Bhagwant Singh gave up the right which he asserted under a deed of gift from Gajadhar Singh. The suit of Bhagwant Singh was eventually dismissed, on the ground that he was not proved to be an heir of Ram Prasad Singh.

The present suit was then filed by Gajadhar Singh for the redemption of the same mortgage. His allegation was that he was the heir of Ram Prasad Singh and was also in possession of certain property left by him under a Will, dated the 19th October 1899. In regard to the deed of gift executed by him in favour of Bhagwant Singh, his statement was that Bhagwant Singh had relinquished his rights under the gift in his favour.

The Court of first instance dismissed the suit, holding that the claim was barred by reason of the dismissal of the previous suits. The lower Appellate Court gave a decree and remanded the suit to the Court of first instance for disposal on the merits.

The decree passed in the suit filed by Kanhaiya Bakhsh Singh was obviously not a decree passed in accordance with section 92 of the Transfer of Property Act then

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in force, for it did not fix any definite time for the payment of the mortgage money and contained no provision declaring that, if such payment was not made on or before the date fixed, the mortgaged property shall be sold in satisfaction of the mortgage money. But all the same it was an effective decree, giving the then plaintiff, Kanhaiya Bakhsh Singh, a right to redeem the mortgage after three years on payment of a definite sum of money. It was capable of execution, and if Kanhaiya Bakhsh Singh failed to enforce it within the time allowed by law, his remedy became barred by time. The matter is concluded by the decision of this Court in *Bhola Singh v. Jai Gobind* (1), which followed a previous decision in *Ram Dayal v. Raja Rampal Singh* (2), and a second suit for redemption is not, therefore, maintainable.

The decree was not of a declaratory nature and the decisions in *Gur Pershad v. Rattan Singh* (3) and *Raja Partab Bahadur Singh v. Raja Surat Singh* (4) do not apply, because the terms of the settlement decrees passed in those cases were not similar. The decree also did not constitute a new mortgage. The effect of the compromise merely was to postpone redemption for three years and give the mortgagor a right to redeem after the expiry of that period. In *Narayan Govind v. Anand Ram Kojiram* (5) it was held that a decree for redemption, giving no fixed time for payment, could be executed at any time by paying the mortgage money within the time usually allowed for an application for execution.

The appeal is, therefore, allowed and the suit dismissed with costs throughout.

Appeal allowed.

- (1) 12 Ind. Cas. 993; 14 O. C. 257.
- (2) 6 O. C. 367.
- (3) 6 O. C. 239.
- (4) 8 O. C. 361.
- (5) 16 B. 480; 8 Ind. Dec. (N. S.) 798.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 116 OF 1916.

September 1, 1917.

Present:—Mr. Mittra, A. J. C.

KALICHARAN—PLAINTIFF—APPELLANT

versus

LAL INDAR SHAH—PLAINTIFF—

RESPONDENT.

Registration Act, (XVI of 1908), s. 49—Lease unregistered, admissibility of, to prove covenant to compensate for improvements—Collateral fact, what is.

An unregistered instrument is admissible in evidence to prove a collateral fact, but to be collateral, the fact must be independent of or separable from the purpose to effect which the law requires registration. [p. 924, col. 1.]

Plaintiff sued defendant for compensation for improvements effected by him while he was a lessee of a village under the defendant, and in support of his claim relied on an unregistered deed of lease which contained an implied condition to compensate him for improvements:

Held, that the deed of lease was inadmissible in evidence under section 49 of the Registration Act, inasmuch as the plaintiff was seeking to prove the terms of the lease for the purpose of enforcing those terms, and not merely for a collateral purpose. [p. 924, cols. 1 & 2.]

Appeal from the decree of the Court of the Divisional Judge, Chhattisgarh Division, dated the 22nd November 1915, in Appeal No. 45 of 1915.

Mr. M. B. Kinkhede, for the Appellant.

Mr. D. B. Tiwari, for the Respondent.

JUDGMENT.—The plaintiff-appellant was a Thekadar of the village of Hathri Kanhar within the Zemindari of Ambagarh Chowki. On the expiry of a previous lease the plaintiff was given a lease for a term of three years commencing from the 6th May 1908. This instrument is unregistered. The defendant-respondent, who is the Zemindar, instituted Suit No. 214 for the ejectment of the plaintiff and he was duly ejected in pursuance of the decree. It was held in that suit that the plaintiff was a lessee from year to year and that his lease was determined by a notice to quit given on the 7th October 1913. The plaintiff now sues for compensation for improvements made by him. He built three houses, sunk a well and made an embankment. The claim for compensation is based upon the allegation that the plaintiff was encouraged by the Zemindar to make these improvements. In support of his claim he has no evidence to tender except the unregistered lease,

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The lower Appellate Court has held the lease to be inadmissible in evidence for want of registration and has dismissed the plaintiff's claim for compensation.

In second appeal it is contended that the lease should have been admitted in evidence as the plaintiff is no longer making any claim to the village. He wants to establish that the Zemindar induced him to make these improvements. The lease contains a covenant not to eject the lessee in case he improved the village and there is also by implication an agreement to compensate for such improvements. The sole question is, therefore, whether in view of the provisions of section 49 of the Registration Act the lease should have been admitted in evidence. Section 49 provides that an instrument which is compulsorily registrable shall not affect any immoveable property comprised therein. So far as this part of the provision is concerned it does not stand in the way of the plaintiff, for the plaintiff does not seek to establish a charge or other interest in the village by reason of his improvements. He merely makes a claim for compensation. But there is another part of the section which lays down that such an instrument shall not be received in evidence of any transaction affecting such property. The expression "affecting such property" governs the word transaction and not "evidence". The contention of the appellant is that in all suits for money the instrument is receivable as evidence. This is a position which cannot be maintained. It is clear law that in a suit for rent the terms of the lease cannot be proved by putting in an unregistered deed of lease. The relationship of landlord and tenant can be proved but not the terms of the contract. As held in *Narayan Bisnoi v. Jaswant Singh* (1), such an instrument is admissible to prove a collateral fact, but to be collateral, the fact must be independent of or divisible from the purpose to effect which the law requires registration.

When the plaintiff says he seeks to give evidence of an encouragement on the part of the Zemindar, he really means to prove an implied agreement in the lease to compensate him for improvements. This is part and parcel of the lease and the plaintiff

cannot prove the terms of the lease when the lease is unregistered. A recent case decided by the High Court of Bombay and cited on behalf of appellant emphasises the distinction between the parties to a contract and proof of the terms of a contract. [*Ohhottalal Aditram Travadi v. Bai Mahakore* (2).]

None of the cases cited before me seems to have much bearing on the point for decision. In *Balaji Teli v. Musammam Bana Bai* (3) an unregistered lease was held not admissible in evidence in a suit for damages for breach of contract to retain the defendant in possession of certain lands. In *Parmanand v. Birkhu* (4) there was not only a claim for damages but also for injunction and the unregistered document was held inadmissible in evidence. In *Gangabisan v. Tukaram* (5) an unregistered deed of sale was held admissible in support of a claim for specific performance of a contract. The Full Bench in *Rajah of Venkatagiri v. Narayana Reddi* (6) held that in an action for damages for breach of contract to execute the lease an unregistered *kabuliyat* was admissible in evidence to prove the contract. Upon a consideration of the cases cited before me I have come to the conclusion that the appellant is not entitled to prove the terms of the lease for the purpose of enforcing those terms. This is giving evidence of the transaction of lease, for which registration was essential.

It is argued that the village is one of the Scheduled Districts and hence the Registration Act does not apply to it, as no notification under the Scheduled Districts Act of 1874 has been issued, but the Registration Act of 1877 and the present Registration Act extend to the whole of British India "except such districts or tracts of country as the Local Government may from time to time with the previous sanction of the Governor General in Council exclude from its operation". There is no such notification excluding Ambagarh Chowki from the operation of the Registration Act.

(2) 40 Ind. Cas. 83; 19 Bom. L. R. 322; 41 B. 463.

(3) 1 N. L. R. 47.

(4) 1 Ind. Cas. 903; 5 N. L. R. 21.

(5) 2 Ind. Cas. 244; 5 N. L. R. 70.

(6) 17 M. 456; 4 M. L. J. 198; 6 Ind. Dec. (N. S.) 316.

(1) 1 N. L. R. 147.

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It is contended that some of the covenants in the lease (*i. e.*, those relating to improvements) should be regarded as mere license, and in support of this reliance is placed upon *Narsingdas v. Ratanlal* (7). I am unable to agree with this contention. The ruling cited does not apply to this case. The lease in this case was not merely a license but was meant to create an interest in immoveable property. The authority to build houses was not given independently of the lease but only as part of the lease. Moreover, it was merely an agreement not to eject the lessee if he makes certain classes of improvements. I cannot, therefore, regard part of the lease as merely creating a license and as such not requiring registration.

The appeal fails and is dismissed, but in the circumstances of the case I direct that each party will bear his own costs of the second appeal.

Appeal dismissed.

(7) 34 Ind. Cas. 471; 12 N. L. R. 75.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 1884 AND 1989 OF 1915.

April 28, 1917.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Bakewell.

KUNNATH MADAMPIL KUNJUNNI *alias* 4th NAIR AVERGAL AND ANOTHER

—DEFENDANTS NOS. 2 AND 3—APPELLANTS

IN S. A. No. 1884 OF 1915—RESPONDENTS

IN S. A. No. 1989 OF 1915

versus

MANNARGHAT RAMANUNNI *alias* MOOPPIL NAYAR AVERGAL—PLAINTIFF

—RESPONDENT IN S. A. No. 1884 OF 1915—

APPELLANT IN S. A. No. 1989 OF 1915.

Malabar Compensation for Tenants' Improvements Act (Mad. I of 1909), ss. 3 (3), 5, 6 (3), 7, 9 (1), 19—Claim for compensation—Burden of proof—Settlement as to compensation before date of contract—Commissioner, second, appointment of—Functions of Commissioner—Commissioner's report, value of—Second Commissioner, duties of—Admissions of parties, effect of.

Ordinarily a tenant who claims compensation for improvements under Madras Act I of 1900 is bound to prove that he has improved the property and that he has spent money in making the improve-

ments. He must show that he has done work which has added to the value of the holding, that that work is suitable and that it is also consistent with the object with which he obtained the Kanom. [p. 926, col. 2.]

Under section 5 (1) of the Malabar Compensation for Tenants' Improvements Act the tenant against whom a decree in ejectment is passed is only entitled to the value of the improvements made either by himself or by his predecessor-in-title. He is not entitled to the value of the improvements effected by every person other than the landlord. [p. 927, col. 1.]

Thupran v. Mamad Kasim, 17 Ind. Cas. 433, dissented from.

The Courts should not lightly ignore admissions made by parties to proceedings. [p. 927, col. 1.]

The decision in *Thiruvattiyil Vattath v. Vishnu Barathikal*, 28 Ind. Cas. 339, that if an increase in the income is proved, the presumption is that the tenant has improved the land, is too broadly stated. [p. 928, col. 1.]

The report of a Commissioner appointed by a Court is not equivalent to a judgment which is binding on the parties. Ordinarily, the Commissioner's report should be supplemented by the evidence which he gives in the case. The Commissioner should not only embody the statements of the parties but should give his own opinion on their contentions. [p. 928, col. 1.]

Section 7 of the Malabar Compensation for Tenants' Improvements Act deals only with contracts which limit the right of the tenant to make improvements after the date of the contract. [p. 929, col. 1.]

Prima facie every person is entitled to enter into a contract settling the accounts between himself and another or settling the differences between them. If this right of the freedom of contract is to be taken away, it must be by express and clear words, and there is nothing in section 7 of the Malabar Compensation for Tenants' Improvements Act which takes away the effect of a settlement as to compensation for improvements effected before the date of the contract. [p. 929, col. 2.]

An order appointing a second Commissioner to assess the compensation should not be regarded as a direction for re-valuation. *Re-valuation* is a technical term and should be confined to cases mentioned in clause (3) of section 6. [p. 929, col. 2.]

Where a Commissioner has ignored the evidence and sent in a report based on guess work, the direction to a new Commissioner to do that work properly is not a direction to re-value. Consequently the second Commissioner can only take into account the value prevalent when the first Commissioner made his report. [p. 929 col. 2; p. 930, col. 1.]

Second appeal against the decree of the District Court, South Malabar, in Appeal Suits Nos. 500 and 501 of 1910, preferred against the decree of the Court of the Subordinate Judge, Calicut, in Original Suit No. 35 of 1908 (Original Suit No. 8 of 1905, on the file of the Subordinate Judge Palghat).

The Hon'ble Mr. S. Srinivasa Aiyangar (Advocate-General), Messrs. C. Madhavan Nair and P. Appu Nair, for the Appellant

KUNNATH MADAMPIL KUNJUNNI v. MANNARGHAT RAMANUNNI.

in Second Appeal No. 1989 of 1915 and for the Respondent in Second Appeal 1884 of 1915.

Messrs. C. V. Ananthakrishna Aiyar and A. Sivarama Menon, for the Respondents in Second Appeal No. 1989 of 1915 and the Appellants in Second Appeal No. 1884 of 1915.

JUDGMENT.

S. A. No. 1989 of 1915.

The plaintiff, a Sthanee, granted a Kanom of the properties in dispute for Rs. 71-6-11 to the 1st defendant in the year 1873—Exhibit D. In 1892 that Kanom was renewed, the amount being fixed at Rs. 3,363-0-9. Exhibit A is the counterpart executed by the 1st defendant in that year. He assigned Exhibit A to the defendants Nos. 2 and 3. The present suit was brought for redemption. The main question related to the value of improvements. The Subordinate Judge awarded the 2nd and 3rd defendants Rs. 19,009-3-7 which was increased by the District Judge in appeal to Rs. 43,552 5-10. Both parties have preferred second appeals. We shall first deal with the plaintiff's appeal. In considering the questions argued before us the contention of Mr. Ananthakrishna Aiyar, who appeared for the tenant, that whatever may be the value of the second appeal, our powers are governed by section 100 of the Code of Civil Procedure, has to be borne in mind.

Before dealing with the question of improvements, we may at once dispose of that portion of the appeal which complains against the finding that a portion of item No. 5 does not belong to the plaintiff. The learned Advocate-General, while drawing our attention to certain flaws in the reasoning of the Courts below, rightly conceded that there is legal evidence to support the finding. We must, therefore, dismiss the second appeal with costs so far as this item is concerned.

The main contest centred upon the question, whether the defendants are entitled to any compensation for improvements in respect of items Nos. 1 and 2. The Subordinate Judge very summarily disposed of this question on the ground that, as items Nos. 1 and 2 were *nilams* and as there was no agreement in Exhibits A and B to pay compensation for them, the defendants were not entitled to any. In appeal, the District Judge, although he dealt with the question more fully, has, in our opinion, wrongly thrown the onus of proof upon

the plaintiff. Ordinarily, a tenant who claims compensation for improvements is bound to prove that he has improved the property and that he has spent money in making the improvements. Admittedly no account showing the amounts spent on the improvements has been produced. Mr. Ananthakrishna Aiyar contended that if the tenant can show that the income derivable from the demised property has increased since the date of the Kanom, that would be enough to entitle the tenant to claim compensation for the improvements. It may be conceded that under the Malabar Compensation for Tenants' Improvements Act the Jenmi and the tenant are regarded as co-partners in respect of the additional value imparted to the land by the labour of or by the expenditure of money by the tenant. In this respect the Malabar tenant is placed in a more advantageous position than tenants elsewhere. Nevertheless, *prima facie*, the tenant must prove certain things. Under section 3, clause 3 of Act I of 1900, improvement has been defined to be "any work or product of a work which adds to the value of the holding, is suitable to it, and consistent with the purpose for which the holding was let, mortgaged, or occupied." Consequently the tenant must show that he has done work which has added to the value of the holding, that the said work is suitable and that it is also consistent with the object with which he obtained the Kanom. As regards the 1st of these requirements there can be no doubt in this case. It is not suggested that the improvements made were not consistent with the Kanom granted by the Jenmi. The tenant has still to prove that an additional value has been imparted to the holding by his work and that the work which he executed was suitable to the holding. If we turn to section 5, it is clear that the burden is upon the tenant to prove, before he claims compensation, that he has made the improvements or that his predecessor-in-interest has made them. The learned Vakil for the tenant contended with reference to section 5 that if there were improvements on the land the tenant in possession is entitled to their value at the time of ejection, if any person other than the landlord had made the improvements.

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We are unable to agree with this contention. Clause (1) of section 5 makes it clear that the tenant against whom the decree in ejectment is passed is only entitled to the improvements made either by himself or by his predecessor-in-interest. The definition of the word *tenant* in the Act is not against this view. If *Thupran v. Mamad Kasim* (1) holds otherwise, we are unable to agree with it. In the present case there are very strong circumstances why the tenant should be called upon to establish his case. In Exhibit A, the counterpart of the lease executed by the 1st defendant, he stated that "excepting items Nos. 1 and 2 which have been entered as *nilams* in the prior Kanom deeds, as the value of the reclamations of the properties which I have reclaimed at my expense in respect of the other schedule properties by converting them into double crop lands has not been now examined and estimated and settled, you have agreed to give me, etc." This clause in the agreement suggests on the facts of it that the 1st defendant agreed in 1892 that he had made no improvements in respect of items Nos. 1 and 2. It may be that this presumption against him may be rebutted, and that he may be able to show that since that time improvements have been made by him. In that view, the evidence given by him will have to be examined to find out to what extent he has improved the properties and to what compensation he is entitled in consequence of those improvements. The District Judge has not addressed himself to this question. He has not realised the importance of admissions contained in Exhibit A; the decision of the Judicial Committee in *Ohandra Kunwar v. Ohaudhri Narpal Singh* (2) shows that the admissions of the parties should not be lightly ignored. It is true as pointed out by Mr. Ananthakrishna Aiyar that the word *nilam* in Exhibit A does not necessarily show that it was a double crop land. It certainly means arable land. As to whether the 1st defendant has expended money and labour in converting it into double crop land, that

is a matter which must depend upon the evidence given in the case. As we said before, Mr. Ananthakrishna Aiyar's suggestion that whoever might have improved the land, although he be a person between whom and the 1st defendant there is absolutely no connection, still he is entitled before ejectment to claim the value of the improvements, is one which we are unable to accept. Therefore, it was the duty of the 1st defendant to have adduced evidence to prove his case.

There is another circumstance which also throws the burden upon the 1st defendant. In the written statement filed by him, he stated that, though in the demise of 1872 items Nos. 1 and 2 were entered as *nilams*, all such lands were left uncultivated, that some of the plaint lands were forest lands and were not frequented by people generally. Here again he seems to admit that a great portion of items Nos. 1 and 2 were cultivable lands. Before the first Commissioner, the statements made by him show that he did not lay claim to having made considerable improvements upon these items. In Exhibit 3B he stated, as regards the major portion of item No. 1, that they were originally single crop lands and that they were dug and their level lowered and converted into double crop lands. As regards the other portions he contended that some of them were reclaimed from item No. 5 and others from item No. 6. On the other hand, the plaintiff's Kariasthan contended that all of them were *nilams*. There seems to have been no suggestion before the Commissioner that the lands were waste and that they were converted into single or double crop lands by the exertion of the 1st defendant. As regards item No. 2, the contention before the 1st Commissioner tended to negative any suggestion that a major portion of that item was reclaimed by the defendant and converted into double crop lands. Under these circumstances, it was the duty of the 1st defendant to have adduced sufficient and clear evidence to establish his right to compensation. The District Judge lays much stress upon the fact that the income at the time of the demise was only 212½ *paras* of paddy, whereas in a suit brought by the plaintiff for use and occupation he estimated the income at almost 10 times that quantity.

(1) 17 Ind. Cas. 433.

(2) 21 A. 184; 4 Bom. L. R. 237; 2 M. L. T. 109; 17 M. L. J. 103; 5 C. L. J. 115; 11 C. W. N. 321; 4 A. L. J. 102 (P. C.).

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We do not think that the increase in the income is any criterion of increased value having been imparted to the lands by the tenant. It has to be remembered in the first place that Komu Menon, the 1st defendant, was a confidential agent of the Sthanee, and in all likelihood a favourable rent was fixed as against him by his master.

The increase in the net income might be due to a number of other circumstances. The decision in *Thiruvattiyil Vattath v. Vishnu Barathikal* (3) was quoted as showing that if an increase in the income is proved, the presumption is that the tenant has improved the land. In our opinion the proposition has been too broadly stated. The District Judge has drawn attention to Exhibits Nos. 293 and 296 as showing that some improvements were made in a portion of item No. 1. In the first place, we are not satisfied that A is really a portion of item No. 1. Even granting for argument's sake that it is so, it does not follow that because on a portion of item No. 1 some improvements were made, that is any indication that the whole of that property has similarly been improved. A is less than 2 acres in extent. One other circumstance we must mention before passing away from items Nos. 1 and 2 and it is this: the Commissioners who inspected the place and submitted their report have not given any relevant evidence in the case. There seems to be an impression in Malabar that a report of the Commissioner is equivalent to a judgment which is binding upon the parties. Ordinarily the Commissioner's report should be supplemented by the evidence which he gives in the case. In the present instance, the Commissioner only embodies the statements made by the parties and does not give his own opinion on their contentions. Consequently it is practically of no use. On the whole, we have come to the conclusion that the procedure adopted by the District Judge in throwing the onus upon the plaintiff, in not taking into account the admissions contained in Exhibit A, in attaching artificial importance to the increase in the net income and in not considering the statements made before the first Commissioner vitiate the judgment altogether. We have, there-

fore, resolved to set aside his judgment in so far as it awards compensation for items Nos. 1 and 2 and to remand the appeal to him for fresh disposal. He will be at liberty to examine the Commissioners who have sent in their reports, with a view to ascertain whether any improvements were made by the 1st defendant; he can also consider any other evidence on the record to which his attention may be drawn by the parties on this question.

As regards item No. 3 we must dismiss the appeal with costs. There is no evidence connecting this item with the decree, Exhibit 252, nor is there any evidence that compensation was estimated by the decree or concluded by a contract between the parties.

As regards items Nos. 4, 5 and 6, the Subordinate Judge fixed a particular sum as the amount of compensation payable to the tenant. The District Judge in appeal relied upon a notification published by the Government in February 1910 regarding valuation. It is true that the decree in ejectment was passed in December 1909. Strictly speaking, the notification of the Government is not evidence of the value of paddy in December 1909. But there can be no question that before the notification was issued inquiries must have been instituted, and having regard to the nearness of time, we see no reason to differ from the conclusion of the District Judge that the value of paddy in December 1909 was the same as that contained in the notification of the Government in February 1910. We must dismiss the appeal so far as these items are concerned with costs.

As regards items Nos. 7 and 8, the position is this: prior to 1872, one Muneappa was the tenant of the Jenmi in respect of these items. After the first defendant obtained the decree, he and the Jenmi sued Muneappa for redemption in 1882. A decree was passed directing the plaintiffs to pay Muneappa Rs. 3,000 and odd. At the time of the renewal in 1892, the 1st defendant was asked to pay this sum to Muneappa and to tack on that amount to his mortgage. The learned Advocate-General contended that this contract comes within the proviso to section 19 of Act I of 1900, as the amount due was settled

(3) 28 Ind. Cas. 389.

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by a contract in writing and registered. Mr. Ananthakrishna Aiyar, on the other hand, argued that it is section 7 of the Act of 1887 that applies to the contract. It is not necessary to decide whether section 19 of the Act I of 1900 is not really retrospective and consequently as the improvements were claimed under the new Act, whether the question should not be decided with reference to that section. Even granting that section 7 of the Act of 1887 applies, we are unable to hold that the settlement as to compensation come to in 1892 is not binding on the parties. That contract does not take away or limit the right of a tenant. It only settles the amount due under the mortgage at the time of the renewal. We, therefore, fail to see how this provision is obnoxious to section 7. Further we are clear that that section deals only with contracts which limit the right of the tenant to make improvements after the date of the contract. Of course, we are bound by the decision of the Full Bench in *Kunhalloor Puthia Veetil Rayarappa Atioli v. Vathukoilath Parkum Punnisseri Kelappa Kurup* (4), to read the word 'and' as meaning 'or'. Even in that view what the Legislature prohibits the tenant from binding himself by are (a) contracts not to make any improvements, and (b) contracts settling the amount of the possible improvements in advance. The intention was not to prejudice the rights of the tenants by an *a priori* agreement without reference to the rights that may come into existence by the tenants working the property in a husbandlike manner. To this exception was added by the Act of 1900 by section 19, which enabled the parties to settle the amount of compensation by a document in writing and registered.

The learned Vakil for the respondent drew our attention to *Uthungnakath Avuthala v. Thazhathorayil* (5). The two learned Judges who composed that Bench took two different views of section 7. Mr. Justice Subramania Aiyar held that all contracts, whether it related to improvements effected before the date of the contract or after, were within the mischief of the section. Mr. Justice (4) 39 Ind. Cas. 741; 32 M. L. J. 110 at p. 117; (1917) M. W. N. 195; 21 M. L. T. 245; 5 L. W. 617; 40 M. 594.

(5) 22 M. 435; 7 M. L. J. 293; 7 Ind. Dec. (N. S.) 308.

Davies held that all improvements which were effected after January 1886 were within the section whether they were before or after the contract. With all deference we are unable to agree with either view. We are not at liberty, as Mr. Justice Subramania Aiyar did, to embark upon a conjecture as to the policy of the Legislature where the language of the section is plain and unambiguous. *Prima facie*, every person is entitled to enter into a contract settling the accounts between him and another, or for settling the differences between them. If this right of the freedom of contract is to be taken away, it must be by express and clear words; and we find nothing in section 7, which takes away the effect of a settlement as to compensation for improvements effected before the date of the contract. As regards the view taken by Mr. Justice Davies, we do not find any words in the section to justify the interpretation placed by the learned Judge.

We must, therefore, reverse the decree of the District Judge as regards the compensation payable for these items. If any new improvements were made since 1892 or if the tenant has done anything to guard, maintain or improve the improvements existing on that date, he will be entitled to compensation in respect of them. Otherwise the tenant is only entitled to the amount mentioned in Exhibit A. The District Judge must now assess any fresh compensation that may be claimed in the light of the above observations. This must be done by the evidence on the record. Costs to be provided for in the revised decree.

IN S. A. No. 1884 of 1915.

In this second appeal Mr. Ananthakrishna Aiyar argued that the valuation given by the Appellate Court should be re-considered on three grounds:—

(a) In the first place, he argued that the valuation of the paddy at the time when the second Commissioner sent in his report should be taken into account. We do not think the order appointing the second Commissioner to assess the compensation should be regarded as a direction for *re-valuation*. That is a technical term and should be confined to cases mentioned in clause (3) of section 6. Where a Commissioner has ignored the evidence and sent in a report based on

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guess work, the direction to a new Commissioner to do that work properly is not a direction to re-value. Consequently the second Commissioner could only take into account the value prevalent when the first Commissioner made his report. The language of section 6 renders this clear. The decision in *Veluthemana v. Pathuma* (6) also supports this view. See also *Kunhammad Kutti v. Panchara Alleema* (7). The District Judge is, therefore, right on this question.

(b) The second complaint is that the District Judge is wrong in regarding the supplemental report of the Commissioner as unauthorised. It is clear from the orders to which our attention was drawn that a fresh report was called for. The District Judge is bound to apply his mind to that report.

(c) The third contention is also well founded. At the time of the renewed demise, the Jenmi was under a contract to supply water to the tenant at a fixed rate. On the faith of the contract, the defendant reclaimed the land in such a way as to make it capable of receiving the water. If the contract had not existed, he might have improved the land in some other manner. Consequently we think that under section 9 (1) the tenant's improvement has "caused an increase in the value of the net produce of the holding." The contention of the learned Advocate-General that, as no second crop could have been cultivated in most of the lands if the Jenmi's water was not utilised and—that, therefore, the tenant must be deemed not to have contributed to the increase in the income, does not do justice to the language of the section. In estimating the net produce, the explanation to section 9 shows that the tax payable for the water may be deducted as a cost of the cultivation. The method by which the income was estimated on the basis that no water was supplied is wrong.

We must set aside the decree of the District Judge and remand the appeal for disposal to him in the light of the above observations. No fresh evidence. Costs to abide.

Appeals allowed; Case remanded.

M. C. P.

(6) 17 Ind. Cas. 131.

(7) 33 Ind. Cas. 746; 30 M. L. J. 203.

PATNA HIGH COURT.

CIVIL REVISION NOS. 202, 219 TO 222
OF 1917.

January 11, 1918.

Present:—Mr. Justice Roe and Mr. Justice
Jwala Prasad.

Maharani JANKI KUER—APPLICANT

versus

KUKUR DUSADH AND OTHERS—

RESPONDENTS.

*Civil Procedure Code (Act V of 1908), s. 115—
Revision—Jurisdiction—Erroneous decision upon point
of law, whether ground for interference.*

Section 115 of the Code of Civil Procedure does not apply to cases where the law enunciated by the lower Court is wrong with regard to the discretion vested in it or where the evidence adduced was inadmissible or was misunderstood, inasmuch as all those are errors affecting merely the result of the cogitation of the Court upon the facts submitted to it: they are not errors involving any question of jurisdiction. [p. 931, col. 1.]

Revision from a decision of the Special Judge, Champaran.

Messrs. P. Kennedy and Baikuntha Nath Mittra, for the Applicant.

Mr. Hari Bhushan Mukerji, for Mr. Ambica Prasad Upadhyaya, Messrs. Rajender Prasad, Tribhuan Nath Sahai and Krishna Sahay, for the Respondents.

JUDGMENT.—These five cases arise from a decision of the Special Judge of Champaran upon appeals from the Assistant Settlement Officer decreeing in a modified form suits for enhancement of rent upon holdings held under the Bettia Raj. The applicant before us is the Court of Wards acting for the Bettia Raj. The grounds taken in revision are that the limitations put by the Special Judge upon the enhancement applied for were based upon an unlawful exercise of the discretion vested in him by section 35 of the Bengal Tenancy Act. The learned Judge in dealing with these cases considered, firstly, the disparity between the prices of staple food crops for the ten years immediately prior to the application for settlement of rent and the prices of those crops during the ten years immediately prior to that period. He ascertained that if the disparity alone be considered, the Raj was entitled to an enhancement of $4\frac{1}{2}$ annas in the rupee, but in view of the fact that the disparity was an abnormal disparity, considered that it would be unfair to give an enhancement of $4\frac{1}{2}$ annas, and, therefore, gave an enhance-

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ment of three annas only. Objection is taken to this line of reasoning on two grounds, firstly, that under section 32 it must be taken that the Legislature had considered, before settling periods of ten years as the periods to be compared, all possibility of abnormal rises and falls in specific years. It is argued that the ten years' rule was inserted after full consideration by the Legislative Council and that the discretion vested in the Judge under section 35 was not meant to extend to a modification of the provisions of section 32. It is pointed out in this connection that section 32 itself makes provision for any abnormal rise or fall by giving the Court power to select any period of ten years it chooses as the period to be compared with the period immediately prior to the suit. The second ground taken upon which the proceedings of the Judge should be set aside is, that the whole basis of the argument that the latter years were abnormal years is based, firstly, upon evidence not legally admissible, and secondly, upon a complete misunderstanding of that evidence. With regard to both these points we are of opinion that section 115 of the Code of Civil Procedure does not apply. It may be that the law enunciated by the learned Judge was wrong with regard to the discretion vested in him. It may be that the evidence adduced was inadmissible. It may be that it was misunderstood. But these are all errors affecting merely the result of the cogitation of the learned Judge upon the facts submitted to him. They are not errors involving any question of jurisdiction. This seems to us to have been the view taken in *Madhavray Ganeshpant Ore v. Gulabhai Lallubhai* (1) and the date of that decision indicates that the interferences with the decisions of the Courts below quoted in I. L. R. XVIII Bombay had not the approval of the Divisional Bench responsible for the latter decision. The latest case upon the point is *Balakrishna Udayar v. Vasudeva Aiyar* (2), in which at page 58* their Lordships of the Judicial

(1) 23 B. 177; 12 Ind. Dec. (N. S.) 116.

(2) 40 Ind. Cas. 650; 22 C. W. N. 50; 15 A. L. J. 645; 2 P. L. W. 101; 33 M. L. J. 69; 26 C. L. J. 143; 19 Bom. L. R. 715; (1917) M. W. N. 628; 40 M. 793; 6 L. W. 501; 11 Bur. L. T. 48 (P. C.).

*Page of 22 C. W. N.—Ed.

Committee held that the section is not directed against conclusions of law or fact in which a question of jurisdiction is not involved. It is to be noted further that in *Sajivan Mahto v. Gulab Chand Lal* (3) the Hon'ble the Chief Justice was of opinion that the decision of the District Court upon a point of law was manifestly erroneous. He declined to interfere on the ground that no appeal lay, and contented himself with pointing out the error of the District Court in order that a similar error might not be committed in future. In the case before us we are not prepared to discuss the question whether there was any error of law in the decision of the Special Judge, but must draw attention to the danger of an implied promise to the tenants of the estate contained in the judgment before us. The learned Judge says: "I may state here that I propose to follow this decision in all future appeals from the Bettiah Sub-Division, whether or not the Assistant Settlement Officer may have stated the case as he has done in the present judgment, unless special reasons for departing from it are made out. The reasons given for the present decision are of general application, and it would not be fair that decisions should vary because one Assistant Settlement Officer states the same case differently from another. If Second Appeal No. 13 of 1916 were now before me I should decide it differently on this point." The Court of Wards naturally anticipates that the special reasons referred to in this passage must be reasons not hitherto advanced. We have no doubt that this is not the true meaning of the passage. Inasmuch as no appeal lies from the judgment of the Special Judge, we are confident that all further appeals will be heard upon their merits, and the arguments on the points urged again considered. The learned Judge has been moved to change his opinion already in one direction. It may be that on further consideration he may be moved to change it in another. We may note for instance that there is said to be authority for the proposition that Government publications are not admissible in evidence. This is a point which should be considered before

(3) 35 Ind. Cas. 678; 1 P. L. J. 409

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quotations are allowed from Administration reports. Farther it is said that the Court of Wards will be able to put before the Court at the next hearing figures which will show that it is possible to divide the thirty years for which price lists have been kept in this province, into not less than twenty successive decennial periods. If it is shown as the result of the comparison of twenty successive decennial periods that the tendency in any given direction has been steady, it can no longer be said that there is in the conditions of any one period anything abnormal. These points no doubt will be regarded as special reasons for reconsideration of the judgment now before us. For the reasons stated the applications fail and are rejected with costs, two gold mohurs in each case.

Applications rejected.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 508 OF 1917.

April 6, 1918.

Present:—Mr. Batten, A. J. C.

HAZARILAL MOTILAL—APPELLANT
versus

SHYANIBABU AND ANOTHER—

RESPONDENTS.

C. P. Land Revenue Act (XVIII of 1881), s. 69, applicability of—Settlement record, entry in, suit for correction of—Limitation applicable.

Section 69 of the C. P. Land Revenue Act relates to disputes as to whether or not land admittedly belonging to one particular proprietor is *sir* land or not. It has no application whatever to disputes as to whether A or B is the proprietor of a plot of land.

The special rule of limitation laid down in section 69 (4) of the C. P. Land Revenue Act has, therefore, no application whatever to a suit brought for the correction of a settlement entry in which the defendant has been recorded as a proprietor instead of as an occupancy tenant of *sir* land.

Appeal from the decree of the Additional District Judge, Saugor, in Civil Appeal No. 45 of 1917, decided on the 24th August 1917.

Mr. G. L. Subhedar, for the Appellant.

JUDGMENT.—The lower Courts in this

case have dismissed the suit solely on the ground of limitation, holding that the special period of one year laid down in sub section (4) of section 69 of the Central Provinces Land Revenue Act is applicable to the case.

Section 69 relates to disputes as to whether or not land admittedly belonging to one particular proprietor is *sir* land or not *sir* land. Section 69 has no application whatever to disputes as to whether A or B is the proprietor of land. In this case the plaintiffs' claim is that they are the proprietors of the land and that the defendant is only their occupancy tenant. They complain that at the settlement the defendant No. 1 was recorded as proprietor instead of as occupancy tenant. The mistake alleged to have occurred is that whereas defendant No. 1 was formerly the proprietor of the land as his *sir* and he has now ceased to be proprietor and has now become occupancy tenant; he is still wrongly recorded as proprietor of *sir* land instead of as occupancy tenant of the land which was formerly *sir*. If the plaintiffs fail in their case, they can have no possible objection to the defendant No. 1 being recorded as *sir* proprietor instead of ordinary proprietor. The question whether the land should be recorded as *sir* or not, does not arise in this case. The sole question is whether or not plaintiff is the proprietor and defendant No. 1 the tenant. The special rule of limitation laid down in section 69 (4) of the Central Provinces Land Revenue Act has, therefore, no application whatever to the case. The case has been decided on wrong grounds and is remanded to the lower Appellate Court for further trial with reference to the above remarks. It is to be observed that the plaintiffs complain that the settlement entry is incorrect but they have filed no copy of the settlement entry to which they object. Before the suit can be properly decided, the plaintiffs must be called upon to file a copy of the entry to which they object and which they say is wrong. A refund certificate will issue. Other costs will be costs in the suit.

Case remanded.

AZIZ KHAN V. DUNI CHAND.

PRIVY COUNCIL.

APPEAL FROM THE PUNJAB CHIEF COURT.

April 16, 1918.

Present:—Viscount Haldane, Lord Dunedin,
Lord Sumner, Sir John Edge and Mr.
Ameer Ali.

AZIZ KHAN—PLAINTIFF—APPELLANT
versus

DUNI CHAND AND OTHERS—DEFENDANTS—
RESPONDENTS.

*Contract Act (IX of 1872), s. 16—Mortgage—
Interest, high rate of—Transaction improvident—
Hardship—Relief, whether can be given.*

Even where a transaction appears to be undoubtedly improvident, in the absence of any evidence to show that the mortgagee has taken undue advantage of his position, a Court of Justice cannot give relief to the mortgagor on grounds of simple hardship. [p. 934, col. 1.]

Appeal from a judgment and decree of the Chief Court of the Punjab (Mr. Justice Agnew and Mr. Justice Shadi Lal) in Appeal No. 928 of 1912, dated the 15th July 1913, reported as 20 Ind. Cas. 812, reversing a decree of the Divisional Judge, Attock.

Mr. Erfan Ali, for the Appellant.

JUDGMENT.

MR. AMEER ALI.—This is an appeal from a judgment and decree of the Chief Court of the Punjab, dated the 15th July 1913, and arises out of a suit brought by the plaintiff in the Court of the District Judge of Attock for the redemption of two mortgages in respect of a large tract of land in that district of which he has acquired by purchase a one-third share.

It appears that the lands in suit belonged originally to one Bahadoor Khan, who on the 23rd May 1878 gave it in usufructuary mortgage to the defendant-respondent for a term of fifteen years. The amount borrowed on that mortgage was Rs. 400 and it was stipulated that the mortgagee should receive the rents and profits in lieu of interest, and that at the end of the fifteen years the mortgagor should be entitled to take back the property on payment of the principal amount borrowed. In 1881, Bahadoor borrowed from the defendant another sum of Rs. 550 on mortgage of the same property. The document in respect of this loan is dated the 17th January 1881. It recites the first mortgage and states the money now borrowed is Rs. 550, the total debt being Rs. 950; it then provides that for four years

the money borrowed should carry no interest; that after four years if the debt is unpaid it should bear interest at 25 per cent. per annum, and in case of default in the annual payment of interest it should be calculated at compound rate.

In the suit the plaintiff claimed to redeem on the basis of the first mortgage, his contention being that the second mortgage, owing to ambiguity, was void under the provisions of section 29 of the Indian Contract Act. The defendant, on the other hand, contended that the plaintiff could only redeem on payment of the whole mortgage debt with compound interest at the contractual rate, amounting in the aggregate to over a lakh of rupees. The District Judge held, in substance, that, although the second mortgage was somewhat ambiguous, the meaning of the parties was sufficiently clear, viz., that interest should be chargeable only on Rs. 550. He held further that the contract as to compound interest was unconscionable entered into by the mortgagor when he "was under pressure amounting to undue influence." He accordingly decreed redemption upon payment by the plaintiff of the sum of Rs. 950 with simple interest on Rs. 550 at the rate of 25 per cent. from the date of the second mortgage to date of suit, which amounted to something like Rs. 3,351. With the principal the total amount decreed came to Rs. 4,301.

From this decree the defendant appealed to the Divisional Judge, who was of opinion that the plaintiff was bound by the mortgagor's contract to pay compound interest. But as the defendant had claimed in appeal only Rs. 10,000 in addition to the amount decreed by the first Court, and as this amount, in his opinion, was considerably below what was actually due, he varied the District Judge's decree by increasing the amount to be paid by the plaintiff in order to enforce redemption to Rs. 14,301, but restricted the redemption to one-third of the property mortgaged.

The plaintiff thereupon appealed to the Chief Court on the same ground he had urged in the Courts below. The learned Judges have held that although the language of the second mortgage is by no means free from ambiguity, the interpretation offered by the Counsel for the

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respondents appeared to them clear and consistent, viz., that the first mortgage was subject to its own conditions; that the loan under the second mortgage was to carry no interest for four years; that after four years interest was payable on it annually at the rate of 25 per cent. and in default of such annual payment of interest, compound interest was chargeable; and that the amount borrowed plus such interest was repayable at any time after four years from the date of the mortgage. They also held that there was no evidence that the contract as to compound interest was entered into under pressure or undue influence. They accordingly dismissed the plaintiff's appeal as regards the amount, but varied the Divisional Judge's decree by declaring that the plaintiff was entitled to redeem the entire property on payment of the Rs. 14,301-7-9.

Their Lordships see no reason to interfere with the judgment and decree of the Chief Court. The interpretation of the second document on which the learned Judges have proceeded appears to their Lordships reasonable and consistent. The transaction was undoubtedly improvident, but in the absence of any evidence to show that the money-lender had unduly taken advantage of his position, it is difficult for a Court of Justice to give relief on grounds of simple hardship.

Their Lordships will accordingly advise His Majesty that the appeal should be dismissed but without costs, as the respondents do not appear.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 51 OF 1918.

December 5, 1918.

[Present:—Sir Henry Drake-Brockman, J. C.]

VINAYAKRAO KRISHNARAO

—DEFENDANT—JUDGMENT-DEBTOR—

APPELLANT

versus

BAIJANATH SALIGRAM—

PLAINTIFF—DECREE-HOLDER—

RESPONDENT.

Limitation Act (IX of 1908), s. 6, Sch. I, Art. 151,

applicability of—Civil Procedure Code (Act V of 1908), O. XXXIV, r. 5 (2)—Mortgage suit—Final decree, application for—Limitation—Minority of applicant, effect of.

Section 6 of the Limitation Act applies solely to the time for the institution of a suit or the time for an application for an execution of a decree. It does not apply to an application to make a decree absolute. [p. 935, col. 1.]

Nizam-ud-din Shah v. Bohra Bhim Sen, 43 Ind. Cas. 870; 40 A. 203; 16 A. L. J. 85, followed.

A mortgage suit remains pending until a final decree is passed. An application for a final decree in a mortgage suit being governed by the Code of Civil Procedure is subject to the limitation prescribed by Article 181 of Schedule I of the Limitation Act. [p. 935, col. 2; p. 836, col. 1.]

Digamber v. Ganpat, 33 Ind. Cas. 496; 12 N. L. R. 50 and *Lakshmi Achi v. Subbarama Aiyar*, 29 Ind. Cas. 142; 39 M. 488 at p. 492; 2 L. W. 403; 28 M. L. J. 490; (1915) M. W. N. 327; 17 M. L. T. 385, followed.

Appeal from a final decree passed on 2nd March 1918, in the Mortgage Suit No. 19 of 1910, passed by the Additional District Judge, Saugor.

Mr. D. T. Mangalmoorty, for the Appellant.

Mr. G. L. Subhedar, for the Respondent.

JUDGMENT.—The facts of the case out of which this appeal arises may be briefly stated.

The plaintiff, who was then a minor, obtained on the 19th October 1910 a preliminary decree for sale of immoveable property on foot of a mortgage. On the 1st October 1917 he applied under rule 5 (2), Order XXXIV, 1st Schedule to the Civil Procedure Code, for a final decree for sale alleging that he had reached the age of 18 on the 30th September 1917. The 30th September 1917 was a Sunday. The mortgagor did not oppose the application but the present appellant, who purchased the mortgaged property *pendente lite*, contended that the plaintiff attained majority in June 1914 and that in any case the application was time-barred, section 6 of the Indian Limitation Act, 1908, having no application. The lower Court found on the evidence adduced by the plaintiff that he was born on the 1st October 1896, and this conclusion is now accepted by the appellant though impeached in one of the grounds of appeal. The learned Additional District Judge held also that section 6 of the Limitation Act, which he wrongly cited as section 7, applies to applications generally and is

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not confined to applications for execution of decrees. From the fact that *Maharaj Kumar Guneswar Singh v. Jagadhatri Pershad Narain Singh* (1), a case decided in 1898, was cited in support of this conclusion as well as from the citation of section 7 it appears that the Judge had not before him a copy of the Limitation Act (IX of 1908) now in force.

The plaintiff having obtained a final decree for sale, the purchaser of the mortgaged property has preferred this appeal. That section 6 of the Limitation Act will not help the plaintiff-respondent is conceded on his behalf by his learned Advocate and there is clear authority against the view taken by the lower Court, in *Nizam-ud-din Shah v. Bohra Bhim Sen* (2), where it was pointed out that the section applies solely to the time for the institution of a suit or the time for an application for the execution of a decree.

The appellant contends on the authority of *Digamber v. Ganpat* (3), *Nizam-ud-din Shah v. Bohra Bhim Sen* (2), above cited, and *Lakshmi Achi v. Subbarama Aiyar* (4) that a mortgage suit remains pending until a final decree is passed and that the application for a final decree, being governed by the Code of Civil Procedure, is subject to the limitation prescribed by Article 181 of the Limitation Schedule now in force.

For the respondent reliance is placed upon *Madhab Moni Dasi v. Pamela Lambert* (5), where it was held that Article 181 does not govern an application for an order absolute under rule 3, Order XXXIV. The case, however, must be distinguished on the ground that the preliminary decree for foreclosure was obtained before the present Code of Civil Procedure came into operation. As pointed out by Jenkins, C.J., in *Amolak Chand v. Sharat Chandra* (6), the Judges expressly refrained from deciding that the present Code applied and in fact

treated the case as not falling under that Code by directing that an order absolute should be made.

Before the Code of 1908 came into force, the Calcutta High Court had long held that there was no period of limitation within which a mortgagee was bound to apply for an order absolute for sale in a suit brought for sale of the mortgaged property. The *ratio decidendi* was that the application was one to obtain a supplementary decree, that the general Article (178 now 181) was the only Article that could possibly be applied and that the said Article applied only to applications under the Code of Civil Procedure. A similar view prevailed in this Court [see *Tallappa v. Dattu* (7) and *Jaka v. Jamna* (8)]. This view, however, is no longer tenable after the decisions of the Privy Council in *Batuk Nath v. Munni Dei* (9), *Abdul Majid v. Jawahir Lal* (10), and *Munna Lal Parruck v. Surat Ohunder Mukerji* (11). Their Lordships of the Judicial Committee have plainly approved of the position taken by the Allahabad High Court that an application for an order absolute for foreclosure or sale under the Transfer of Property Act was an application to execute or enforce the conditional decree and that the period of limitation was, therefore, three years from the date of the decree. The conflict of decisions above mentioned has now been removed by transferring to the Civil Procedure Code the provisions relating to mortgage decrees and by laying down that what follows the first decree is not an order for sale or foreclosure but a decree for sale or foreclosure. Such an application as that in the present case is, therefore, not one for execution of the first decree and consequently neither Article 182 of the Limitation Schedule nor section 6 of the Limitation Act applies. That Article 181 is

(7) 5 C. P. L. R. 61.

(8) 16 C. P. L. R. 114.

(9) 23 Ind. Cas. 644; 36 A. 284; 18 C. W. N. 740; 12 A. L. J. 596; 19 C. L. J. 574; 16 Bom. L. R. 360; 27 M. L. J. 1; 16 M. L. T. 1; 1 L. W. 729; (1914) M. W. N. 437; 41 I. A. 104 (P. C.).

(10) 23 Ind. Cas. 649; 36 A. 350; (1914) M. W. N. 485; 27 M. L. J. 17; 12 A. L. J. 624; 16 Bom. L. R. 395; 18 C. W. N. 963; 19 C. L. J. 626; 16 M. L. T. 44; 1 L. W. 483 (P. C.).

(11) 27 Ind. Cas. 683; 42 C. 776; 2 L. W. 282; 17 M. L. T. 120; 21 C. L. J. 118; 19 C. W. N. 561; 17 Bom. L. R. 408; 25 M. L. J. 470; 42 I. A. 88 (P. C.).

(1) 3 C. W. N. 24.

(2) 43 Ind. Cas. 870; 40 A. 203; 16 A. L. J. 85.

(3) 33 Ind. Cas. 496; 12 N. L. R. 50.

(4) 29 Ind. Cas. 142; 39 M. 488 at p. 492; 2 L. W. 403; 28 M. L. J. 490; (1915) M. W. N. 327; 17 M. L. T. 385.

(5) 6 Ind. Cas. 537; 37 C. 796; 15 C. W. N. 337; 12 C. L. J. 328.

(6) 11 Ind. Cas. 943; 38 C. 913 at p. 922; 16 C. W. N. 49.

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applicable was held in *Madho Ram v. Nihal Singh* (12) and *Ramji Lal v. Karan Singh* (13).

The view I have taken is in accord with that of a Bench of this Court in *Chunnilal v. Tikamdas* (14), where it is held that the limitation for an application under rule 6, Order XXXIV, is that prescribed by Article 181. The appeal succeeds, the final decree for sale passed by the lower Court is set aside and the application for such a decree is dismissed.

The appellant will pay the costs incurred by the respondent for translating documents, as the translations were required in connection with the ground of appeal, which contests the finding that the respondent did not attain majority till the 1st October 1914. The other costs in this Court will be borne by the respondent. The appellant will pay the costs incurred by the respondent for witnesses in the lower Court, but all the other costs in that Court will be paid by the respondent.

Appeal accepted.

(12) 30 Ind. Cas. 494; 38 A. 21; 13 A. L. J. 935.

(13) 40 Ind. Cas. 424; 39 A. 532; 15 A. L. J. 448.

(14) 39 Ind. Cas. 854; 13 N. L. R. 76.

PATNA HIGH COURT.

FIRST CIVIL APPEAL No. 129 OF 1917.

December 10, 1918.

Present:—Mr. Justice Roe and

Mr. Justice Coutts.

RAM SUNDER SAHU—APPELLANT

versus

RAM NARAIN SAHU AND OTHERS—

RESPONDENTS.

Specific Relief Act (I of 1877), s. 42, scope of—Declaration of past right, suit for, maintainability of—Transfer of Property Act (IV of 1882), s. 41—Transfer by ostensible owner—Transferee, position of—Enquiry, reasonable, effect of.

Section 42 of the Specific Relief Act provides for the declaration of a present legal character or a present legal right. It has no application to a case where the plaintiff seeks a declaration as to a right which has ceased to exist. [p. 938, col. 1.]

Defendant purchased a mahal from the farzidar of the plaintiff after making reasonable enquiries which satisfied him that the farzidar was the real owner of the mahal;

Held, that the defendant being a bona fide purchaser for value from the ostensible owner, the plaintiff was debarred by section 41 of the Transfer of Property Act from setting up his title to the mahal. [p. 939, col. 1.]

Appeal from a decision of the Subordinate Judge, Mozafferpore.

Messrs. *Sayed Hasan Imam, M. Yunus, Lakshmi Narain Sinha* and *Shiveshwar Dayal*, for the Appellant.

Messrs. *P. K. Sen, Fakhruddin, Rai Gurnu Saran Prasad* and *Nirsu Narain Sinha*, for the Respondents.

JUDGMENT.

COURTS, J.—This was a suit in respect of a certain temporarily settled estate called Chak Jalal Charidar Diari, bearing No. 11918 on the revenue roll of the District of Muzaffarpur. We do not know much about the history of this estate, but it appears to have been settled by Government for short terms of years from about the year 1842. In the year 1896 default was made in payment of revenue by the proprietors and according to the case of Ram Narain Sahu, the plaintiff, who was one of the defaulting proprietors, he purchased at the sale in the name of a servant of his, named Kuldip Narain. What was purchased at the sale was the right, title and interest of the settlement holders who were holding for a term of years. After the expiry of this term there were further settlements by Government with Kuldip Narain, the last settlement being for 3 years from 1st April 1913 to the 1st of March 1916, and the plaintiff's case is that all these settlements were really made with him in the name of Kuldip Narain. In December 1913 Kuldip was very ill and as he appeared to be dying the plaintiff alleges that in order to protect the property from the heirs of Kuldip, he got the latter to execute a Kobala in the names of his brothers. There was delay in registration of the Kobala and Kuldip died before it was registered. After his death registration was applied for but execution was denied by Kuldip's heirs and registration was refused. Subsequently in February 1914, Kuldip's minor son Harender Prosad, defendant No. 6, through his mother executed a Kobala in favor of Ram Sunder Sahu, defendant No. 5. Ram Sunder got his name registered and appeals to the Collector and Commissioner by Ram Narain were in-

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fructuous. Ram Sunder did not at once get possession, but in April 1916 he got settlement from Government for 3 years and in a case under section 144, Criminal Procedure Code, he got possession. This case was after the institution of the present suit. In his plaint Ram Narain asked that it might be declared that Chak Jalal was held in Milkia by him; that Kuldip Narain was his Farzidar, and that the defendants had got no right in the Mahal. Further having been dispossessed in the case under section 144 the plaintiff asked that he might be put back into possession. The defendants raised various pleas which appear sufficiently from the issues framed in the case, which were as follows:—

1. Whether the Secretary of State for India in Council is a necessary party to the suit?

2. Whether section 36 of Act XI of 1859 bars this suit? Is the plaintiff otherwise estopped from prosecuting the suit?

3. Whether the defendant 2nd party Ram Sunder Sahu is a *bona fide* purchaser for value and is the plaintiff estopped from disputing his title?

4. Whether Kuldip Narain was a Farzidar of the plaintiff and whether the plaintiff has got any title to the Mouza in suit?

5. Whether the defendant 1st party has been improperly made defendant in the suit?

6. Whether the defendants are entitled to confirmation of possession?

7. To what relief, if any, the plaintiff is entitled?

The learned Subordinate Judge found the first four issues in favour of the plaintiff. But in view of the fact that it was outside the jurisdiction of the Court to decide whether Government was justified in giving settlement to the defendant, he declined to give a decree for possession. He has, however, passed a decree declaring that the plaintiff was the real auction-purchaser of the temporarily settled Mahal, Chak Jalal Charidar Diara; that he was a settlement holder up to March 1916, and that Kuldip Narain was his Farzidar. He, however, held that the defendants Nos. 1 to 4 were not necessary parties. Against this decree the defendant Ram Sunder has appealed and there is a cross-appeal against

the decision of issue No. 5 declaring that defendants Nos. 1 to 4 had no interest in the property. The plaintiff's cross-appeal has not been pressed and I would dismiss it without costs.

Two points have been argued in the appeal by Ram Sunder Sahu: (1) that section 41 of the Transfer of Property Act is a bar to the suit, and (2) that the decree is bad in view of the provisions of section 42 of the Specific Relief Act. I will deal with the latter point first. The first clause of section 42 of the Specific Relief Act runs as follows:—"Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the Court may in its discretion make therein a declaration that he is so entitled and the plaintiff need not in such suit ask for any further relief." The question, in the present case, is whether the plaintiff is entitled to any legal character or to any right as to any property which would entitle him to a declaration such as has been given. With regard to this point the portion of the decree with which we are concerned, runs as follows:—"It may be declared that the plaintiff is the real auction-purchaser of the temporarily settled Mahal, Chak Jalal Charidar Diara, and that he is the settlement holder up to March 1916, and Kuldip Narain Singh was his Farzidar." On the face of it this is not a declaration that the plaintiff is entitled to any present legal character or that he has any present right to the property in dispute. The learned Subordinate Judge realised this, for he says in his judgment: "It may at first appear that it (the declaration) can be of no practical use to the plaintiff", but he continues as follows:—"as Chak Jalal is a temporarily settled estate, the property of a private individual, and as some right is reserved to the last settlement holder as is indicated by Kuldip Narain's Patta, Exhibit 16, clause 4, namely, the right to receive some Malikana in case of refusal to take fresh settlement, and as it further indicates that settlement would be offered in the first instance to the last settlement holders, I think the declaration will be of great use to the plaintiff in approaching the Government and asking

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for a temporary settlement with him after the expiry of the term of the present settlement, even if it is conceded that he cannot do so now." Now it is not and it cannot be contended that Government would either with or without this declaration be bound to give the plaintiff a settlement and it is in fact almost certain that Government, when they knew the facts, would not give a settlement. They would certainly not give a settlement if Kuldip Narain is not his Farzidar and even assuming, as the learned Subordinate Judge has found, that Kuldip Narain was his Farzidar, he is a co-proprietor who has gone behind the backs of his co-sharers and has got a settlement by means of a Farzi transaction. This would certainly not find favour with Government and in fact it would appear that it has not done so, for settlement has, as I have already said, been made with the defendant Ram Sunder in 1916, who has also got his name registered in the Collectorate. The decree, therefore, in so far as any settlement is concerned, could be nothing more than a recommendation to Government. It was no declaration of a present legal character or a legal right, and it is not within the scope of section 42 of the Specific Relief Act.

The learned Subordinate Judge, however, seems to think that by reason of a certain clause in Kuldip Narain's Patta of 1910 the declaration which he has given will assist the plaintiff in getting Malikana. The clause runs as follows:—"That at the end of the aforesaid period of settlement you shall have the right to a renewal of the settlement on the revenue that may be fixed. If you do not take the settlement on the revenue that be then fixed, you shall be entitled to receive Malikana at the usual rates." The plaintiff, however, never asked for a declaration that he was entitled to receive Malikana nor has any such declaration been made. All that the Subordinate Judge intends by the declaration is that it shall help the plaintiff in the event of his making a claim for Malikana and apparently conveying a pious hope that he may get it. The declaration then in regard to this also is nothing more than a recommendation to Government from the Subordinate Judge and is not within

the scope of section 42. Apart from this there is, in my opinion, no ground for the finding of the Subordinate Judge that the plaintiff can have any right to re-settlement Malikana. He relies on the Patta of 1910, but the Patta under which Kuldip was holding when he died was a Patta of 1913, which has not been produced. Ram Sunder's Patta of 1916, Exhibit T, however, has been produced and it contains no provisions for either re-settlement or payment of Malikana and there is nothing to show whether the Patta of 1913 was similar to the Patta of 1910 or to that of 1916. In fact as the onus was on the plaintiff and as he has not produced the Patta of 1913, there is a suspicion that if he did produce it, it would be against him. In any case in the absence of the Patta, I am not prepared to accept the view of the learned Subordinate Judge that there is any provision in it for either Malikana or for settlement.

I now come to the question whether section 41 of the Transfer of Property Act is a bar to the suit. This section runs as follows:—"Where, with the consent, express or implied, of the person interested in immoveable property, a person is the ostensible owner of such property and transfers the same for consideration, the transfer shall not be voidable on the ground that the transferor was not authorized to make it, provided that the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith." So far as the first part of the section is concerned, it is not even suggested that the plaintiff has any case. The question is whether, as required by the proviso, Ram Sunder took reasonable care to ascertain that the transferor had power to make the transfer and acted in good faith. On this point, it seems to me, there can be no doubt. Ram Sunder says that at the time he made the purchase he made inquiries about the title of Kuldip Narain and what he did was to consult Register D, to make inquiries from the *raiyats* of Chak Jalal and to consult his Mukhtear named Badri Narain. The register showed the name of Kuldip and Badri Narain got for him copies of documents relating to

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Chak Jalal. These copies, he says, related to a suit between Kuldip Narain and Ramdhari, to a *dakhil kharij* case between Ram Charitar and Ram Narain and to a Kat-band case between Kuldip and the tenants of Chak Jalal. There was also a copy of a deposition and a copy of judgment in a Balabandi case between Kuldip Narain and Lalji Babu. Now we have on the record most of these documents. The first of them to which I shall refer is the deposition of Ram Narain in the *dakhil kharij* case with Ram Charitar and related to a village called Dandpur, which the applicant said was owned by him and was in his possession. In the course of that deposition, which was made before the Sub-Deputy Collector on 1st October 1910, Ram Narain stated:—"Village Chak Adam is in the name of Gobind Shah. No other *milkiat* excepting the village in dispute stands in others' name as *benami*." This clearly indicates that the plaintiff had no Malikana right in the lands in the present suit Chak Jalal. Again on 16th March 1911 deposing to another suit the plaintiff stated:—"Mouza Chak Jalal Diara formerly belonged to me. It was sold for arrears of Government revenue. Kuldip Narain is in possession of the Mouza as auction-purchaser since it was sold for arrears of Government revenue. I can swear I have no concern with the present settlement of the Mouza."

The next document is Exhibit N, a plaint in a suit between Kuldip Narain and Ramdhari. The suit was in respect of a piece of land in Chak Jalal. The suit was compromised and nowhere was there any suggestion made that Kuldip Narain was a Farzidar of Ram Narain or that Ram Narain had anything to do with the Mouza.

The next document to which I will refer is a judgment in a suit brought by Kuldip against one Bindeswari Prosad, who was the proprietor of a neighbouring Mouza, for a certain piece of land which Kuldip Narain claimed as a part of Chak Jalal. In that suit one of the issues was whether the plaintiff was a *benamidar* of Ram Narain Sahu and after going into the evidence very fully the Subordinate Judge, who heard the suit, found that Kuldip Narain was not the *benamidar* of Ram Narain.

This then was the evidence on which Ram Sunder relied, and on these documents it is difficult to understand what other conclusion he could have arrived at than that Kuldip Narain was the real settlement holder. I fail also to understand what more he could have done to ascertain that the transferor had power to make the transfer. The learned Subordinate Judge has said that as Badri Narain has not been examined, he has no materials to decide whether the papers which were read over to Ram Sunder were sufficient to lead a reasonable man to be satisfied with what they embodied. But, as I have already pointed out, these documents are on the record and they are, in my opinion, more than sufficient to satisfy any reasonable man that Ram Narain had nothing to do with the Chak Jalal estate. The learned Subordinate Judge seems to think that Ram Sunder Sahu should have insisted on the production of the original sale-certificate by which Kuldip Narain purchased. But there was very little object in this, because this was a temporarily settled estate. The sale-certificate merely transferred the right, title and interest of the remainder of the temporary settlement and Ram Sunder was perfectly justified in relying on the terms of the settlement which was running at the time when he made the purchase, and this he knew was in the name of Kuldip Narain. It appears then that up till the time when Ram Sunder applied for registration of his name, Ram Narain had never suggested that he was the real owner and in fact had on oath specifically denied his connection with the Mouza. Under these circumstances, I am satisfied that whether Kuldip Narain was the Farzidar of Ram Narain or not, Ram Sunder made all reasonable inquiries and acted in good faith. For the above reasons, therefore, I would set aside the decree of the learned Subordinate Judge and would decree this appeal with costs.

In conclusion I would note that Ram Narain has committed gross perjury. In his examination on oath before the Sub-Deputy Collector Babu Suresh Chander Deb on 1st October 1910 he stated that "Village Chak Adam is in the name of Gobind Shah. No other *milkiat* excepting the village in dispute stands in other's

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name as *benami*." Again in his statement before the Munsif of Hajipur on 16th March 1911 he stated: "Mouza Chak Jalal Diara formerly belonged to me. It was sold for arrears of Government revenue. Kuldip Karain is in possession of the Mouza as auction-purchaser, since it was sold for arrears of Government revenue. I can swear that I have no concern with the present settlement of the Mouza." In the present suit Ram Narain has stated on oath before the Subordinate Judge on 22nd January 1917: "Chak Jalal was sold for arrears of revenue in 1896. It was I who purchased it. It was in the name of my servant Kuldip Narain that I purchased." It is impossible to reconcile these statements and I would direct that he be called on to show cause why he should not be prosecuted for perjury.

ROE, J.—I entirely agree that the plaintiff has no present title in this estate and that, therefore, he is not entitled to a decree under the Specific Relief Act.

I also agree that the plaintiff should be prosecuted for perjury. Let notice be issued to him to show cause why a direction for his prosecution should not be made under section 476, Criminal Procedure Code. The 6th of January next may be fixed for hearing.

Appeal decreed.

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER NO. 126 OF 1917.

April 23, 1918.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

SUBBARAYA PILLAI—RESPONDENT—

APPELLANT

versus

SATHANATHA PANDARAM—PETITIONER—
—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 145, applicability of, to surety bonds executed outside Court.

Section 145, Civil Procedure Code, is confined to cases where the liability of the surety has been entered into in the face of the Court or has been recorded by Court in accordance with the provisions of the Code. It does not extend to surety bonds taken by a judgment-creditor outside the Court. [p. 943, col. 1.]

Lakshmi Narain Khanna v. Guru Datta Mehra, 18 Ind. Cas. 859, dissented from.

Appeal against the order of the District Court, Tanjore, dated 30th July 1917, in Appeal Suit No. 754 of 1916, preferred against the order of the Court of the District Munsif, Tiruvalur, in Execution Petition No. 355 of 1916, in Original Suit No. 110 of 1913, on the file of the Court of the District Munsif, Tiruturaiundi, under execution in the Court of the District Munsif, Tiruvalur.

FACTS appear from the judgment.

Mr. N. S. Rangaswami Ayyangar for Mr. T. Narasimha Aiyangar, for the Appellant.—The wording of section 145 clearly shows that that section is co-related to several provisions in the Code itself which provide for the taking of security bonds, such security bonds being of course given to Court or filed in Court. Compare section 145 with Order XLI, rules 1, 5, 6; Order XXXVIII, rule 2, section 55, Civil Procedure Code. In all such cases there can at no time be any question as to the liability of the surety and so summary realisation by execution of the decrees or order against the surety is reasonable. On the other hand in cases where a person is alleged to have become surety by an agreement outside the Court, there will be the necessity to inquire into the factum or validity of such agreement itself; and to such cases summary process is unsuitable. *Baboo Ram Kishen Doss v. Hurkhoo Sing* (1), *Gujendro Narain Roy v. Hemanginee Dossee* (2) and *Abdool Kureem v. Abdool Huq Kazei* (3). Cases decided under the Code of 1859, which so far as this portion of the section is concerned was not materially different from the present section, all show that the section was understood to apply to bonds given to or filed in Court and taken under the provisions of the Code in that behalf. Mr. S. Muthiah Mudaliar, for the Respondent, relied on *Lakshmi Narain Khanna v. Guru Datta Mehra* (4) and the unqualified language of the section itself.

JUDGMENT.

NAPIER, J.—The sole question raised in this second appeal is whether section 145 of the Code of Civil Procedure applies to surety bonds taken by the judgment-creditors

(1) 7 W. R. 329.

(2) 13 W. R. 35; 4 B. L. R. App. 27.

(3) 15 W. R. 21; 8 B. L. R. 205.

(4) 16 Ind. Cas. 859.

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outside Court. The counter-petitioner in the case executed a surety bond in favour of the plaintiff in Original Suit No. 110 of 1913 in the Court of the District Munsif of Tiruturaipundi, in consideration for which the plaintiff-petitioner stayed execution of his decree against the defendant. He now seeks execution of the decree against the surety and objection is raised that section 145 does not apply. The District Munsif held that section 145 applies to cases in which the surety bond was put into Court before final orders were passed on the prior execution petition. The District Judge, on appeal, held that the section is of general application and allowed execution to proceed. It is somewhat remarkable that the exact point has not been decided before now and it seems to be generally admitted that the proceedings under this section have not generally been taken in respect of surety bonds not given before the Court. My learned brother, who has an unrivalled experience in these matters, tells me that he has never known of such an application. It cannot be denied, however, that the language of the section is wide enough to include such surety bonds. But it is argued that the sub-sections (a), (b) and (c), which describe the classes of surety bonds affected by the section, all in terms refer to bonds taken before the Court under the provisions of the Code and that, therefore, the application of the section must be so limited. Sub-section (a) "for the performance of any decree or part thereof" would certainly apply to a provision for staying execution under Order XLI, rule 5, clause 3 (c), on the appellant giving security for the due performance of such decree or order as may ultimately be binding on him. Sub-section (b) "for the restitution of any property taken in execution of a decree" undoubtedly applies to Order XLI, rule 6, which requires the Court which passed the decree, on sufficient cause being shown by the appellant, to take security from the respondent for the restitution of any property which he seeks to take in execution of the decree. Sub-section (c) "for the payment of any money, under an order of the Court in any suit or in any proceedings consequent thereon" in terms applies to Order XXVIII, rule 2, clause (2), namely: "Every surety for the appearance of a defendant shall bind himself, in

default of such appearance, to pay any sum of money which the defendant may be ordered to pay in the suit." In the same sub-section (c) the words "for the fulfilment of any condition imposed on any person under an order of the Court, etc.," would in terms apply to any condition for the stay of execution imposed under Order XXI, rule 26, clause (3), and also to a realisation of security in default of a judgment-debtor applying to be made insolvent under section 55, sub-section (4). In all these cases the security might contain a surety bond and the bond would, of course, be given before the Court. Sub-sections (b) and (c) in the section 145 are new. The corresponding section of the old Code, section 253, ran as follows:—

"Whenever a person has, before the passing of a decree in an original suit, become liable as surety for the performance of the same or of any part thereof, the decree may be executed against him to the extent to which he has rendered himself liable, in the same manner as a decree may be executed against a defendant." The same question would, therefore, arise on the construction of this section, but the only cases dealing with this section are those that raised the question whether the words "before the passing of a decree in an original suit" apply to suretyships for the due performance of appellate decrees, on which there was a difference of opinion in the different High Courts of this country. There is a decision of the High Court of Calcutta reported as *Lakshmi Narain Khanna v. Guru Datta Mehra* (4), which is against the appellant. In that case a warrant was issued for the arrest of a judgment debtor which directed it to be stayed if the judgment debtor furnished security. The judgment-debtor was arrested and brought before the Court. Then the following entry was made in the order-sheet: "The judgment-debtor has been brought after being arrested. The decree holder's Pleader states that the judgment-debtor's father-in-law...has deposited with him Government promissory notes of the value of Rs. 2,000 as stated in his petition as security for the decretal amount; so he asks the Court to release the judgment-debtor from custody. The judgment-debtor is released." The decree-holder applied for execution against the surety and prayed that he promissory notes in

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his custody might be sold. Objection was taken that section 145 was not applicable, because the appellant did not become surety by an application to the Court or by a bond filed in the proceedings. The Bench held that the section does not provide that this liability must have accrued upon an application presented to the Court or a surety bond filed in the proceedings, and proceeds as follows: "We cannot limit the application of the section to cases where the liability of the surety is undisputed or is a matter of record." The facts of this case, however, show that execution was stayed under an order of the Court and the debtor released on the surety being given, although the security was certainly taken outside Court. In the present case no order has been passed by the Court at all, so that although the language of the Judges seems wide enough to cover the present case and though they specifically decide that the security need not be taken before the Court, there is still the difference that it was the Court that stayed its hand and not the decree-holder. In *Thirumalai v. Ramayyar* (5) the main question was whether section 253 of the old Code could be availed of where security had been given on behalf of the respondent to an appeal under section 54 of the Code for the due performance of the decree, that is under Order XLI, rule 6, of the present Code. The Court held that execution could be had against the sureties and used the following language: "The obligation which the surety undertakes is an obligation to fulfil the decree which may be passed against the defendant or appellant in the original suit or in appeal, and the obligation is contracted before the Court and is as much a matter of record as the decree undertaken to be fulfilled. There is no apparent reason for directing the successful party to obtain a fresh decree against the surety, whilst the very obligation is to fulfil the decree against the defendant or the appellant." The reasoning of the Court here is inconsistent with the contention of the respondent and with the wide language in *Lakshmi Narain Khanna v. Guru Datta Mehra* (4), but is not inconsistent with the actual decision in 16 Ind. Cas. 859. Then there were some decisions under

section 204 of Act VIII of 1859, which were as follows:—"Whenever a person has become liable as surety for the performance of a decree, etc.," which section it is to be noted has not got the words in section 253 of the Code of 1882, "before the passing of the decree in an original suit." In a case reported as *Baboo Ram Kishen Doss v. Hurkhoo Singh* (1) it seems to have been assumed that section 204 applies to cases such as that of parties who become sureties under section 76 or 83 of the Code. In *Gujendro Narain Roy v. Hemanginee Dossee* (2) it is held that a security bond entered into subsequent to a judgment cannot be enforced under section 204. These two cases were considered by the High Court of Calcutta in a later decision reported as *Abdool Kureem v. Abdool Huq Kazeem* (3). There the judgment debtor had been arrested upon a warrant in execution of a decree and applied for his discharge on the ground that he had no means of paying the debt. He was released on a bond given to the Munsif by two sureties under a provision corresponding to section 55, sub-section 4 of the present Code. The Munsif held that as the bond was given subsequent to the judgment it could not be enforced under section 204. The Court distinguished the two prior cases in *Baboo Ram Kishen Doss v. Hurkhoo Singh* (1) and *Gujendro Narain Roy v. Hemanginee Dossee* (2), on the ground that the liability of the surety in those two cases did not arise in the course of or out of proceedings in the suit but upon distinct and independent contracts made between the sureties and the creditor, and seemed to be of opinion that in such circumstances the section would not have been applicable. It is to be noted, however, that the decision of the two earlier cases did not go on this question at all. But this is an indication of the view of the Court that bonds taken outside the Court are not within the section. The position then is that there are contradictory rulings under the old Code in the Calcutta High Court and language in a modern decision by the High Court of Calcutta which is against the appellant, while the language in *Thirumalai v. Ramayyar* (5) seems to be in his favour. I find it impossible to express a confident opinion on the point. But as at present advised I think that

(5) 13 M. 1; 4 Ind. Dec. (N. S.) 711.

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considering that the language of the various sub-sections can be referred to specific provisions of the Code, and considering that the object of the section is to allow execution against a person who is not a party to the suit or legal representative, it is more proper to confine it to cases where the liability has been entered into in the face of the Court or has been recorded by the Court in accordance with the provisions of the Code.

The result will be that the civil miscellaneous second appeal succeeds and the judgment of the District Munsif must be restored with costs here and in the lower Appellate Court.

SADASIYA AIYAR, J.—I agree and only wish to add with the greatest respect to the learned Judges who decided the case in *Lakshmi Narain Khanna v. Guru Datta Mehra* (4) that I agree neither with the reasons for the decision nor with the actual decision, even having regard to the particular facts of that case. I do not think that the fact that the Court itself stayed the execution on the report made to it of security having been given outside the Court, would enable the Court to allow the security to be realised in execution. The only security which could be so realised is one to be furnished to the Court or at least filed in Court.

M.C.P.

Appeal allowed.

PATNA HIGH COURT.

CIVIL REVISION No. 187 OF 1918.

December 5, 1918.

Present:—Mr. Justice Atkinson and Mr. Justice Manuk.

THE BANK OF BENGAL—PETITIONER
versus

SARAT CHANDRA MITRA—RESPONDENT.

Execution of decree—Jurisdiction, territorial, limits of—Attachment—Corporation having different branches, property in possession of, whether can be attached—Property outside jurisdiction of Court.

The jurisdiction of a Court is circumscribed by and co-extensive with its territorial limits. [p. 945, col. 1.]

Where property sought to be attached is *bona fide* without the jurisdiction of the original Court whose decree is sought to be enforced and is in the hands

of a third party who is not amenable to or permanently residing within the jurisdiction of the executing Court, the decree of the executing Court must be transferred to the Court within the local limits of whose jurisdiction the property sought to be attached is for the time being. [p. 945, col. 1.]

A corporation may be said to reside wherever it carries on its business, irrespective of the location of its head office, and if a corporation such as a Bank has branch offices in fifty separate and distinct jurisdictions, it can and may be sued in any one of such jurisdictions for the enforcement of a right in respect of which a cause of action exists within the limits of each independent jurisdiction [p. 945, col. 2.]

The jurisdiction of an executing Court to attach moveable property belonging to a judgment-debtor in the hands of another or under his control or a debt due by him is correlative and co-extensive with the right which the judgment-debtor himself would have had to sue for the recovery of his property or his debt as against his debtor or trustee. [p. 946, cols 1 & 2.]

One R entered into the service of the Patna Branch of the Bank of Bengal, and as security for his fidelity to the Bank deposited with the Bank Government promissory notes of the value of Rs. 20,000. The promissory notes were sent from Patna to Calcutta and were kept in the custody of the Head Office of the Bank. A creditor of R attached the Government promissory notes and the interest accruing due under them in execution of a decree passed by the Subordinate Judge at Patna:

Held, that inasmuch as the Bank had a residence within the jurisdiction of the Patna Court and carried on business therein, that Court had jurisdiction to attach both the Government promissory notes and the interest accruing under them, notwithstanding the fact that the notes were in the physical custody of the Head Office of the Bank at Calcutta. [p. 946, col. 2.]

Civil revision from an order made by the First Subordinate Judge, Patna, dated the 1st June 1918.

Messrs. Syed Hasan Imam, Sultan Ahmad and Siva Narain Bose, for the Petitioner.

Messrs. Khurshaid Hasnain, Susil Madhab Mullick, Bankim Chandra De and Narendra Nath Sen, for the Respondent.

JUDGMENT.

ATKINSON, J.—This application comes before us in revision from an order made by the learned First Subordinate Judge of Patna, dated the 1st of June 1918.

It is necessary to shortly set out the facts of the case before we consider the legal questions arising for our determination.

One Sarat Chandra Mitra obtained a decree for Rs. 2,000 against Raghunath Prasad; and the decree-holder, Sarat Chandra Mitra, seeks now to attach certain property alleged to be the property of Raghu;

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nath Prasad in the hands of the Bank of Bengal.

In the year 1910 Raghunath Prasad was taken into the service of the Bank of Bengal as a Treasurer; his duties were restricted to acting as Treasurer in the Patna Branch of the Bank of Bengal.

Prior to Raghunath Prasad's entry into the service of the Bank, the Bank required that he should enter into a fidelity bond for the due and faithful performance of his duties; and required security in cash for the sum of Rs. 20,000 and a mortgage on immovable property to the extent of Rs. 30,000. In pursuance of this arrangement Raghunath Prasad deposited with the Bank of Bengal Government promissory notes for the sum of Rs. 20,000 and a mortgage-deed on property situate at Arrah for Rs. 30,000. The terms of the contract made between the parties, that is to say, Raghunath Prasad on the one hand and the Bank of Bengal on the other, are embodied in the security bond, dated the 23rd of May 1910.

The Bank of Bengal contend that Raghunath Prasad has not faithfully discharged his duties within the terms of the bond, and that he has been guilty of default and breach of duty; and that he has involved the Bank in substantial loss and damage, and that they are, therefore, in the events that have happened, entitled under the provisions of clauses 2 and 9 of the bond itself to realise the security deposited with them to cover their loss; and that they are also entitled to retain so much of the interest as has accrued thereon since suspension by way of collateral security, in the event of Government securities deposited with the Bank proving insufficient, to cover the Bank's total loss.

The judgment-creditor, Sarat Chandra Mitra, in the suit in which he obtained his decree before the First Subordinate Judge of Patna, instituted an application seeking to attach in execution of his decree the Rs. 20,000 Government promissory notes deposited as security with the Bank; and also to attach so much of the interest as may have accrued on the Rs. 20,000 and now admittedly in the Bank's hands. The learned Subordinate Judge

decided that the Government promissory notes lodged by Raghunath Prasad with the Bank were attachable subject to the Bank's lien. He also held that the accrued interest in the hands of the Bank was attachable; and that such interest did not form part of the Bank's security to cover any loss or damage that the Bank might have sustained owing to any default or breach of duty committed by Raghunath Prasad acting in his office as Treasurer of the Patna Branch of the Bank of Bengal.

On the hearing of the aforesaid application for attachment the Bank of Bengal intervened, and they claimed before the learned Subordinate Judge that he had no jurisdiction whatsoever to attach the Government paper money in the custody of the Bank and deposited with them by way of security, nor was the learned Judge entitled to attach the interest in their hands which formed collateral security against any loss they might incur by reason of any defalcations on the part of Raghunath Prasad. The learned Judge decided against the contention of the Bank and held that the main security and the interest were liable to attachment; and on the 8th June the learned Judge issued a precept against the Bank which expressly prohibited the Bank from disposing of the interest accrued and in their hands, and from realizing the Government promissory notes deposited with the Bank by Raghunath Prasad. The Bank of Bengal was prohibited and restrained by a further order, dated the 15th July 1917 from parting with, or disposing of, the said property in their possession to any other person.

The contention of the Bank, as argued before us, is that the property sought to be attached is outside the jurisdiction of the Patna Subordinate Court; and, therefore, not subject to attachment; and further that it was an excess of jurisdiction on the part of the Patna Subordinate Court to seek to attach property in the hands of a party residing permanently beyond and without the jurisdiction of such Court; and that thus the First Subordinate Judge of Patna had no jurisdiction to attach either of the denominations of property in question.

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Speaking generally, it is an accepted principle of international jurisprudence that the jurisdiction of a Court in enforcing execution of its decrees is restricted by its territorial limitations. That is to say the jurisdiction of a Court is circumscribed by and co-extensive with its territorial limits. Thus a Court desiring to seize or attach the property of a judgment-debtor outside its jurisdiction, and where such property is in the hands of, or custody of another, also outside the jurisdiction such property sought to be attached in aid of the executing Court can only be reached by a regular method of procedure which has been prescribed by the rules of the Civil Procedure Code, and similar codes which prevail in all countries, viz., the decree of the executing Court must be transferred to the local limits of the jurisdiction of the external Court within which the property sought to be attached is for the time being.

This rule of law only applies when the two following facts concur: (1) when the property sought to be attached is *bona fide* without the jurisdiction of the original Court whose decree is sought to be enforced, and (2) when the property sought to be attached is in the hands of a third party not amenable to or permanently residing within the jurisdiction of the executing Court.

I say property *bona fide* without the jurisdiction of the original Court, because I conceive that the above rule of law would not apply if property was fraudulently or surreptitiously removed from one jurisdiction to another for the purpose of defeating the right, authority and power of the executing Court in the execution of its decrees. In such a case a proceeding could be brought against persons within the jurisdiction from which the property was removed, which would in its operation and effect secure the recovery of the property attempted to be made away with and placed outside the jurisdiction of the original Court merely to defeat its jurisdiction and the execution of its decrees. An exception to the general principle may exist with reference to the jurisdiction of a Court to sell land outside the territorial limits of its jurisdiction in pursuance of a mortgage decree, provided some portion

of the mortgaged property is within the jurisdiction of the original Court which grants the decree.

The law thus stated is in harmony and accord with the same principles laid down in the learned judgment of the Judges of the Calcutta High Court in the case reported as *Begg, Dunlop & Co. v. Jagannath* (1) and in which case all the authorities are reviewed with the greatest care, and with the principles of law as authoritatively laid down by that decision we respectfully concur.

The fundamental distinction between the case reported as *Begg, Dunlop & Co. v. Jagannath* (1) and the present case is that in the former the garnishee or debtor of the judgment-debtor, whose debt was sought to be attached, was a firm carrying on business in Calcutta, and only in Calcutta, and that the debt that was due to the judgment-debtor was payable in Calcutta, and nowhere else; and thus it was held that the Court had no jurisdiction to attach a debt payable to the judgment-debtor outside its jurisdiction by a person not amenable to its jurisdiction.

In this case we have a great banking corporation, having its head office at Calcutta with subordinate branches throughout the rest of India, where it carries on its Banking business. In Patna itself, within the jurisdiction of the Court of the First Subordinate Judge of Patna, the Bank of Bengal have a local branch where they carry on their trade or business of banking and with reference to which the contract that was made between the Bank and Raghunath Prasad was solely conversant.

A corporation may be said to reside wherever it carries on its business, irrespective of the location of its head office, and if a corporation such as a Bank has branch offices in fifty separate and distinct jurisdictions, it can and may be sued in any one of such jurisdictions for the enforcement of a right in respect of which a cause of action exists within the limits of each independent jurisdiction.

The test to be applied in such cases is to be found accurately stated at page 116, I. L. R. 33 Calcutta [*Begg, Dunlop & Co. v. Jagannath* (1)] already referred

(1) 11 Ind. Cas. 417; 39 C. 104; 16 C. W. N. 402; 14 C. L. J. 228.

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to above. The learned Judges there say:— the test to be applied is whether the judgment-debtor, as creditor, could have sued the garnishee as his debtor in the Court in which the execution proceedings were commenced.

In this case I put the specific question to learned Counsel appearing on behalf of the appellants and the respondent. Could Raghunath Prasad have sued the Bank in Patna for default in paying to him the interest due on the Government securities lodged with the Bank had there been no default to justify its suspension? and the answer was in the affirmative. I apprehend no other answer could in law or fact have been given; because it is clear to demonstration that in the contingency put, the right to sue the Bank in Patna would have undoubtedly existed at the suit of Raghunath Prasad.

Take another illustration to test the question of jurisdiction. Assuming the contract of service to have come to an end without any default on the part of Raghunath Prasad; and the Bank refused for no good and sufficient cause to return to Raghunath Prasad the Government securities held by them, could Raghunath Prasad have sued the Bank at Patna for the return and recovery of the securities retained by them? Of course he could.

Mr. Hasan Imam in the earlier portion of his argument contended that Raghunath Prasad would have been forced to go to Calcutta to demand payment of each instalment of the interest as it fell due on the securities held by the Bank, in pursuance of clause 9 of the security bond. This argument is, in our opinion, untenable; and I think it may fairly be said that Mr. Hasan Imam abandoned this contention in the latter portion of his argument addressed to us.

Applying these recognised tests, it may be generally stated, as a broad and general proposition, that the jurisdiction of an executing Court to attach moveable property belonging to a judgment-debtor in the hands of another or under his control, or a debt due by him is correlative and co-extensive with the right which the judgment-debtor himself would have had to sue for the recovery of his property

or his debt as against his debtor or trustee.

In the present case the mere removal of the securities by the Bank to the Head Office at Calcutta and their retention there by the Treasurer or Secretary of the Bank for the time being by consent of the parties, would not defeat the jurisdiction of the Subordinate Court at Patna to attach such securities at the suit of a judgment-creditor of Raghunath Prasad, subject to the lien of the Bank. The removal of the securities to Calcutta was merely a precautionary act for the better custody of the Government securities committed to the Bank's charge; and upon which they undoubtedly had and claimed to exercise a lien.

Though the security notes deposited with the Bank were physically at the Head Office of the Bank in Calcutta, in the eye of the law they were constructively within the jurisdiction of the Patna Courts for the purpose of attachment, inasmuch as the Bank had a residence within the jurisdiction of the Patna Subordinate Court and carried on their business therein.

Thus it appears to us that the securities held by the Bank under clause 8 of the security bond, dated the 23rd May 1910, are attachable at the instance of Sarat Chandra Mitra by the Court of the First Subordinate Judge of Patna; but subject to the lien of the Bank thereon. No order, however, is capable of being maintained which would limit, restrict or prohibit the due and reasonable exercise by the Bank of its right to enforce its lien upon the securities deposited with it as and when occasion might arise. The learned Judge by his precept of the 8th June and his order of the 16th July 1917 has gone too far. I would refer to the precept of the 8th June, which prohibits and restricts the Bank from disposing of the security deposited with them. The order of the 8th of June was followed by an order of the 16th July, which was still more prohibitive and mandatory in its terms. Neither of these orders can stand.

The learned Judge in the judgment which he delivered on the 1st June made a very proper declaration in the view we take of the law applicable to the facts of this

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case. He merely stated in the course of his judgment that so far as the security itself was concerned, that is the Government paper security, it was attachable subject to the lien of the Bank. In other words all that in effect is attachable at the suit of the judgment-creditor of Raghunath Prasad, Sarat C. Mitra, is whatever residue of the capital moneys representing the security deposited with the Bank may be available, after the Bank's claim in respect of the loss or damage that they have sustained by reason of the default and infidelity of Raghunath Prasad has been completely satisfied. But in the exercise of the Bank's right of lien it is not competent for the Subordinate Court at Patna to restrict the Bank in the due exercise of their rights with regard to the enforcement of their lien and the realization of the securities upon which that lien is based. Therefore, the order of the learned Judge, dated the 16th July 1917, is wrong in form. It goes too far; and he cannot, in our opinion, enjoin or prohibit the Bank by his order from realizing their security; if the securities are in fact capable of being realized by the Bank. This disposes of the first contention addressed to us.

Mr. Hasan Imam's main argument was based upon the fact that the security-deed contemplated that the Government promissory notes tendered as security were to be handed over to the Secretary or Treasurer of the Bank at Calcutta and retained by him there, and that thus it was property outside the jurisdiction not liable to attachment. With that view we cannot agree, and for the reasons I have already stated, inasmuch as the Bank carries on its trade or business at Patna, and has a residence or place of business in Patna; and, therefore, even though the physical possession of the securities may be with the Bank at Calcutta, constructively in the eye of the law the Bank is within the jurisdiction of the Patna Court and the property which they hold is liable to attachment subject to their lien.

The other question that arises for determination is whether the interest payable on the securities deposited and now accumulated in the hands of the Bank, since suspension of its payment, is attach-

able. Clause 9 of the security deed has created for us some difficulty as to its true interpretation and construction. The clause is by no means clear or free from doubt. The drafting of this clause leaves much to be desired in the art of proper conveyancing. The difficulty created by clause 9 is the omission to state precisely and expressly what the parties to the security bond obviously intended that the deed should express. By clause 9, Raghunath Prasad, so long as he observed good faith and acted with fidelity towards his employers, would have been entitled to receive the accruing interest upon the securities deposited with the Bank when it fell due. Clause 9 gives the Bank a power of suspending the payment of the interest to Raghunath Prasad in the event of loss or damage accruing to the Bank by reason of the want of fidelity on the part of Raghunath Prasad in the due discharge of his duties. The interest payable to Raghunath Prasad was to be paid or credited to him so long as good faith was observed. When the Bank sustained damage then the right of suspension accrued. What was the object of giving the Bank the power to suspend payment of interest? We think, considering the scope and tenor of the deed, and bearing in mind its object and design, that it must have been the intention of the parties to the deed to provide that the Bank's right to suspend payment of the interest, when default occurred, coupled with it the right to retain the accumulated interest and such as might accrue after suspension; and that thus it was clearly intended and the true meaning of the fidelity bond is that the interest so accumulated and accruing should form a fund, as collateral security, in the event of the main security proving insufficient to discharge the total loss or damage sustained by the Bank; otherwise clause 9 would be meaningless.

Why should the Bank have the power to suspend payment and yet retain the accumulated and accruing interest in their hands, but in respect of which they were to have no claim?

We have carefully considered the argument addressed to us *contra* on behalf of the respondent; but with that argument we cannot agree. Thus we think that in this

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case having regard to the form, scope and phraseology of the security bond itself, the Bank is entitled to retain the interest accumulating and accruing after suspension as collateral security for the main debt. The interest in the Bank's hands is, in our opinion, liable to attachment; but attachable subject to the lien of the Bank. The judgment-creditor will, therefore, only be able to attach, to satisfy his decree, whatever residue may remain over either of the principal security or of the interest that has accrued or may accrue thereon after the Bank's total loss has been satisfied.

The difficulty in this case has been created by the action of the Bank itself. Mr. Hasan Imam contends that it would have been open to the Bank to say that they themselves were satisfied that a loss had been sustained and to have realised forthwith out of the securities at their disposal a sufficient sum to cover their loss; leaving it to Raghunath Prasad to sue them for an account or to challenge the validity of their claim to realize the security deposited with the Bank. However, the Bank did not adopt the course suggested; and up to the present time owing to the action of the Bank the amount of the loss or damage sustained by them at the hands of Raghunath Prasad has not been ascertained. The Bank could have elected to have acted in the manner indicated; but they preferred to assert their right to sue Raghunath Prasad and claim a declaration of their right to realize and dispose of the securities and the interest accumulated thereon in satisfaction of their loss.

For these reasons, we think, the order of the learned Judge in substance was right; but in form it was wrong. The order of the learned Judge must, therefore, be modified to this extent, that the respective properties comprised in and appropriated by clauses 8 and 9 of the security bond of the 23rd May 1910 will be attached subject to the Bank's general right of lien in respect of both such properties; and the order of the 16th July 1917 and the precept of the 8th June 1917 prohibiting or injunctioning the Bank in the exercise of the enforcement of their right of lien as against such properties are hereby set aside and are declared to be inoperative and illegal.

Therefore, this application made in civil revision to us by the Bank has failed. The entire difficulty that has arisen in this case has been occasioned by the Bank's own mistake and in disregard of their apparent and legal rights, therefore, we direct that the Bank of Bengal do pay the sum of five gold *mokurs* to the respondent as and for the costs of the hearing of this application.

The application of the Bank of Bengal is dismissed; and we order that the respective denominations of property specified in clauses 8 and 9 of the fidelity bond, dated the 23rd May 1910, are liable to attachment without restriction or prohibition upon the Bank's general right of, lien in respect thereof; and that in so far as the precept of the 8th June 1917 and the order of the 16th July 1917 purport to limit and fetter the Bank in the assertion and exercise of their general right of lien upon the aforesaid securities, the same are illegal, void and without force and effect; and that the only property available for attachment at the instances of Sarat C Mitra is the residue, if any available, of the respective properties mentioned and set forth in clauses 8 and 9 of the security bond after the claim of the Bank has been fully satisfied and discharged.

MANUK, J.—I entirely agree with the judgment of my learned brother and have nothing to add.

Application dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 201 OF 1917.

June 21, 1918.

Present:—Mr. Batten, A. J. C.

GOVINDA, MINOR, GUARDIAN *Musammam*
PURI, AND ANOTHER—DEFENDANTS—

APPELLANTS

versus

CHINDHOO—PLAINTIFF—RESPONDENT.

C. P. Tenancy Act (XI of 1898), s. 60—Occupancy tenancy—Sub-lease—Ejectment of sub-lessee—Notice to eject—Jurisdiction of Civil and Revenue Courts.

KAMLESHRI PRASAD SINGH v. RAGHUBANS PRASAD SINGH.

Under section 60 of the Central Provinces Tenancy Act a sub-lease of occupancy land cannot be made from year to year, it can only be made for a term of one year. If before the end of the year no notice is given, there may be a presumption that the parties intend to make a fresh lease for the ensuing year, but where a notice is given by the occupancy tenant to his sub-tenant that he does not intend to renew the sub-lease, the sub-lease comes to an end with the end of the agricultural year, and the sub-tenant is thereafter in the position of a trespasser and can be ejected through a Civil Court.

Appeal from the decree of the Court of the District Judge, Bhandara, dated the 6th January 1917 in Appeal No. 118 of 1916.

Messrs. S. C. Dutta Chowdhury and K. K. Gandhi, for the Appellants.

Mr. G. L. Subhedar, for the Respondent.

JUDGMENT.—This appeal arises out of a suit brought by an occupancy tenant to eject a sub-tenant who refused to vacate the field after the end of the agricultural year, although a notice was given to him before the end of the agricultural year that the sub lease would not be renewed. In appeal it is urged for the defendants that the Munsif had no jurisdiction to try this suit because the suit was one between landlord and tenant, and that the notice of ejection was not valid because it was not given sufficiently early. Under section 60 of the Tenancy Act a sub-lease of occupancy land cannot be made from year to year, it could be only made for a term of one year. No doubt if before the end of the year no notice is given, there may be a presumption that the parties intend to make a fresh lease for the ensuing year, but in this case notice was given by the occupancy tenant to his sub-tenant that he did not intend to renew the lease. The lease, therefore, came to an end under section 60 with the end of the agricultural year and after that date the defendants in the circumstances were trespassers. The Munsif had jurisdiction to try this suit and the notice was given in sufficient time. I may add that it would have been a sufficient notice even if the land had been an absolute occupancy tenancy, since it was given over 5 months before the end of the agricultural year. For these reasons the appeal is dismissed.

Appeal dismissed.

PATNA HIGH COURT.

APPEAL FROM ORIGINAL DECREE NO. 146 OF 1916.

December 10, 1918.

Present:—Mr. Justice Roe and Mr. Justice Coutts.

KAMLESHRI PRASAD SINGH AND
ANOTHER—DEFENDANTS—APPELLANTS

versus

RAGHUBANS PRASAD SINGH—
PLAINTIFF AND SIRJUG PRASAD SINGH
AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Joint family—Karta, purchase in name of—Debts collected and loans made by karta—Presumption—Burden of proof.

Where a purchase of property is made in his own name by the karta of a joint Hindu family, the presumption is that the property is acquired out of the family funds, unless it can be shown by definite evidence that the karta acquired the property from private funds and not from funds which were in his hands as the head of the family. [p. 950, col. 2; p. 951, col. 1.]

Where the head of a joint Hindu family collects money due upon family bonds, the presumption is that he makes the collections on behalf of the joint family, and if he re-issues the money collected on fresh loans, the presumption again is that he issues it for the benefit of the family and not for his own private benefit. [p. 951, cols. 1 & 2.]

Appeal from a decision of the Subordinate Judge, Monghyr.

Messrs. P. R. Das, Naresh Chandra Sinha and Sivanandan Rai, for the Appellants.

Messrs. Ganesh Dutt Singh, Jal Gobind Singh and Purnendu Narain Sinha, for the Respondents.

JUDGMENT.

ROE, J.—This appeal arises out of a suit for partition. The pedigree of the family is given in the plaint. It is descended from Brij Lal Singh and the property to be divided is the ancestral property of Brij Lal Singh together with four villages subsequently acquired, namely, Pandarak, Surajpore, Rasulpore and Bhagwanpore Bansi or Barauni. In the course of the trial the plaintiff sought for and obtained leave to add to the properties to be partitioned a number of debts which were alleged to be due to the joint family.

The parties are the descendants of the four sons of Brij Lal Singh, the plaintiff and the defendants Nos. 1 and 2 being descended from the third son Parsban Singh, the defendants Nos. 3 and 4 from the eldest son Rang Lal Singh, the defendants Nos. 5 and 6 from the second son, and the defendants Nos. 8 to 13 from the youngest son,

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In the Court of first instance it was alleged that there had already been a partition of the whole estate and that, therefore, the suit should be dismissed. This issue was found against the defendants. The defendants Nos. 1, 2, 5, 6 and 7 do not appeal, the defendants Nos. 3 and 4 appeal and the defendants Nos. 8 to 13 have filed a cross-appeal. In the argument before us no attempt was made to contest the learned Subordinate Judge's finding that no valid partition of the family property had taken place.

The points for consideration are only (1) whether the defendants Nos. 3 and 4 being the elder branch are entitled to Jethansi or an eldest son's share; (2) whether the four villages I have named were a part of the joint family estate or the self-acquired property of Rang Lal Singh, the grandfather of defendants Nos. 3 and 4; and *thirdly*, whether a number of bonds standing in the name of Gita Prasad Singh and his sons represent loans made from the private purse of Gita Prasad, or from the joint family estate. The learned Subordinate Judge decided all these issues against the appellants.

Upon the question of the eldest son's share the learned Subordinate Judge has dealt only with the oral evidence, and that evidence he has dealt with in a somewhat summary fashion. The documentary evidence shows that upon a reference to arbitration of a dispute with regard to the whole family property made in the year 1905 one of the arbitrators, Deekinandan Singh, drew up a statement of the rights of the parties and in it distinctly recorded a finding that the elder branch was entitled to 5/21sts of the family property, the remaining branches being entitled only to 4/21sts. Reading the evidence of Jhumak Singh, the plaintiff's witness No. 5, it is clear that he himself and another of the arbitrators acquiesced in the finding recorded by Deekinandan Singh. Deekinandan Singh himself gave evidence on behalf of the plaintiff and says that his decision regarding Jethansi was most probably based on the oral evidence on behalf of the parties. In 1908 a petition was filed by Sarjug Prasad Singh representing as the genealogical table shows, the branch to which the plaintiff himself belongs, in pro-

ceedings regarding the registration of the four villages under dispute upon the second point raised in this Court. In this petition it is distinctly admitted that the eldest branch is entitled to a Jethansi share. The second witness for Gita Prasad Singh's branch, Bajrang Prasad, states that up to 60 years ago Jethansi custom was recognised in the family. Seeing that there has admittedly been no partition since the separation from his brothers of Brij Lal Singh who is the great-grandfather of the majority of the parties, we may assume that there has been no partition for sixty years, and that, therefore, it is impossible for the custom of Jethansi, if it existed 60 years ago, to have now died out. The evidence, which I have quoted, coupled with the oral evidence of the witnesses called by the defendants Nos. 3 and 4 seems to me conclusive proof of the custom alleged by the defendants Nos. 3 and 4, and I would order that a partition of the immoveable property be made on the basis of a division of the property into 21 parts, of which the defendants Nos. 3 and 4 will receive five parts, the remaining branches four parts each; the plaintiff's branch being again sub-divided into two equal shares of two annas each to the plaintiff of the one part and the defendants Nos. 1 and 2 of the second part.

I can see no reason to disturb the finding of the learned Subordinate Judge that the villages in dispute were acquired from joint funds. Mr. P. R. Das admits that if the burden of proof is on him to show from what means the acquisition was made, his evidence does not support the burden of proof upon him. He suggests, however, that on the basis of the decision in the case of *Bodh Singh Doodhocrria v. Guneshchunder Sen* (1) there is no burden of proof on him at all, since it is shown by the arbitrators' award and by the evidence on both sides that the family has for a very long time had separate accounts and have issued loans from their separate private funds. The ruling in question is based, I take it, upon the principle that where all the family has been dealing in immoveable property as self-acquired property, the presumption that all

(1) 19 W. R. 356; 12 B. L. R. 317; 3 Sar. P. C. J. 253.

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immoveable property acquired in the name of any member of the family is joint property at once disappears. There is nothing upon the record to show that any other branch of the family has been making private acquisitions of immoveable property. The evidence with regard to separate transactions is limited to the issue of loans upon simple bonds. No case has been cited of separate acquisitions of immoveable property by any of the junior branches. It is admitted that Rang Lal Singh, in whose name these properties were bought, was at the time of the purchase the Karta of the family. I am of opinion that his descendants were required to show by definite evidence that he acquired these properties from private funds and not from funds which were in his hands as the head of the family. It being admitted that they have failed to show this, the learned Subordinate Judge's decision upon this point must be upheld.

The learned Subordinate Judge has dealt with the question of the ownership of the bonds standing in the name of Gita Prasad in even more summary fashion than that in which he disposed of the other points in dispute. It is quite clear from the evidence of the plaintiff's witness at page 19 and from the award of Daokinandan Singh at page 29 that from 1314 onwards Gita Prasad was the manager of such business as remained joint after the reference of the family disputes to arbitration in 1905. Deokinandan Singh himself admits in his evidence at page 17 that when he went into the accounts with the intention of settling the disputes, he found that there were 142 debtors of the joint family on bonds and *bahi khatas*. His award shows that with regard to one of these bonds at least the consideration had not been advanced by Gita Prasad alone. It also appears from that award that there was considerable confusion regarding the realisation of the various debts, each member of the family playing for his own hand. The presumption is that the head of the family in collecting the moneys, due upon these bonds was collecting on behalf of the joint family; and if he re-issued the moneys collected on fresh loans, the presumption would again be that he issued them the benefit of the joint family and not

for his private benefit. It is impossible for us upon the materials before us to come to a definite finding with regard to each of the loans shown in the schedule. We must, therefore, direct that further proceedings be taken in the lower Court with regard to the loans standing in the names of Gita Prasad and the members of his branch and claimed by him as his exclusive property. This enquiry will take the form of a taking of an account. A Commissioner will be appointed to examine the accounts of Gita Prasad and to ascertain what has been the subsequent history of the bonds outstanding in 1905, and, having ascertained, *firstly*, what sums have been realised and not re-issued, and *secondly*, what sums have been realised and re-issued, he will apportion the bonds, which have been the fruit of previous realisations or renewals of loans previously issued when the family was joint, among the four branches in equal shares. It is clear upon the evidence that there is no Jethansi custom with regard to moveable property. He will also apportion Gita Prasad's liability upon the sums realised from previous loans and not re-issued.

The appeal should be decreed in part. The immoveable property, including the four villages regarding which there is a dispute, will be divided as indicated in the body of the judgment and an account will be taken of the money-lending business of Gita Prasad's branch and an adjudication made thereon on the terms above recorded. I would note that the cross-appeal of Gita Prasad is not pressed. We are asked only to say that the Commissioner in making the partition of the immoveable property will have regard to the general rule of partition, that all specific plots or villages held in severalty by any member of the family will, as far as possible, be allotted to his share on partition. Having regard to the result of this appeal we make no order as to costs either in this Court or in the Court below.

COURTS, J.—I agree.

Appeal decreed in part.

CHAVADI RAMASAMI PILLAI v. VENKATESWARA AIYAR.

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS APPEALS NOS. 197, ETC.,
OF 1917.

July 23, 1918.

Present:—Mr. Justice Spencer and Mr. Justice
Krishnan.

CHAVADI RAMASAMIA PILLAI—
PETITIONER—APPELLANT

versus

E. VENKATESWARA AIYAR AND

OTHERS—RESPONDENTS.

Provincial Insolvency Act (III of 1907), ss. 22, 26 (2), 46 (4)—General Clauses Act (X of 1897), ss. 9, 10, applicability of—Appeal to High Court—Limitation—Computation of time, method of—Exclusion of date of order and of last day if dies non—S. 21 of Provincial Insolvency Act, applicability of, to applications under s. 22(2)

In computing the period limited for appeals under the Provincial Insolvency Act, the principles of sections 9 and 10 of the General Clauses Act should be applied, i. e., the date on which the act appealed against is done and the last day, if *dies non*, should be excluded. [p. 952, col. 2.]

Applications under section 26 (2) of the Provincial Insolvency Act are not governed by the rule of limitation contained in section 22 of the Act. [p. 952, col. 2.]

Appeals under section 46, clause (2) of Act III of 1907, against the orders of the District Court, Tinnevely, dated the 22nd January 1917, in Original Petitions Nos. 628, 626, 630 and 633 of 1916 respectively.

FACTS appear from the judgment.

Mr. C. V. Ananthakrishna Aiyar (with him Messrs. K. E. Gurusami Aiyar, A. Subbarama Aiyar and K. S. Sankara Aiyar), for the Respondents, took the objection that the appeals to the High Court as well as to the District Court under section 26 (2) of the Provincial Insolvency Act were both barred. The latter was out of time, having been made beyond the twenty-one days' time prescribed by section 22.

Section 46 (4) of the Provincial Insolvency Act does not lay down the method of computing time for appeals under the Act. The provisions of the Limitation Act do not apply to appeals under section 46 of the Provincial Insolvency Act. The date of the order appealed against and the last day of the ninety days, which was a Sunday, should not be excluded. If these days are to be included in the ninety days' period, the appeal is clearly barred.

Mr. T. M. Ramaswami Aiyar, for the Appellant.—Though section 46 of the Provincial Insolvency Act is silent as to the method of computing time, the principles of sections 9 and 10 of the General Clauses Act should be applied. The day

on which the Act appealed against was done and the last day, which was *dies non*, should be excluded. Section 9 applies to Acts of the Governor-General in Council passed after 3rd January 1868 and section 10 to Acts passed after the General Clauses Act. If it was intended that the ninety days' period should be strictly computed, the Act would have expressly said so.

The application to the District Court under section 26 (2) is not to be viewed as an appeal against any order of the Official Receiver to attract the provisions of section 22 of Act III of 1907. It is only an application for action being taken by the Court.

JUDGMENT.—It is argued that these appeals are barred by limitation on the ground that, as the general provisions of the Limitation Act have been held not to apply to appeals under section 46 of the Provincial Insolvency Act, the date upon which the order appealed against was made and the Sunday upon which the ninety days allowed by section 46 expired, cannot be excluded. Section 46, clause (4), merely declares that ninety days shall be the period of limitation for appeals to the High Court without specifying the method of computing that period.

Section 9 of the General Clauses Act does not directly apply to this section, in which the words "from" and "to" do not occur. Nevertheless we think it was intended that the computation should be done as it is usually done in appeals under other Acts, seeing that no other method is prescribed, that is, that ninety days should be reckoned from the date of the order appealed against. We must, therefore, apply the general principle contained in section 9 under which the day on which the act appealed against is done is to be excluded.

Further under section 10 of the General Clauses Act, the 22nd April, which was a *dies non*, must be excluded, and it is unnecessary to resort to section 4 of the Limitation Act for this purpose.

It was also argued that the application to the District Court itself was barred by limitation under the twenty-one days' rule in section 22 of the Provincial Insolvency Act. But we observe that the application to the District Court was not an appeal against any order passed by the Official Receiver but was one to the Court to take action under section 26, clause (2).

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On the merits we are of opinion that there was sufficient cause for the petitioner's Vakil failing to attend on the date of hearing, if the facts stated in his affidavit which have not been controverted are true. The petitioner could not be expected to proceed with his application, which involved certain complicated matters of law and fact, unaided, and he might have been reasonably given some time to engage a fresh Vakil. We think that when the facts became known on the petitioner's application to the District Court to restore his petition to file, the District Judge should have allowed his application on such terms as to costs, etc., as he thought proper.

We set aside the Judge's order of January 22nd dismissing the appellant's petition and direct the Judge to take it again on his file and dispose of it according to law.

The appellant will bear his own costs and the respondents' costs in the District Court up to date. Costs in this Court will abide and follow the result.

M. C. P.

Appeal allowed; Case remitted.

PATNA HIGH COURT.

APPEALS FROM ORIGINAL ORDERS NOS. 57, 58
AND 59 OF 1918.

CIVIL REVISION NO. 82 OF 1918.

December 10, 1918.

Present:—Mr. Justice Roe and Mr. Justice
Coutts.

IN A. O. O. NO. 57 OF 1918

Babu CHOTTEY LAL—APPELLANT

IN A. O. O. NO. 58 OF 1918

Babu BRIJ NARAIN—APPELLANT

versus

Musammat MADHO BIBI—PLAINTIFF AND
LALDHARI PRASAD AND OTHERS—DEFEND-
ANTS—RESPONDENTS IN BOTH.

IN A. O. O. NO. 59 OF 1918

LALDHARI PRASAD AND ANOTHER—
APPELLANTS

versus

Musammat MADHO BIBI—PLAINTIFF AND
CHOTTEY LAL AND OTHERS—DEFENDANTS
—RESPONDENTS.

IN C. R. NO. 82 OF 1918

KESHWAR NARAYAN—PETITIONER
versus

Musammat MADHO BIBI AND OTHERS—
OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. I, r. 9,

Sch. II, para. 21—Arbitration—Reference to arbitration by some members of joint family for partition—Award, validity of.

Where the question of the partition of the family properties of a joint Hindu family is referred to arbitration and some of the members of the joint family are not party to the reference, the award given in pursuance of such reference partitioning the family property is invalid and cannot be filed under paragraph 21 of Schedule II of the Civil Procedure Code [p. 955, col. 2.]

Appeals from a decision of the Subordinate Judge, Monghyr.

Messrs. P. K. Sen, S. P. Sen and M. Haque, for the Appellants.

Messrs. Hassan Imam, Asar Narayan Prasad and Rajendra Prasad, for the Respondents.

JUDGMENT.

ROE, J.—The defendant Laldhari Prasad was the first cousin of the deceased husband of the plaintiff; the second, third, fourth and fifth defendants were the sons of Laldhari Prasad and the sixth defendant was the adopted son of the plaintiff's husband Hit Prasad.

The property in dispute was that of Sakhi Chand, the father of Hit Prasad and uncle of Laldhari Prasad. The plaintiff's case was that the partition of this property had been referred to arbitration by all the parties to the dispute and that an award had been made in terms of the reference. She, therefore, asked that under section 21 of the Second Schedule of the Civil Procedure Code the award should be filed and a decree made thereon.

Some ten objections were made by the various parties and these the learned Subordinate Judge discarded as without foundation. He ordered the award to be filed and a decree was thereon made in accordance with the award.

The three appeals before me are by Laldhari Prasad and his major son Rajballabh Narain No. 59, by Brij Narain No. 58, and by Chottey Lal No. 57. The application in revision is made by Keshwar Narayan on the allegation that he, being the son of the defendant Brij Narain, was entitled to a share in the property and was, therefore, a proper party to the suit. He had applied during the course of the trial to be joined as a party. His application had been rejected by the learned Subordinate Judge.

In the appeal as argued before this Court, the first objection taken is that of

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Chottey Lal the second defendant, on the ground that he was a major at the time of the reference to arbitration and was no party to it. By Brij Narain it is argued that the arbitrators made their award carelessly in that three debts Nos. 21, 22, and 23 of the schedule attached to the award were debts barred by limitation and in that a debt worth only Rs. 412 was valued at Rs. 510 in the award. It is further urged that he was not served with notice and that the arbitrator acted improperly in pressing for the payment of a debt due to a servant of his while the consideration of the award was actually in progress. By Laldhari Prasad it is urged that the arbitrators were guilty of carelessness, in that item No. 17 of the debts allotted to his share have been grossly overvalued. It is also urged that though the property was worth two lakhs of rupees the arbitrator managed to finish the work in one month's time; that he did not write the award himself and that he did not certify at the end of it that it was written at his dictation.

The learned Subordinate Judge dismissed the objections now urged by Brij Narain and Laldhari Prasad summarily, and indeed it is apparent on the face of it that there is no substance in them at all. With regard to the unfairness of the allotment, it is to be noted that though the property is worth two lakhs of rupees, the only unfairness alleged is with regard to sums of money amounting in all to less than Rs. 1,000. On this point the plaintiff's first witness has given evidence that the debts were divided into three classes, (1) those which were easily realisable, (2) those which could be realised with difficulty, and (3) those which were barred or not realisable at all. There is no real evidence on the defendants' side to rebut this assertion, and I have no doubt that, in making the award, the arbitrator acted fairly enough. There is no real evidence that Brij Narain received no notice. It is indeed certain that he was present during the proceedings and was aware of them, otherwise there could be no sense in his suggestion that pressure was brought to bear upon him during the proceedings to pay a debt due to the arbitrator's servant. The evidence with regard to the latter

suggestion of misconduct is of the flimsiest character. The learned Subordinate Judge had no hesitation in rejecting it and I can see no reason for differing from him. The suggestion that the arbitrator was unduly hasty is not substantiated by evidence, nor is there any substance in the contention that the arbitrator was required to write the whole award with his own hand. It is not contended that the award that was made by the arbitrator was in any respect different from that filed in Court. The award filed in Court was signed by the arbitrator and that signature was a sufficient indication that he was responsible for it.

The real difficulty in the case is that the one vital point, namely, the age of Chottey Lal at the time of the reference to arbitration seems to have received no attention at all from the plaintiff. The defendant Chottey Lal gave evidence that he was a major at the time of the reference to arbitration. He produced an entry made at the time of his first admission into the Monghyr Training Academy, and in that entry it is mentioned that the date of his birth is 3rd Baisakh 1306 Fs., which, on a reference to the Chronological Tables, will be found to correspond to the 28th April 1899. The Ekrarnama upon which the reference to arbitration was made was dated the 31st August 1917 and the award was filed on 27th September 1917. *Prima facie*, therefore, this boy was 18 years and 4 months at the time of the reference to arbitration. His father Laldhari did not pretend to be acting as Karta of the family. He signed the reference to arbitration as guardian of Chottey Lal. The major son Raj Ballabh signed in his own capacity. It is clear, therefore, (and Mr. Hasan Imam admits this) that if Chottey Lal was of age on the 31st August 1917 he was no party to the Ekrarnama. The learned Subordinate Judge gives the following reasons for not accepting this certificate.

His father stated in the Ekrarnama that he was a minor. His elder brother Raj Ballabh deposed in the suit, but did not mention the fact that Chottey Lal was a major and Chottey Lal himself did not know before the date of hearing that he had attained majority:—

"Chottey Lal swears that when he took

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admission in the school he took his horoscope with him and the date of his birth was entered in the school register from that horoscope. No horoscope has been filed in this suit. The school register shows that there was no horoscope brought by Chottey Lal and the date of birth was entered according to the statement of some person. It is significant that the father Laldhari Prasad, who is the Karta of the family, has not deposed in the case. From the deposition of Chottey Lal it appears that his father and others consulted in the morning of the 17th January 1918 and then he was approached, and then Chottey Lal came with his objection. I do not believe that Chottey Lal has attained majority; his appearance too does not support his statement."

The learned Subordinate Judge then goes on to make a misstatement of the law with regard to the binding nature of the reference even though Chottey Lal had attained majority. In the reasons given by the learned Subordinate Judge, he seems to me to have entirely lost sight of the fact that if Chottey Lal was indeed a minor on the 3rd August 1917, he must have been within a very short time of his majority. Certainly age can be more nearly told by appearance in a child of 8 years of age than in a boy nearly 18 years of age. In Indian families no festivities are held to celebrate birthdays and it is extremely rare for members of a family to know with any certainty the month in which even their adult sons or brothers were born. Oral evidence given upon the point would have been absolutely valueless and might by cross-examination at once have been shown to be so. We have before us the only documentary evidence extant of the date of this boy's birth. In spite of the fact that Chottey Lal himself has been foolish enough to say that his horoscope was shown to the head master, there is no real evidence on the record that he ever had a horoscope at all. He was under 8 years of age when he first attended the Monghyr Academy. He cannot possibly remember now whether a horoscope was sent with him or not. The school register shows that no horoscope was in fact sent with him. The evidence of the correctness of the entry

in the register that he was born on the 3rd Baisakh 1306 stands entirely unbuttressed on the plaintiff's side and no question was asked in cross-examination of the defendants' witnesses to suggest that this date was inaccurate. Mr. Hasan Imam suggests in his argument that the entry was falsely made in order to qualify the boy for the Entrance Examination eight years later. There seems to be no point in this suggestion, for if his birthday had in fact been the 1st September 1899, he would have been, I understand, equally eligible for an Entrance Examination in 1917. It was never suggested in the Court below that the 3rd Baisakh was a date which would create an ability or remove a disability in respect of an examination. A statement of this description, made at a time when there was no apparent reason for a misstatement, is to my mind of far greater value than any statement that might be made when the question had become one of controversy. In the absence of any rebutting evidence, I feel that it is impossible to hold that this entry was not correct. It follows, therefore, that I must with great regret come to the conclusion that Chottey Lal was a major at the time of the reference to arbitration and that, therefore, he was no party to it and that, therefore, the suit as against him should have been dismissed.

Similarly Keshwar Narain is stated in an affidavit, dated the 16th April 1918, to be one and-a-half years old, implying that he was born in October 1916. He too should have been represented in the reference to arbitration as one having a share in the joint family properties. The learned Subordinate Judge holds upon this point that it is unnecessary that he should be a party to the suit, for the reason that when he comes of age he may, if he wishes, contest the arbitrator's award. It would seem to me that an award purporting to partition the property of a joint family but liable to be set aside at once by Chottey Lal and in sixteen years' time by Keshwar Narain is not a valid award. In my opinion the first proviso to section 21 of the Second Schedule has not been fulfilled. I am not satisfied that the matter has been referred

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to arbitration by all the parties necessary to a suit for partition. Notwithstanding the provisions of Order I, rule 9, I hold that the partition of the family property cannot be regarded as having been validly referred to arbitration. In this view the learned Subordinate Judge's order directing that the award be filed should be set aside. I would, therefore, set it aside and direct that the appeal be decreed and the suit of the plaintiff dismissed.

With regard to costs I am satisfied that Chottey Lal has been put forward solely for the purpose of defeating an equitable claim on a technical objection. I would, therefore, order that all the parties bear their own costs throughout the litigation.

Courts, J.—I agree.

Appeal decreed; Revision accepted.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 81 of 1917.

April 23, 1918.

Present:—Mr. Batten, Offg. J. C., and
Mr. Findley, Offg. A. J. C.

TORTAN BAI AND OTHERS—DEFENDANTS
—APPELLANTS

versus

BALLABHJI OJHA—PLAINTIFF—
RESPONDENT.

Hindu Law—Mithila and Benares Schools, difference between—Succession—Female succeeding to estate of son, death of—Estate, whether goes to husband's heirs or son's heirs—Property purchased out of income of estate, devolution of.

Under the Mitakshara Law as interpreted by the Benares School, when a female succeeds to the estate of her son, the heirs of the son, the last male holder, would succeed to the estate after the death of the female. [p. 956, col. 2.]

The Mithila School is a branch of the Mitakshara School, the Mitakshara being the basis of the works which set out the law of the Mithila country. Therefore, it lies on those who allege to the contrary to prove that there is something in the Hindu Law as interpreted by the Mithila School to justify their contention that when a woman succeeds to her son the immoveable property goes on her death to the heirs of her husband, and not to the heirs of her son. [p. 956, col. 2; p. 957, col. 1.]

There is no difference in this respect between the Benares and the Mithila Schools of Hindu Law. [p. 958, col. 1.]

Musammatt Thakoor Deyhee v. Rai Baluk Ram, 11 M. I. A. 139 at p. 174; 10 W. R. (P. O.) 3; 2 Ind. Jur. (N. S.) 2 Suth. P. C. J. 49; 2 Sar. P. C. J. 231; 20 E. R. 54, distinguished.

Thakoorain Sahiba v. Mohun Lall, 11 M. I. A. 386; 7 W. R. 25; 2 Suth. P. C. J. 631; 2 Sar. P. C. J. 239; 20

E. R. 146 and *Punchanund Ojhab v. Lalshan Misser*, 3 W. R. 140, followed.

Where the circumstances are such as to show that a Hindu female purchased moveable property from the income of the estate inherited from her son, with a view of its becoming part of the main estate, it passes with the estate at her death, if previously undisposed of, to her son's heirs and not as her *stridhan* to her heirs. [p. 958, col. 2.]

Subramanian Chetti v. Arunachalam Chetti, 28 M. 1 Sridhar v. Kali Pada, 11 Ind. Cas. 971; 16 O. W. N. 106; 15 C. L. J. 12 and *Wahid Ali Khan v. Tori Ram*, 21 Ind. Cas. 91; 11 A. L. J. 856 at p. 860; 35 A. 551, followed.

Appeal from the decree of the Additional District Judge, Jabulpur, in Civil Suit No. 11 of 1917, dated the 10th September 1917.

Messrs. J. O. Ghosh, Damodar Das and Braj Mohan, for the Appellants.

Sir B. K. Bose, Dr. H. S. Gour, Mr. M. Gupta and Mr. K. B. Gupta, for the Respondent.

JUDGMENT.—The questions that arise in this appeal are purely questions of law. The parties are admittedly governed by the Mithila School of Hindu Law, their ancestors having come into these provinces as priests of the Rajah of Mandla. The first six grounds of appeal, which are to be read together, refer to the ancestral immoveable property in suit. Girdhari the head of the family died on the 5th February 1894, and after his death the property was held by his son Jeonath, who died soon after in 1895. Jeonath was thus the last male holder and was succeeded by his mother, Girdhari's widow *Musammatt Kusumabai*, who died on the 31st January 1917. The plaintiff-respondent is a cousin of Girdhari through the male line, and the defendants are Jeonath's three sisters, daughters of Girdhari and *Kusumabai*. The sole question is whether on the death of *Kusumabai* who succeeded to the property as heir of her son, the property goes to the heirs of her husband or to the heirs of her son. Admittedly if it goes to the heirs of her husband, the defendants-appellants are the heirs and if it goes to the heirs of her son the plaintiff respondent is the heir. Under the Mitakshara Law as interpreted by the Benares School the heirs of the son, the last male holder, would undoubtedly succeed to the property. The Mithila School

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is a branch of the Mitakshara School, the Mitakshara being the basis of the works which set out the law of the Mithila country. It, therefore, lies on the defendants to show that there is something in the Hindu Law, as interpreted by the Mithila School, to justify their contention that when a woman succeeds to her son the immoveable property goes on her death to the heirs of her husband, and not to the heirs of her son.

The question depends on the interpretation to be placed on certain passages in the Vivada Chintamani. The original text of Katyayana and the commentary by the author of the Vivada Chintamani are translated at pages 40 and 41 of the introduction to the translation of the Vivada Ratnakara by Golap Chandra Sarkar Sastri and Digamvar Chattopadhyaya. This translation is as follows:—

"The husband's *daya* (heritage or gift) the wife may use according to her pleasure when the husband is dead; but when he is living, she shall preserve it. Otherwise shall pass her time in his family. A sonless (wife) preserving unsullied the bed of her lord, and abiding by her venerable protector, shall enjoy (the husband's property) until her death, being moderate: afterwards the heirs shall take."

The husband's *daya* is the husband's property: that again is (two-fold) either subject of the wife's proprietary right, by reason of the default of any other taker, on his death; or subject of the wife's proprietary right, by his permission, during his life.

As regards the first, it is said (by Katyayana):—

"The husband's *daya*, the wife may use according to her pleasure when the husband is dead."

This, however, refers to property other than immoveable.

But as regards immoveable property it is said (by Katyayana):—

"Shall enjoy until her death, being moderate: afterwards the heirs shall take." "Being moderate" means not expending too much: the word "sonless" is an adjective indicative of the circumstances under which her right (of inheritance to her husband's estate) accrues. As regards the second, however, it is said (by Katyayana):—

"But when he is living, she shall preserve it" the meaning of which is, when the husband is alive she shall preserve his property.

The meaning of "otherwise, etc.," is, that in case there be no property left by the husband the widow shall pass her time in her husband's family only.

Thus even when the deceased husband's property devolves on the wife, she has no independence in making gifts and like alienations by reason of the similarity of expectancy (to know the nature of the wife's right in property inherited by her from her husband): otherwise the expectancy (to know) what kind of interest she has therein would but remain unsatisfied. Hence also the inconsistency of the recital of this text in the Chapter on Sandayaka Stridhana, with its application (to property inherited from the husband) is removed. Because the force of expectancy is stronger than that of the context. Just as in immoveable property *given* by the husband, a woman has no right to make gift and the like, by reason of this text, so also in husband's immoveable property *inherited* by the wife. The same is the opinion of the Prakasa and the Ratnakara. So also in (husband's) immoveable property, inherited by the wife through the son, for herein also there is expectancy and there is no direct text (to the contrary).

(The words within parenthesis are not in the original.)

The above translation as regards the last sentence differs from the translation of P. C. Tagore, which is as follows:—

"If the mother, on the death of her son, gets his immoveable property, she cannot make a gift of it, or dispose of it at her pleasure."

The learned Advocate for the respondent is quite willing to adopt the translation by G. C. Sastri. It is to be noted that the word (husband) in Sastri's translation of this sentence occurs in some texts and not in others.

The argument of the learned Counsel for the appellants is as follows: The original Slokas of Katyayana restrict the wife's right of disposing of property gifted to her by her husband, but the Vivada Chintamani by analogy (or expectancy) extends the restriction to property inherited

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from her husband and to property inherited from the husband through the son; a correct reading of the Vivada Chintamani leads to the further conclusion that as regards property inherited from the husband through the son the husband's heirs inherit the property after her death. The learned Counsel is unable to cite any ruling in support of his interpretation and candidly admits that he has adopted it from G. C. Sastri's treatise on Hindu Law, 4th Edition, page 411. It appears to us, however, that G. C. Sastri's reasoning is fallacious. All that appears to us to be said by the Vivada Chintamani is that just as in respect of property inherited from the husband the widow has no power of alienation, so also in respect of property which she has inherited from the son, the son having inherited it from the father, she has no power of alienation. In our opinion the Vivada Chintamani was not referring to the devolution of the property after the woman's death, but to the restriction of the woman's power of alienation, and the learned author appears to us to read more into the Vivada Chintamani than is to be found there. He is himself adopting the principle of "expectancy" so learnedly expounded by him. The learned Counsel for the appellants refers us to *Musammatt Thakoor Deyhee v. Rai Baluk Ram* (1), but this does not really help him since the widow had succeeded her husband and not her son. On the other hand the learned Advocate for the respondent cites *Thakoorain Sohiba v. Mohun Lall* (2). *A* died leaving his son *B* and a daughter *C*. The son succeeded his father and left a widow *D*, who succeeded him. She made an adoption. *O's* son alleged he was the next reversioner and claimed that the adoption was invalid. It was held that as sister's son he had no *locus standi* to sue and (the important point here) that the son *B* was the *propositus*. We have no doubt, though this is disputed, that the case was decided on the assumption that the parties were governed by the Mithila School. In *Punchanund Ojha v. Lalshan Misser* (3) it was taken for

(1) 11 M. I. A. 139 at p. 174; 10 W. R. (P. C.) 3; 2 Ind. Jur. (N. S.) 106; 2 Suth. P. C. J. 49; 2 Sar. P. O. J. 231; 20 E. R. 54.
 (2) 11 M. I. A. 386; 7 W. R. 25; 2 Suth. P. C. J. 681; 2 Sar. P. C. J. 289; 20 E. R. 146.
 (3) 3 W. R. 140.

granted that the property went to the heirs of the son from whom the mother inherited it. The learned Advocate contends that in the passage of the Vivada Chintamani relied on for the appellants the husband is mentioned of necessity in order to arrive at the analogy for the restriction on alienating the son's estate. We consider this reasoning to be sound.

For these reasons we are of opinion that the learned Additional District Judge, who has read the Sanskrit text in the original, has taken a correct view of the law.

The remaining ground of appeal relates to 14 bullocks purchased by *Musammatt Kusumabai* out of the income of the estate. The learned Additional District Judge has held, no doubt correctly, that the bullocks were purchased to carry on agricultural operations, and has held that they must have been, therefore, intended to be part of the estate, and as an accretion to the estate. For the appellants it is argued that the bullocks, being moveable property, formed part of their mother's *stridhan*. Reliance is placed on *Birajun Koer v. Luchmi Narain Mahata* (4), but that was a case of alienation, not of succession. It is argued that the special rules of the Mithila relied on as regards immoveable property leave it to be inferred that moveable property goes as *stridhan* to the widow's heirs. Reliance is also placed on *Subramanian Chetti v. Arunachelum Chetti* (5). The learned Advocate for the respondent cites *Sridhar v. Kalipada* (6) and *Wahid Ali Khan v. Tori Ram* (7). The correct view appears to us to be that where the circumstances are such as to show that a Hindu female purchases property from the income with a view of its becoming part of the main estate, it passes with the estate at her death, if it is previously undisposed of. We consider that the Additional District Judge has decided this question correctly.

The result is that the appeal is dismissed with costs.

Appeal dismissed.

(4) 10 C. 392; 8 Ind. Jur. 503; 5 Shome L. R. 160; 5 Ind. Dec. (N. S.) 262.

(5) 28 M. 1.

(6) 11 Ind. Cas. 971; 16 C. W. N. 106; 15 C. L. J. 12.

(7) 21 Ind. Cas. 91; 11 A. L. J. 856 at p. 560; 35 A. 551.

CHANDRA KUMAR BISWAS v. NABI BUX.

CALCUTTA HIGH COURT.

CIVIL RULES NOS. 164 TO 166 OF 1918.

July 26, 1918.

Present:—Mr. Justice Teunon and

Mr. Justice Cuming.

CHANDRA KUMAR BISWAS—

PLAINTIFF—PETITIONER IN RULE No. 164

OF 1918

CHANDRA SEKHAR BISWAS—

PLAINTIFF—PETITIONER IN RULE No. 165

OF 1918

*versus*Shaikh NABI BUX—DEFENDANT—OPPOSITE
PARTY IN BOTH.

IN RULE No. 166 OF 1918

CHANDRA SEKHAR BISWAS—

PLAINTIFF—PETITIONER

*versus*Shaikh PAHARU—DEFENDANT—OPPOSITE
PARTY.*Civil Procedure Code (Act V of 1908), O. XLI, rr. 25, 27—Appeal—Appellate Court, whether can order retrial of issues tried by trial Court.*

Order XLI, rule 25, of the Civil Procedure Code does not contemplate an order by the Appellate Court directing a retrial by the primary Court of the issues tried and determined by that Court.

If an Appellate Court considers that any question of fact essential to the right decision of the suit has not been tried and determined by the trial Court, it may frame issues and direct the trial of such issues in the manner provided by Order XLI, rule 25, or it may proceed in the manner provided in Order XLI, rule 27.

Rules against the order of the Additional District Judge, 1st Court, 24-Perganas, in Title Appeals Nos. 72, 73 and 74 of 1917.

Babus Dwarka Nath Mitter and Narayan Chandra Kar, for the Petitioner.

Babus Mahendra Nath Roy and Manmohan Bose, for the Opposite Party.

JUDGMENT.—These Rules are directed against orders made by the learned Additional District Judge of the 24-Perganas, by which in three analogous suits acting or purporting to act under Order XLI, rule 25, Civil Procedure Code, he directs the Court of first instance to retry two of the issues framed in that Court. We find that the issues of which the District Judge has directed a trial or retrial were in fact heard and determined by the Court of first instance. Order XLI, rule 25, does not contemplate an order directing a retrial by the Court of first instance of issues already tried and determined by that Court. If in the opinion of the Appellate Court questions

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of fact considered by that Court essential to the right decision of the suit upon the merits had not been tried and determined, it was open to the Appellate Court to frame issues setting out those questions of fact and direct the trial of such issues in the manner provided in the Order and rule we have cited. We must, therefore, make these Rules absolute, set aside the orders made by the learned Additional District Judge and send the appeals back to him, so that he may hear and dispose of them in accordance with law. At the re-hearing before him if he finds that essential questions of fact have not been determined, it will be open to him to set out those questions and direct their trial, or it will be open to him, if he thinks fit, to proceed in the manner provided in Order XLI, rule 27 and the following rules, or if the evidence and the findings arrived at are in his opinion sufficient, to dispose of the appeals on the record as it stands. Under the circumstances we do not think it necessary to make any order for costs.

*Rules made absolute.*NAGPUR JUDICIAL COMMISSIONER'S
COURT.

SECOND CIVIL APPEAL No. 15-B OF 1917.

August 20, 1917.

Present:—Mr. Mitra, A. J. C.

NARAYAN DAS—PLAINTIFF—

APPELLANT

*versus*CHANDRABHAN AND ANOTHER—DEFEND-
ANTS—RESPONDENTS.*Power-of-attorney, construction of—Act done under power-of-attorney, challenged as being in excess of authority—Authority, proof of—Power to borrow, whether implies power to mortgage—Contract Act (IX of 1872), s. 197—Ratification, proof of.*

Where an act purporting to be done under a power-of-attorney is challenged as being in excess of the authority conferred by the power, it is necessary to show that on a fair construction of the whole instrument, the authority in question is to be found within the four corners of the instrument either in express terms or by necessary implication. [p. 960, col. 2.]

A power to borrow money does not necessarily imply a power to mortgage property. [p. 960, col. 2.]

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Where a power-of-attorney authorised the agent to borrow money, to execute a bond, sign the name and present the same for registration on behalf of his principal and also added a general clause that the donor of the power will be bound by any acts done by the donee, and the agent in pursuance of that power mortgaged his principal's property:

Held, that the mortgage, though binding upon the principal as a loan, was not binding as a mortgage. [p. 960, col. 2.]

Section 197 of the Contract Act lays down that a ratification may be express or implied from the conduct of the person on whose behalf the act is done. The acts relied upon as proving ratification, however, must be clearly inconsistent with a denial of liability. [p. 960, col. 2.]

Appeal from the decree of the Court of the District Judge, West Berar, Akola, dated the 12th October 1916, in Appeal No. 124 of 1916.

Messrs. P. S. Kotwal and M. V. Joshi, for the Appellant.

Mr. G. V. Kulkade and Sir B. K. Bose, for Respondent No. 1.

Mr. Bhawani Shankar, for Respondent No. 2.

JUDGMENT.—The main point for decision is whether the mortgage-deeds are binding upon the respondent-defendant Chandrabhan. They were executed at a time when Chandrabhan was in jail, who had appointed one Khushal as his agent under a power-of-attorney dated July 1911 (Exhibit D-2). This authorises Khushal to borrow money to execute a bond, sign the name and present the same for registration on behalf of Chandrabhan. In addition to this there is the usual general clause that the donor of the power will be bound by any acts done by the donee. The Courts below have held that this power-of-attorney did not authorise Khushal to mortgage his principal's property. On behalf of the appellant reliance is placed upon the case of *Bank of Bengal v. Ramanathan Chetty* (1).

The facts of this case and the terms of the instrument there are clearly distinguishable from those of the case before me. Their Lordships, however, cited with approval a previous judgment of the Privy Council in a colourable case as applicable to powers-of-attorney executed in India. I quote, therefore, the following passage from *Bryant v. La Banque du Peuple* (2)

(1) 32 Ind. Cas. 419; 30 M. L. J. 232; 20 C. W. N. 329; 3 L. W. 210; 19 M. L. T. 176; (1916) 1 M. W. N. 150; 14 A. L. J. 217; 23 C. L. J. 348; 18 Bom. L. R. 387; 9 Bur. L. T. 1; 43 C. 527; 8 L. B. R. 533 (P. C.).
(2) (1893) A. C. 170 at p. 177; 62 L. J. P. C. 63; 1 R. 336; 68 L. T. 546; 41 W. R. 600.

from the judgment in the case of *Bank of Bengal v. Ramanathan Chetty* (1):

"Where an act purporting to be done under a power-of-attorney is challenged as being in excess of the authority conferred by the power, it is necessary to show that on a fair construction of the whole instrument the authority in question is to be found within the four corners of the instrument, either in express terms or by necessary implication." The power to hypothecate property is clearly not given in express terms. Is it given by necessary implication? In support of this the learned Advocate for the appellant wanted to rely upon oral testimony to the effect that Chandrabhan was willing that his property should be sold in order to enable him to defend himself from the criminal charge then pending against him. But such oral evidence is, in my opinion, excluded by section 91 of the Evidence Act. It is argued that the power to borrow necessarily implies power to mortgage property. I am clearly of opinion that there is no authority for any such contention. I hold, therefore, that the mortgages, though binding as loans, were not binding upon Chandrabhan as mortgages.

The next question is whether there has been a ratification of the mortgage by Chandrabhan. The Courts below have held that no such ratification has been proved. This is a mixed question of law and fact, but taking the principal facts, as found by the lower Appellate Court, I am unable to hold that ratification has been clearly proved. Section 197 of the Contract Act lays down that a ratification may be express or implied from the conduct of the person on whose behalf the acts are done. The acts relied upon as proving ratification must be clearly inconsistent with a denial of liability. Now in the present case as the money was borrowed and property mortgaged by the agent, an offer to pay money to the mortgagee does not necessarily prove a ratification of the mortgage as such. It is consistent with the admission of a liability for the loan, but not inconsistent with a denial of liability of the property pledged. Chandrabhan's statement in the lower Court (Exhibit P-7) is merely a statement of fact that a mortgage has been executed.

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The further statement recorded in the same deposition, that Chandrabhan did not take back the mortgage-deed because he had paid Rs. 1,700 only to Khushal, is still not an admission of liability under the mortgage-deed as such. Reliance is placed upon a notice dated 16th January 1914 by Chandrabhan to the plaintiff, in which it is stated, by selling one field to Ganpat Mohanaji he had already paid Rs. 1,700 to the plaintiff and offered Rs. 800 for redemption. The original is not before the Court. This is the description of the notice given in the judgment of the lower Appellate Court. I do not think importance should be attached to the word redemption used in the judgment of the lower Appellate Court. I think it does not amount to anything more than an offer to compromise, for the principal amount secured by the mortgage was Rs. 2,500, the offer made more than two years after the mortgage was of the principal sum only without interest. This does not unequivocally point to a ratification. It would appear from Exhibit D.1, which is a sale-deed in favour of Ganpat Mohanaji, that the original agreement was to pay Rs. 1,700, the consideration for the sale-deed to the plaintiff's guardian, and who thereupon attested the sale-deed. These lines have been scored through, and the document as finally registered mentions nothing about any agreement to pay the money to the plaintiff. Even if there had been any agreement to pay Rs. 1,700 to the plaintiff, that would still be not inconsistent with Chandrabhan's denial of liability under the mortgages as such.

The lower Court has passed a decree for Rs. 5,000, that is, for the whole principal and its *damdupat*. This involves a finding that no payment was made to the defendant of the amount of Rs. 1,700 and even if the payment had been made, it would not have conclusively shown that Chandrabhan ratified the mortgage. I hold, therefore, the finding that the ratification has not been proved, is a correct finding. In this view it is unnecessary to discuss the question whether the plaintiff is estopped against the defendants with regard to the release of his No. 191 included in the mortgage-deed. The appeal,

therefore, fails and is dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

RULE Nisi No. 379 of 1918.

July 24, 1918.

Present:—Mr. Justice Newbould and
Mr. Justice Panton.

MESSRS. F. P. NALLADAROO & Co.—
DEFENDANTS No. 1.—PETITIONERS

versus

HARI KISSEN RATHI AND ANOTHER

—PLAINTIFFS—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 115, O. IX, r. 9—Restoration of suit dismissed for default—Sufficient cause, absence of—Order restoring suit, whether without jurisdiction—Revision.

On an appeal against an order of the primary Court refusing to restore a suit dismissed for default the Appellate Court restored the suit, although it found that the plaintiff could not show sufficient cause for his non-appearance within the meaning of Order IX, rule 9, Civil Procedure Code:

Held, that the order of the Appellate Court was not without jurisdiction. [p. 963, col. 1.]

Rule against the order of the Munsif, 3rd Court, Bankura.

Mr. Zorab (with him Babu Satindra Nath Mukherjee), for the Petitioner.—This is a Rule to show cause why the order of the District Judge passed in appeal restoring a suit which was dismissed for default should not be set aside. The facts shortly stated are these: The plaintiff, opposite party, brought a suit at Bankura for setting aside a decree passed by the Court of Small Causes at Calcutta on the ground of fraud. When the case came up for hearing, the plaintiff was found absent so the suit was dismissed for default. The plaintiff then made an application under Order IX, rule 9, of the Civil Procedure Code for getting the order of dismissal set aside. The Court of first instance dismissed the application for restoration on the ground that the plaintiff failed to show any sufficient cause which had prevented him from appearing in Court when the case had been called on for hearing. It further found that as the plaintiff intentionally and deliberately kept

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away when the case was called on for hearing, the application for restoration should not be allowed. Against that order of the Court of first instance there was an appeal by the plaintiff, and the Appellate Court held that although the plaintiff did not show any sufficient cause for non-appearance, yet in the exercise of its discretion the suit should be restored for the ends of justice.

My submission is that in the absence of any sufficient cause which would bring the case within the purview of Order IX, rule 9, of the Civil Procedure Code, the Appellate Court acted without jurisdiction in ordering the restoration of the suit by setting aside the order of the primary Court. If for the sake of mere ends of justice a suit is to be restored to file, then the object of Order IX, rule 9, would be frustrated and there would be no end of litigation and harassment of litigant parties.

Babu Dwarka Nath Ohakrabarty (with him Babu Bankim Chandra Mukherjee), for the Opposite Party.—The Appellate Court was quite right in restoring the suit to file in the exercise of its judicial discretion, and it has got jurisdiction to do so for the ends of justice in cases which do not strictly fall within the purview of Order IX, rule 9, Civil Procedure Code. In deciding the case the learned Judge appears to have distinguished two classes of cases, viz., (1) where the plaintiff whose suit has been dismissed for default has got a strict right to get his case restored, i. e., where he had sufficient cause for non-appearance as contemplated by Order IX, rule 9, Civil Procedure Code, and (2) where the Court has got an inherent power to restore a suit for the ends of justice, even though the provisions of Order IX, rule 9, do not strictly apply to the case. In ordering the restoration of the suit if the learned Judge has exercised a judicial discretion, the petitioner has got nothing to complain of. Refers to *Lalta Prasad v. Ram Karan* (1). Order IX, rule 9, Civil Procedure Code, makes it incumbent upon the Court to set aside the order of dismissal for default under certain circumstances, but nothing in the Code takes away the inherent powers of the Court to restore a

(1) 14 Ind. Cas. 187; 34 A. 426 at 428; 9 A. L. J. 66.

suit to file for any other valid reason. *Debi Bakhsh Singh v. Habib Shah* (2). In that case Order IX, rule 9, was not strictly applicable, yet their Lordships thought that Order IX, rule 9, is controlled by section 151, and the Court could order restoration for the ends of justice. If the Judge believes my story but considers that the reason given by me cannot be said to be a sufficient cause within the meaning of Order IX, rule 9, he can, in the exercise of his discretion, restore the suit.

My next point is that this is an application under section 115, Civil Procedure Code, and your Lordships cannot interfere unless there is a question of jurisdiction. Here no question of jurisdiction is involved. The order passed by the learned Judge cannot be said to be without jurisdiction. He is perfectly right in the law on which he has decided the appeals and there is nothing wrong in the judgment of the Appellate Court. Even mere error of law is not sufficient for your Lordships' interference in revision, unless there is some erroneous exercise of jurisdiction by the Appellate Court. The laches, if any, may be sufficiently punished by making an order for costs, because the Courts do not exist for the enforcement of discipline but for the decision of the rights of the parties. Refers to *Cropper v. Smith* (3).

Mr. Zorab, in reply.—The finding of the Court of first instance is that the absence of the plaintiff is deliberate and intentional, and this finding has not been reversed by the Appellate Court. Having found that there was no sufficient cause within the meaning of Order IX, rule 9, for restoring the suit, the Appellate Court should have dismissed the appeal. Without doing so it proceeded to decree the appeal on the ground that in its discretion the suit should be restored. The case of *Lalta Prasad v. Ram Karan* (1) shows that the Court may for any valid reason restore the suit for the ends of justice. But the learned Judge in this

(2) 19 Ind. Cas. 526; 40 I. A. 150 at p. 154; 35 A. 331; 17 C. W. N. 829; 11 A. L. J. 625; 18 C. L. J. 9; 15 Bom. L. R. 640; 25 M. L. J. 149; 14 M. L. T. 33; (1913) M. W. N. 566; 16 O. C. 194 (P. C.).

(3) (1884) 26 Ch. D. 700 at p. 710; 53 L. J. Ch. 891; 51 L. T. 733; 33 W. R. 60.

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case has not assigned any reason whatsoever for restoring the suit except this, that in his discretion the application for restoration should be allowed. Discretion means judicial discretion and not mere caprice or humour. If the judgment of the Appellate Court is allowed to stand, then in no case is a plaintiff whose suit has been dismissed for default to make out a sufficient cause as required by Order IX, rule 9, Civil Procedure Code. He may get the order of dismissal set aside by showing some cause not coming within the purview of Order IX, rule 9, but which would satisfy the humour or caprice of the Court. The learned Judge has acted without jurisdiction in ordering the restoration of the suit. The Court of first instance in the exercise of its discretion dismissed the application for restoration. In reversing its order of dismissal the learned Judge has substituted his own discretion for that of the first Court, and he was not justified in doing so unless there is some special reason. Refers to *Rehmat-un-nissa Begum v. Price* (4). If the decision of the Appellate Court be taken to be correct, then it would free the plaintiff in each and every case from the burden of proving sufficient cause as required by Order IX, rule 9, Civil Procedure Code, and the question of restoring or not restoring a case is to be left to the mere caprice or humour of the Court.

JUDGMENT.—Our attention has been drawn to a decision of the Allahabad Court in the case of *Lalta Prasad v. Ram Karan* (1) and also to the decision of the Judicial Committee in the case of *Debi Bakhsh Singh v. Habib Shah* (2) and, on a consideration of these rulings, we are of opinion that the order of the District Judge is not without jurisdiction. We accordingly discharge this Rule with costs, hearing fee two gold *mohurs*.

Let the record be sent down at once.

Rule discharged.

(4) 45 Ind. Cas. 568; 27 O. L. J. 623; 22 C. W. N. 601; 16 A. L. J. 513; 5 P. L. W. 25; 23 M. L. T. 400; 8 L. W. 53; 20 Bom. L. R. 714; 35 M. L. J. 262; 42 B. 380.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2390
OF 1916.

August 7, 1918.

Present:—Mr. Justice Fletcher and
Mr. Justice Walmsley.

THE SECRETARY OF STATE FOR INDIA
IN COUNCIL—DEFENDANT—APPELLANT
versus

CHATURBHUI NANDA—PLAINTIFF

AND OTHERS—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), O. I, r. 10—
Appeal—Misjoinder of parties—Procedure, proper.*

The appellant was the first defendant in a suit brought by the plaintiff. The primary Court decreed the suit with costs against the appellant. On appeal the lower Appellate Court, finding that the appellant was not a necessary party to the suit and was wrongly joined as a defendant, struck off the appellant's name from the record as a defendant and dismissed his appeal, making no order as to costs:

Held, that the proper order which should have been made by the lower Appellate Court was to set aside the order of the primary Court and to dismiss the suit against the appellant with costs. [p. 964, col. 1.]

Appeal against the decree of the District Judge, Midnapur, dated the 23rd May 1916, affirming that of the Subordinate Judge, 2nd Court of that District, dated the 30th January 1914.

FACTS appear from the judgment.

Babu *Ram Charan Mitter* (with him Babu *Prish Chander Choudhry*) for the Appellant.—The plaintiff brought a suit under section 104H of the Bengal Tenancy Act making the Secretary of State for India in Council a party defendant. The primary Court passed a decree against the defendant-appellant. On appeal, the lower Appellate Court, finding that the Secretary of State for India was not a necessary party and was wrongly joined as defendant to the suit, struck off the name of the Secretary of State as defendant without making any order as to costs. When in substance the lower Appellate Court allowed the appeal and set aside the decree of the Court of first instance, although it did not say so in so many words, it should have awarded costs to the Secretary of State.

Babu *Saroda Charan Maity*, for the Respondents.—The Secretary of State contested the suit, not only on the ground that he was not a necessary party, but also on other grounds. The Court of first instance found on all the issues raised against the Secretary of State and decreed the suit with costs. The lower Appellate Court found in

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his favour only on the point that he was not a necessary party. So the order of the Court of Appeal below dismissing the appeal without costs is correct. The question as to costs is discretionary with the Court, and the learned Judge in the exercise of his discretion has disallowed costs. The order of the Court as to costs should not be interfered with in appeal.

Babu Ram Charan Mitter, in reply :—When the lower Appellate Court allowed the contention of the appellant that he was not a necessary party to the suit, his order dismissing the appeal *in toto* without costs is bad.

JUDGMENT.—This is an appeal preferred by the defendant, the Secretary of State for India in Council, against the decision of the learned District Judge of Midnapur, dated the 23rd May 1916. In form, the decision of the learned District Judge affirms the decision of the Subordinate Judge; but, in substance, it does not. The suit was brought by the plaintiff under the provisions of section 104H of the Bengal Tenancy Act. The first defendant was the Secretary of State for India in Council. Before the Subordinate Judge, the plaintiff was successful and, in that Court, the learned Judge directed the Secretary of State to pay the costs of the plaintiff. The Secretary of State then preferred an appeal to the Court of the District Judge and the learned District Judge, having properly directed himself to the law, as is admitted on both sides, held that the Secretary of State for India in Council was not a necessary party to the suit and ought not to have been joined as a defendant. Thereupon, the learned District Judge said that he would strike off from the record the name of the Secretary of State for India in Council as a defendant to the suit and, as a necessary consequence of that, he dismissed the appeal of the Secretary of State making no order as to costs. That obviously is wrong. The proper order the learned Judge ought to have made is this. The learned District Judge should have set aside the order of the primary Court in so far as it decreed the plaintiff's suit against the first defendant and, in lieu thereof, he ought to have directed that the suit as against the first defendant should stand dismissed with costs both in the

primary Court and before himself. That is the order which we must make, with this addition that the appellant must have his costs in this Court also. The decree as against the other defendants will stand.

Appeal decreed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO. 104 OF 1917.

October 5, 1918.

Present:—Mr. Mittra, A. J. C.

SITABAI—APPLICANT

versus

BAPU ANNA AND OTHERS—NON-APPLICANTS.

Will—Executor becoming incapable of acting—Administrator, appointment of—Public officer, whether can be appointed.

In the absence of a Statute authorising such an appointment, a public officer and his successors-in-office should not be asked to undertake duties, *e.g.*, the duties of an Administrator, which are outside their official duties. [p. 964, col. 2]

Where one of the executors appointed under a Will retired with the permission of the Court and the other became an insolvent and the Court thereupon appointed the Deputy Commissioner of the District to act as Administrator of the estate:

Held, that the order appointing the Deputy Commissioner to act as Administrator was *ultra vires* and must be set aside. [p. 965, col. 1.]

Revision of the order passed by the District Judge, East Berar, Amraoti, in Miscellaneous Probate Case No. 1 of 1901, on the 9th May 1917.

Mr. G. V. Deshmukh, for the Applicant.

Messrs. M. V. Joshi and V. D. Sathey, for the Non-Applicants.

ORDER.—Of the surviving executors appointed under the Will of Mr. Jog one has become insolvent and the other retired with the permission of the Court. The District Judge has now appointed the Deputy Commissioner, Amraoti, to act as Administrator. This order is *ultra vires*. In the absence of a Statute authorising such an appointment, a public officer and his successors-in-office cannot be asked to undertake duties outside their official duties. Before inviting the Deputy Commissioner to become Administrator, the District Judge

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should have fully realised the situation in which he was placing him. The Administrator has to collect debts, pay legacies and carry out the terms of the Will, and these duties may be prolonged indefinitely during the lifetime of the legatees and the testator's widow Sitabai. Suits will have to be filed by the Administrator and it is difficult to see how funds are to be supplied to him. He may be held responsible for the costs of litigations if eventually the appeal now pending before the Privy Council is successful. I hold that the order was *ultra vires* and it is accordingly set aside.

My attention has also been called to a previous order to be found in the order-sheet dated the 30th April 1917, in which it is recited that the appointment of Mr. Jog as guardian is cancelled. This is not correct. So far as I can find, there is no such order either in these proceedings or in the proceedings under the guardianship case. Each party will bear the costs of this petition of revision in both Courts.

Order set aside.

CALCUTTA HIGH COURT.

CIVIL RULE No. 356 OF 1918.

August 19, 1918.

Present.—Mr. Justice Fletcher and

Mr. Justice Walmsley.

JOGENDRA NATH MALLIK—JUDGMENT—

DEBTOR—PETITIONER

versus

SHIB NARAYAN MUKERJEE—DECREE—

HOLDER—OPPOSITE PARTY.

Bengal Tenancy Act (VIII B C. of 1885), s. 170, cl. (3)
—Purchaser at rent sale, whether can deposit money for release of holding attached in execution of subsequent rent-decree against original tenant—Benamidar of original tenant, right of, to make deposit.

A purchaser at a sale in execution of a rent-decree, who is not a party to a subsequent decree for rent obtained by the landlord against the original tenant, is not entitled under section 170 (3) of the Bengal Tenancy Act to deposit the decretal amount due under the latter decree, inasmuch as his interest is not voidable at the sale in execution of the decree against the original tenant. [p. 966, col. 1.]

If such a purchaser is a *benamidar* of the original tenant, he has got no interest at all in the holding, voidable or otherwise, and, therefore, has no right

under section 170 (3) of the Bengal Tenancy Act to make the deposit. [p. 966, col. 1.]

Rule against the order of the Munsif, 1st Court, Howrah, in Rent Execution Case No. 264 of 1918.

FACTS appear from the judgment.

Babu Hemendra Chunder Sen for Babu Jotindra Lal Banerjee, for the Petitioner.—This Rule arises out of an application under section 115 of the Civil Procedure Code against an order refusing to allow the petitioner to deposit in Court, under section 170 (3) of the Bengal Tenancy Act, the amount due to the decree-holder landlord. The petitioner purchased the holding at a sale in execution of a previous rent-decree obtained by the opposite party landlord against the original tenant. Then the opposite party landlord brought this suit for rent against the original tenant without making the petitioner a party to that suit, obtained a decree and in execution of the decree attached the holding. The petitioner, who had acquired an interest in the holding by his purchase at the rent sale, applied to deposit the amount due under the rent-decree to get the holding released from attachment. The landlord decree-holder knew very well that the original tenant had no interest in the holding after the petitioner's purchase at the rent sale and with a view to get rid of the petitioner's interest in the holding by the sale in execution, he brought a rent suit and obtained a decree against the original tenant. The landlord cannot refuse to recognise the interest of the petitioner and the latter may make a deposit under section 170 (3). Refers to *Tarak Das v. Harish Chandra* (1).

[Babu Surendra Nath Roy, for the Opposite Party.—The petitioner is a *benamidar* of the original tenant.]

The petitioner's application has not been disallowed on that ground. The question is whether he can make a deposit under section 170 (3), and I submit that he can.

Babu Surendra Nath Roy (with him Babu Satyendra Nath Roy), for the Opposite Party, referred to *Jotindra Mchan Tagore v. Durga Dabe* (2). By the sale of the judgment-debtor's property the petitioner's interest in the property cannot in any way be affected.

(1) 16 Ind. Cas. 977; 17 C. W. N. 163; 16 C. L. J. 548.

(2) 10 C. W. N. 438.

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JUDGMENT.—This is a Rule calling on the opposite party to show cause why the order complained of should not be set aside and the petitioner permitted to pay the amount of the rent decree into Court. The petitioner alleged that he had purchased the holding at a sale in execution of a rent-decree. Subsequent to that, the landlord opposite party brought a suit for rent against the original tenants and obtained a decree. Thereupon, the petitioner applied to deposit the decretal amount into Court under the terms of section 170 (3) of the Bengal Tenancy Act. The Court below has found that the present applicant was not a party to the rent suit and that the rent-decree was not passed against him and has accordingly refused the petitioner's application. Of course, the petitioner does not come under the purview of section 170 (3) of the Bengal Tenancy Act. If his story is true that he has got an interest, it is not an interest voidable on the sale because the sale of the judgment-debtor's property will not include the property purchased by the present petitioner. Therefore, if that is right, the applicant does not come under section 170 (3).

The other allegation is that the present applicant is a *benamidar*. If he is a *benamidar* he has no interest at all, voidable or otherwise, and has got no right under section 170 (3) of the Bengal Tenancy Act to deposit the money. The present application is wholly misconceived. This Rule, therefore, fails and must be discharged with costs, one gold *mohur*.

Rule discharged.

CALCUTTA HIGH COURT.

ORIGINAL CIVIL SUIT No. 337 OF 1913.

July 18, 1918.

Present :—Justice Sir Asutosh Chaudhuri, KT.

HAZARIMUL SHOHANLAL—PLAINTIFF

versus

SATISH CHANDRA GHOSH AND OTHERS

—DEFENDANTS.

*Contract Act (IX of 1872), ss. 108, Excep. (v), 109—
"Goods," meaning of—Transfer, fraudulent—Transferee,*

whether gets good title—Share certificates accompanied by blank transfer deeds, whether negotiable—Negotiability, conditions of—Usage, effect of.

One S. was the owner of certain jute shares. One U. obtained the shares from S. by fraudulent representations and sold them to L. who sold them to the plaintiff firm, the latter being *bona fide* purchasers. At the time of sale L., made over to the plaintiffs the share certificates and a blank transfer deed signed by J, the person then registered as owner of the shares:

Held, (1) that the transaction was covered by section 108 of the Contract Act and L, who bought the shares from U, did not acquire a good title to them and, therefore, could not pass a good title to the plaintiffs; [p. 968, col. 1; p. 999, col. 2.]

(2) that although U. was in possession of the shares, he could not give a good title under section 108, exception (1) of the Contract Act, which requires possession with the consent of the owner and which does not apply where that consent is obtained by deceit; [p. 968, col. 1.]

Cole v. North-Western Bank, (1875) 10 C. P. 354; 41 L. J. C. P. 233; 32 L. T. 733; *Cahn v. Pockett's Bristol Channel Steam Packet Co.*, (1899) 1 Q. B. D. 643; 68 L. J. Q. B. 515; 80 L. T. 269; 47 W. R. 422; 8 Asp. M. C. 516; 4 Com. Cas. 163; 15 T. L. R. 247 and *Oppenheimer v. Frazer*, (1907) 2 K. B. 50; 76 L. J. K. B. 806; 97 L. T. 3; 12 Com. Cas. 289; 23 T. L. R. 410; 51 S. J. 373, relied upon.

(3) that the plaintiffs were entitled to recover from L. the price they had paid for the shares with interest. [p. 970, col. 1.]

The expression "goods" in section 108 of the Contract Act includes all moveable property. [p. 963, col. 1.]

Share certificates with blank transfer deeds endorsed by the last registered owner are not negotiable instruments. [p. 969, col. 2.]

Mere proof of usage that sales of shares are effected by delivery of the certificate accompanied by transfer deeds endorsed in blank by the last registered owner is not sufficient to make the share certificates negotiable. [p. 969, col. 2.]

Certain requirements have to be fulfilled before a document can be considered negotiable. It must be in a form which renders it capable of being sued on by the holder of it *pro tempore* in his own name and it must be by the custom of trade transferable like cash by delivery. Failure of these requirements prevents a document from being considered negotiable. [p. 968, col. 2.]

Messrs. Zorab and A. N. Chaudhuri, for the Plaintiff Firm.

Messrs. N. Sirkar, H. D. Bose, S. C. Bose and R. C. Bannerji for the Defendants.

JUDGMENT.—The plaintiff firm claims to be the owner of 25 Baranagore Jute shares, being shares Nos. 51034 to 51088. These shares are now registered in the books of the Company in the name of Shohanlal, who is one of the partners of the plaintiff firm. The plaintiffs bought these shares from the defendant firm of Lalchand Prem.

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sookh on the 7th May 1917 and paid for them at Rs. 27-8-0 per share. The defendant firm at the time of the sale made over to the plaintiff firm the certificate for the said shares and also a blank transfer deed signed by one Jugal Chandra Roy, whose name appeared upto the 11th May 1917 in the books of the said Company as the registered owner of the said shares. After the purchase by them the plaintiff firm got the transfer in the name of Shohanlal on the 12th May 1917. These shares were purchased by the defendant Satish Chandra Ghosh in February 1917. In or about April 1917 a person calling himself Upendra Nath Mukerjee came and proposed to him that he would be able to sell these shares at a better rate than was available in the market. Satish Chandra Ghosh thereupon made over these shares to his clerk Panchanan Mukerjee with directions to him not to part with the shares until cash was paid for them and he sent him with Upendra Nath Mukerjee. This happened on the 17th April 1917. It is stated by Panchanan Mukerjee that when they went to the share market, Upendra Nath Mukerjee persuaded him to make over the shares to him and asked him to wait as he was going to get payment for them; but eventually he did not turn up. Panchanan Mukerjee waited for sometime and then went to his master and reported that he could not trace the man, and from that time Satish Chandra Ghosh could not trace these shares until a Police enquiry was held. These shares appear to have been purchased by the defendant firm of Lalchand Premsookh & Co. from Upendra Nath Mukerjee. It is said by them that a *sawda* was made on the 5th May 1917, but that the shares were actually delivered to them on the 7th May; that payment was made to Upendra Nath Mukerjee by a crossed cheque; but that a few days later the man came back with the crossed cheque and said that he could not cash the crossed cheque and thereupon it is said that the defendant firm of Lalchand Premsookh & Co. paid him cash and took back the cheque. This payment is said to have been made on the 16th May. The rate at which they purchased was Rs. 85 and they say that they paid brokerage also. The plaintiffs bought from Lalchand Premsookh as

above mentioned. I am satisfied upon the evidence that Satish Chandra Ghosh owned these shares and that Upendra Nath Mukerjee obtained them by a trick and disappeared with them. I am also satisfied that the plaintiffs purchased from the defendant firm of Lalchand Premsookh *bona fide*, that they paid full value for them and that they subsequently got their name registered as above mentioned. I am not quite satisfied with the account given by Lalchand of the transaction with Upendra. His account of the matter before me differs from the account given by him in the Police Court in important particulars. His clerk Lal Behari was examined, but he had no personal knowledge of the *sawda*. On the first day of the examination of Lalchand, he said nothing about one Jowala Prosad having acted as broker in the transaction, but he made such a statement on the second day of the hearing. Jowala Prosad has been examined and he says that he met Upendra Nath Mukerjee in the share market and had a conversation with him, that Lalchand came up, and then the matter was discussed between Lalchand and Upendra Nath Mukerjee and the purchase was effected by Lalchand. He says that although he was not a broker in the transaction, he was present at the time when the matter was discussed and, therefore, he claimed brokerage, and Lalchand "out of kindness" gave him some brokerage which he said was Rs. 12 8-0, but from the books of Lalchand Rs. 25 purports to have been paid to Jowala Prosad, which is more than the ordinary brokerage. Lalchand, although old and illiterate, is a shrewd man of business. It is absolutely impossible to rely upon his statements and I am not at all satisfied with the account of the transaction given by him. It is not supported with regard to the details by anybody; but having regard to the large dealings of this firm I will not say that the transaction was *mala fide*. Even accepting the figure mentioned by Lalchand as having been paid, the rate was somewhat lower than the market rate. No attempt has been made to prove that Upendra was a broker or that he was known as such. Lalchand's statement to that effect I am not prepared to accept. In his books the name of Dutt and Mukerjee appears, but the cheque was drawn in the name of

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Upendra Nath Mukerjee. It has not been shown that there was any such firm of brokers as Dutt and Mukerjee. I have carefully considered the matter and I am not at all satisfied with the account given by Lalchand or with the nature of the transaction between him and Upendra.

Under these circumstances what is the result? These shares were obtained by fraud from Satish Chandra Ghosh by Upendra Nath Mukerjee. He was tried in the Calcutta Police Court and has been convicted. The conviction is on alternative sections, criminal breach of trust, or cheating, but which section in fact it was, is immaterial. I hold that he obtained possession of these documents upon a fraudulent representation either to Satish Chandra Ghosh or his clerk and that he fraudulently dealt with these shares. If the transaction is covered by section 108 of the Contract Act, I hold that the person who purchased these shares from him did not acquire good title. The expression "goods" in that section includes all moveable property, see section 76 of the Contract Act. It was said that inasmuch as Upendra Nath Mukerjee was in possession, he could give good title under section 108, exception (1), but that exception requires possession with the consent of the owner. Here the consent was obtained by deceit and I, therefore, hold that the exception is not applicable. In support of this I refer to *Cole v. North-Western Bank* (1), *Oahn v. Pockett's Bristol Channel Steam Packet Company* (2) and *Oppenheimer v. Frazer* (3).

It has been argued that by mercantile usage these documents, share certificates with blank transfer deeds endorsed by the last registered owner, are negotiable instruments. These are certificates of shares in a Company whose Articles of Association require that the transfer shall be by a separate instrument executed both by the transferor and transferee and that the name of the transferee shall be entered in the register of shareholders. On the face of these documents they are not

transferable, but it is claimed that inasmuch as in the Calcutta market sales of shares are effected when they are accompanied by such blank transfer deeds and pass from hand to hand, they are, therefore, to be considered as negotiable instruments; but certain requirements have to be fulfilled before any instrument of this character can be considered negotiable. It must be in a form which renders it capable of being sued on by the holder of it *pro tempore* in his own name and it must be by the custom of trade transferable like cash by delivery. Failure of these requirements prevents its being treated as a negotiable instrument. See Halsbury's Laws of England, Volume 2, page 565, Article 967. It practically sums up what has been held in England. The authorities are there noted and it is, therefore, unnecessary to repeat them. In Chalmers's Bills of Exchange, 7th Edition, page 359, share certificates with blank transfers are stated not to be negotiable instruments on the authority of, amongst other cases, *Swan v. North British Australasian Company* (4). The position of similar documents has been discussed in a great many cases and it is perhaps useful to refer to some of them. In *Colonial Bank v. Hepworth* (5) the question is elaborately discussed. The following passage occurs at page 51:—"The ultimate shape in which the plaintiff's Counsel put their arguments was this: They did not contend, and indeed they could not have successfully contended, that the certificates with blank transfers were negotiable instruments in the strict sense of the term; but they urged that these documents were what they term negotiable by estoppel. They contended that the effect of the mere delivery of the document to a *bona fide* purchaser operated as a legal as well as equitable transfer of the shares whatever might be the defect in the title of the vendor, and that every prior holder was estopped from denying the title of such *bona fide* purchaser. They founded this argument on the first proposition relied on by Lord Cairns in *Goodwin v. Roberts* (6)."

(1) (1878) 10 C.P. 354 at pp. 373; 44 L.J.C.P. 233; 32 L.T. 733.

(2) (1899) 1 Q.B.D. 643 at p. 659; 69 L.J.Q.B. 515; 80 L.T. 269; 47 W.R. 422; 8 Asp. M.C. 516; 4 Com. Cas. 168; 15 T.L.R. 247.

(3) (1907) 2 K.B. 50; 76 L.J.K.B. 806; 97 L.T. 8; 12 Com. Cas. 289; 23 T.L.R. 410; 51 S.J. 373.

(4) (1863) 2 H. & C. 175; 32 L.J.Ex. 273 at p. 278; 10 Jur. (N.S.) 102; 11 W.R. 862; 159 E.R. 73; 126 R.R. 617.

(5) (1887) 36 Ch.D. 36; 56 L.J.Ch. 1089; 57 L.T. 148; 36 W.R. 259.

(6) (1876) 1 A.C. 476; 45 L.J.Ex. 743; 35 L.T. 179; 24 W.R. 987.

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Discussing the question of estoppel the learned Judge says on page 53 "Estoppels cannot be manufactured arbitrarily; no estoppel can be raised on a document inconsistent with the terms of the document itself. What then is the estoppel here? Having regard to the practice proved and the condition in which these documents are when they pass from hand to hand, the right principle to adopt with reference to them is to hold that where the transfers are duly signed by the registered holders of the shares, each prior holder confers upon the *bona fide* holder for value of the certificates for the time being an authority to fill in the name of the transferee and is estopped from denying such authority, and to this extent, and in this manner, but not further, is estopped from denying the title of such holder for the time being. By the delivery an inchoate legal title passes, but a title by unregistered transfer is not equivalent to what has been termed 'Legal Estate' in the shares, or to the complete dominion over them."

In *London and County Banking Company v. London and River Plate Bank* (7) the question arose with regard to a certain share certificate which was in this form "... is entitled to 20 shares in the capital stock of the Company transferable only in person or by attorney on the books of the said Company." On the back of that document was the power-of-attorney. This was executed in blank for the name of the transferee and of the attorney. It was held, having regard to those circumstances, that it was a negotiable instrument. This question was again considered in the *Colonial Bank v. Cady* (8). Those shares were transferable on the books of the Company only on the surrender and cancellation of the certificate by endorsement thereon. Lord Watson expressed an opinion that in a case like that when the endorsed transfer had been duly executed by the registered owner of the shares, the name of the transferee being left blank, delivery of the certificates in that condition by him or by his authority transmitted his title to the shares both legal and equitable.

The person to whom it was delivered could effectually transfer his interest by handing his certificate to another, and the document could thus pass from hand to hand until it came into the possession of the holder who thought fit to insert his name as transferee and to present the document to the Company for the purpose of having his name entered in the register of shareholders and obtaining a new certificate in his favour. Lord Watson was of opinion that the negotiability of such an instrument was not based upon custom but upon estoppel and that the estoppel did not arise out of the mere form of the instrument but out of the fact (if it were a fact) that the owner had represented to the holder as having full authority to deal with the instrument. Lord Herschell added that the mere delivery of the certificate with the endorsed blank transfer and power-of-attorney, signed irrespective of any act or intent of the owner of the share, was not of itself sufficient to pass the title to them. Applying the tests suggested in the English cases and the principles therein enunciated, I hold that the shares in question cannot be treated as negotiable instruments. There is nothing more in the shape of evidence of usage in this case before me than that share certificates with transfer deeds endorsed in blank pass from hand to hand. For legal title it is conceded they must be registered in the books of the Company. I know of no case where it has been held that a transfer deed executed by a transferor in blank as regards the transferee and accompanied by the transferor's share certificates are negotiable instruments transferable by delivery and confer a good title on a *bona fide* holder without notice of any defect in the title of the person from whom he receives them, nor has any such case been brought to my notice. The idea of dealings in shares in this country has come from England and practically the same practice prevails here as in the English Market, and I think that unless there are distinguishing features we ought to follow the law on the subject as is to be found in English cases. I hold that the defendant firm did not acquire good title to these shares and that the plaintiffs by their purchase did not acquire title to them.

(7) (1888) 20 Q. B. D. 232.

(8) (1890) 15 A. C. 267; 60 L. J. Ch. 131; 63 L. T. 27; 39 W. R. 17.

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Then the question arises as to what the plaintiffs are entitled to, their purchase having been *bona fide* and for value from the defendant firm. Under section 109 of the Contract Act the plaintiffs are entitled to recover the loss caused to them in consequence of these shares being declared not to belong to them. They claimed the market value of these shares on the date the Police took possession of them, and all interim dividends and privileges which have been declared and granted by the Company. On this basis they claim at the rate of Rs. 230 per share, but I do not think that they can claim anything more than the value that they paid for these shares with interest from the date of payment at 6 per cent. The result is that the shares are declared as not belonging to them, but as belonging to Satish Chandra Ghosh; that they are entitled to the price that they paid for such shares from the defendant firm with interest as above mentioned; that they are to pay the costs of Satish Chandra Ghosh of this action on scale No. 2 including reserved costs, if any, and to add such costs to their claim and to recover same as against the defendant firm. The plaintiffs will get their costs from the second defendant on scale No. 2.

Order accordingly.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 607 OF 1917.

April 25, 1918.

Present:—Mr. Kotwal, A. J. C.

JWALAPRASAD—DEFENDANT—

APPELLANT

versus

PUNDLIK PANDURANG—PLAINTIFF—

RESPONDENT.

Contract Act (IX of 1872), s. 176—Bailment—Pledge—Notice, whether necessary before suit.

Section 176 of the Contract Act requires a notice only when the pawnee wishes to exercise his option of selling the pledged goods. If he chooses to bring a suit upon the debt, no notice is required by that section.

Appeal from the decree of the District Judge, Bhandara.

Mr. G. B. Pradhan, for the Appellant.

ABHA MUNSHI V. KAMU MOLLA.

JUDGMENT.—In view of the finding of the lower Appellate Court that the plaintiff had verbally asked the defendant to re-pay the loan several times, I cannot see my way to interfere with that Court's decision. Section 176 of the Contract Act requires a notice only when the pawnee wishes to exercise his option of selling the pledged goods. If he chooses to bring a suit upon the debt no notice is apparently required by that section.

As to ground No. 1 it seems to me that the whole case was here opened up on record, and it was open to the lower Appellate Court to reconsider its finding arrived at the *ex parte* hearing.

The finding may have been adverse to the appellant on that hearing, because he may have thought it unnecessary to prove his case fully on the point involved in the finding, hoping to succeed on other points. At any rate the finding referred to in ground No. 1 makes no difference to the result of the appeal before the lower Appellate Court.

This appeal fails and is dismissed under Order XLI, rule 11, Civil Procedure Code.

Appeal dismissed.

CALCUTTA HIGH COURT.

CIVIL RULE No. 368 OF 1918.

August 23, 1918.

Present:—Mr. Justice Fletcher and Mr. Justice Walmsley.

ABHA MUNSHI—PETITIONER

versus

KAMU MOLLA—OPPOSITE PARTY.

Limitation Act (IX of 1908), s. 18, Sch. I, Art. 166—Civil Procedure Code (Act V of 1908), O. XXI, r. 90—Execution of decree—Sale—Application to set aside sale made more than thirty days after date of sale—Applicability of s. 18—Finding, necessary.

It is not competent to a Court to come to the conclusion that an application to set aside a sale under Order XXI, rule 90, of the Code of Civil Procedure made more than thirty days from the date of sale falls within the provisions of section 18 of the Limitation Act, without finding as a fact the date or time when the applicant came to know of the sale. [p. 271, col. 2]

Rule against the order of the Court of the Additional Sub-Judge, Noakhali, in Miscellaneous Appeal No. 144 of 1917.

KANCHANI BEWA v. JADUB PRAMANIK.

Moulvi A. S. M. Akram, for the Petitioner.—The petitioner purchased a certain holding at a sale in execution of a decree for rent. The sale took place on 27th November 1916. Thereafter the opposite party, claiming to have an interest in a portion of the lands sold, filed an application under Order XXI, rule 90, Civil Procedure Code, to get the sale set aside on the ground of fraud and irregularity. That application was made more than thirty days after sale. The application was allowed on the ground that the applicant was kept in ignorance of the sale through fraud and, therefore, his case came within the purview of section 18 of the Limitation Act. But the learned Munsif has not found when the opposite party came to know of the sale. My submission is that, without finding as a fact the date or the time when the applicant first became aware of the sale, the Court below was not competent to find that the case came within the purview of section 18 of the Limitation Act. It is impossible to know from the judgment of the Court below whether the application under Order XXI, rule 90, was made within thirty days from the date of knowledge of sale.

Babu Bepin Ohandra Bose, for the Opposite Party.—The Court below, by finding that the petitioner has brought his case within the purview of section 18 of the Limitation Act, has found by implication that the application was made within thirty days from the date of knowledge.

JUDGMENT.

FLETCHER, J.—This Rule was issued at the instance of the petitioner, who is a purchaser at a sale in execution of a rent decree held on the 27th November 1916, calling on the opposite party to show cause why the order of the learned Additional District Judge should not be set aside. The case is a perfectly simple one. As I have already stated, the present petitioner purchased in execution of a rent decree on the 27th November 1916. The opposite party claims 1/3rd of the property to which the present application relates as being the purchaser at a sale in execution of a mortgage decree. The present case is this: On the 2nd April 1917, the opposite party made an application to the

Court under the provisions of Order XXI, rule 90, Code of Civil Procedure, to set aside the rent sale on the ground of material irregularity and fraud. It is quite clear that that application could not be heard, because the period for making such an application was thirty days from the date of the sale, unless the applicant could bring himself within the provisions of section 18 of the Indian Limitation Act. The learned Judge considered that he had brought himself within the purview of section 18 of the Limitation Act. Whether he has or has not, it is not for us to say. But on the facts found, it is quite clear that the Judge was not entitled to come to the conclusion he has, because he has not found when the opposite party came to hear of the sale and unless he finds as a fact when the opposite party came to know of the sale, he cannot find whether the case comes within the provisions of section 18 of the Limitation Act or not. The case cannot stand on the findings of fact that have been made by the learned District Judge. We must, therefore, set aside the judgment of the learned Judge of the lower Appellate Court and remit the case to him to re-hear it and to come to a proper finding on the facts in order to determine the matter that was pending before him. We make no order as to the costs of this Rule.

WALMSLEY, J.—I agree.

Case remitted.

CALCUTTA HIGH COURT.

CIVIL RULE No. 214 OF 1918.

July 26, 1918.

Present:—Mr. Justice Teunon and Mr. Justice Cuming.

KANCHANI BEWA *alias* KANDANI
BEWA—PLAINTIFF—PETITIONER*versus*

JADUB PARAMANIK AND OTHERS—

DEFENDANTS—OPPOSITE PARTIES.

Civil Procedure Code (Act V of 1908), O. XLI, r. 10

BIJOY CHAND V. THE SECRETARY OF STATE.

—*Appeal in forma pauperis—Security for costs, whether can be demanded.*

A plaintiff preferring an appeal *in forma pauperis* cannot be required to give security for costs of the original suit or of the appeal.

Rule against the Court of the District Judge, Faridpur, in Title Appeal No. 325 of 1917.

FACTS of the case will appear from the following extract from the petition to the High Court:—

"That the learned District Judge of Faridpur, by his order, dated the 5th October 1917, permitted the petitioner to appeal as a pauper.

That on 11th February 1918 the opposite party Nos. 1 to 4 filed a petition under Order XLI, rule 10, Civil Procedure Code, praying that proper security for costs in the lower Court and in the Appellate Court be taken from the appellants.

That on the 27th February 1918 when the appeal came on for hearing, the Pleaders on both sides agreed that the granting or refusing of the respondents' prayer for security for costs was in the discretion of the Court.

That on the 27th February 1918 the appeal remained part heard.

That on the 28th February 1918 when the hearing of the appeal was resumed, the appellant's Pleader tried to contend that the Court had no jurisdiction to demand security for costs in the case of a pauper, but the learned District Judge of Faridpur did not hear him at all on the ground that the Pleader for the appellant was too late in his contention, and on the same day passed an order under Order XLI, rule 10, Civil Procedure Code, requiring the petitioner to furnish to the Appellate Court security for costs of the original suit and of the appeal."

Against the above order of the Appellate Court the petitioner moved the High Court and obtained this Rule.

Dr. Sarat Chunder Bysack (with him Babu Debendra Chunder Paul), for the Petitioner.—The petitioner brought a suit *in forma pauperis* and part of her claim was allowed by the first Court. She appealed *in forma pauperis* and on the application of the respondents the learned District Judge ordered security for costs from the appellant in the lower Appellate Court. My submission is that no security for costs can be demanded from a

person suing or appealing *in forma pauperis*, inasmuch as the general provisions of Order XLI, rule 10, Civil Procedure Code, do not apply to such a case. It is not possible for the pauper who cannot pay Court-fees to give security for costs. The authorities on this point are *Khemraj Shrikrishna Das v. Kisanlala Surajmal* (1), *Musammatt Hafizan v. Abdul Karim* (2) and *Nusseerooddeen Biswas v. Ujjul Biswas* (3).

Babu Suriya Kumar Guha, for the Opposite Party, referred to *Seshayyengar v. Jainulavadin* (4).

JUDGMENT.—On the authority of the decisions reported as *Musammatt Hafizan v. Abdul Karim* (2) and *Khemraj Shrikrishna Das v. Kisanlala Surajmal* (1) we make this Rule absolute and set aside the order against which it is directed. We make no order as to costs.

Rule made absolute.

(1) 42 Ind. Cas. 67; 42 B. 5; 19 Bom. L. R. 771.

(2) 12 C. W. N. 163; 7 O. L. J. 312.

(3) 17 W. R. 68.

(4) 3 M. 66; 4 Ind. Jur. 507; 1 Ind. Dec. (N. S.) 603.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 161 OF 1917.

August 8, 1918.

Present:—Mr. Justice Fletcher and Mr. Justice Walmsley.

HON'BLE (MAHARAJADHIRAJ) SIR
BIJOY CHAND MAHATAB BAHADUR,
K. C. S. I., K. C. I. E., I. O. M.—PLAINTIFF
—APPELLANT

versus

THE SECRETARY OF STATE FOR INDIA
IN COUNCIL AND OTHERS—DEFENDANTS
—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 96—Rectification of lease, suit for, on ground of mistake—Limitation—Lease—Rent receiver deprived of small portion of land without any reduction of rent, whether entitled to damages from lessor—Civil Procedure Code (Act V of 1908), s. 35—Costs—Practice.

A suit for the amendment or rectification of a lease, on the footing of a common mistake of the lessor and the lessee under which some land was wrongly included in the lease, is governed by Article 96 of the First Schedule to the Limitation Act and must be brought within three years from the date when the plaintiff became aware of the mistake. [p. 974, col. 2.]

As regards costs of suit the parties are, in the absence of any special reason, entitled to have the

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ordinary rule observed, namely, that usually costs follow the event. [p. 974, col. 2.]

The plaintiff took settlement of certain resumed Ghatwali lands from the Government, subject to a permanent lease granted by the Government to one U., on the footing that the property so settled with the plaintiff would be treated as a permanently settled estate. Subsequently one B. brought a suit with reference to a small portion of the said lands, which he alleged was *lakheraj*. That suit to which the present plaintiff and the defendants were made parties, was successful. The plaintiff then brought a suit against the Government for rectification of the lease and for the refund of a small sum of money:

Held, that the mere fact that as rent receiver the plaintiff was deprived of a small portion of the lands without any reduction of rent payable to him by U. would not entitle him to any damages. [p. 974, col. 1.]

Appeal against the decree of the District Judge, Bankura, dated the 1st December 1916, affirming that of the Munsif, 2nd Court, Bishunpur, dated the 16th of August 1915.

FACTS appear from the judgment.

Babu *Basant Kumar Bose*, (with him Babus *Bepin Behari Ghose II* and *Sarat Kumar Mitter*), for the Appellant.—This appeal is on behalf of the plaintiff, and it arises out of a suit for amendment of a lease and for recovery of a certain sum of money. The defence is, first, that the suit is barred by limitation because the previous suit, in which a portion of the lands leased was adjudged to be *lakheraj*, was disposed of in 1909 and the present suit was brought more than three years after that suit; secondly, that the suit is not maintainable because there cannot be any reduction of revenue.

As regards limitation, my submission is that the Courts below have erred in holding that Article 96 of the Limitation Act, which relates to relief on the ground of mistake, applies to the case. The cause of action of this suit arises from day to day and, therefore, no question of limitation arises. At any rate Article 120 is applicable to the facts of this case and the period of limitation is six years, because it is a case of breach of a covenant contained in a registered lease. Mistake is not the cause of action in this case and hence Article 96 does not apply. It is the dispossession of Umesh Chandra Roy that gives rise to the plaintiff's cause of action.

The next question is, whether the plaintiff can claim reduction by way of apportionment of rent for loss of land even though

the rent is fixed in perpetuity. In the case of *putni* a lease it has been held by their Lordships of the Judicial Committee that the plaintiff can claim abatement of rent for loss of land. It is a case of equitable relief. If the plaintiff is dispossessed from part of the demised premises by a person claiming under a title paramount, he can claim abatement of rent even though the rent is fixed in perpetuity.

Babu *Ram Charan Mitter* (with him Babu *Brish Chandra Chowdhry*), for the Respondents.—The plaintiff's own case, as it appears from the statement in the plaint and the grounds in the memorandum of appeal, is that by mutual mistake of the parties the land was included in the indenture of lease and, therefore, the Courts below are justified in holding that the suit is barred by limitation under Article 96.

The cross-appeal is with regard to the costs. In dismissing the appeal the lower Appellate-Court should have allowed costs to the respondent, as there is no special reason why the order as to costs should not be made against the plaintiff.

Babu *Basant Kumar Gose* replied.

JUDGMENT.

FLEICHER, J.—This is an appeal by the plaintiff against the decision of the learned District Judge of Bankura, dated the 1st December 1916, affirming the decision of the Munsif of Bishunpore. The plaintiff brought the suit for the amendment or rectification of an indenture of lease and, as consequential thereon, for the refund of a certain small sum of money. The facts are these:—The Government had resumed certain Ghatwali lands. Those lands were let out permanently to one Umesh Chandra Roy. After the grant of this permanent lease to Umesh Chandra Roy, the Maharaja of Burdwan entered into an indenture with the Secretary of State for India in Council, by which he took a lease of the resumed lands subject to the lease that had been granted to Umesh Chandra Roy in perpetuity, on the footing that the property would be treated as a permanently settled estate and the Government revenue should not be liable to increase. Subsequently, one Bholanath brought a suit with reference to a small portion of this land, which he alleged was *lakheraj*. To that suit, both the present plaintiff and

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the defendant were made parties as defendants and the suit was successful. So, a portion of the land apparently included in the lease to the plaintiff went to Bholanath. The finding of the Court of first instance is this: Notwithstanding that the plaintiff may have lost the bare interest in this small piece of land, he is still obtaining the same rent from Umesh Chandra Roy. Whether that is so or not I do not know. But obviously it was the duty of the plaintiff to give evidence of what damage he suffered. The mere fact that as rent receiver he has been deprived of a small portion of this land without any reduction of the rent payable by Umesh Chandra Roy, would not entitle the plaintiff to substantial damages. Without proof of substantial damage, it would be nominal damage, if Umesh Chandra Roy on the terms of his bargain is liable to pay to the plaintiff the same amount of rent notwithstanding the loss of a small piece of land. The matter was, however, dealt with by the learned District Judge on a different point of view. He held that the present suit was barred by limitation. It is quite clear that the suit was instituted five years after the time when the parties came to know of the matter. In 1909, both parties came to know that this piece of land, that Bholanath recovered possession of in his suit, had been by a mistake included in the lease executed by the defendant to the plaintiff, and thereupon the plaintiff became aware that any right to have the document rectified, or as he calls it amended in his plaint, arose when he became aware that Bholanath's suit was finally decided in his favour. He waited for five years before stirring up; and the frame of the suit in this case, as it was put quite clearly in the plaint, was for the amendment of the document on the ground of mistake, and that is supported by the grounds of appeal to this Court because the first ground of appeal is framed on the basis that the land recovered in Bholanath's suit had been included in the lease to the plaintiff by a mutual mistake of the plaintiff and the defendant. Therefore, the plaint in the present case is clearly founded on the ground of a mutual mistake between the plaintiff and the defendant. If there was a mutual mistake between

the parties, it is quite clear that Article 96 of the Indian Limitation Act governs the suit. Article 96 is as follows:—"For relief on the ground of mistake...three years from when the mistake became known to the plaintiff." The plaintiff's own case is that his suit is on the footing of a common mistake between the plaintiff and the defendant, by which this land was included in the lease to the plaintiff. The plaintiff became aware of that mistake in 1909 and under the terms of Article 93, he was bound to bring his suit within three years of becoming aware of the mistake. I agree with the view of the learned District Judge that the present suit is barred by the terms of Article 96 of the First Schedule to the Indian Limitation Act. The appeal, therefore, fails and must stand dismissed.

The cross-objection of the defendant is preferred only with regard to costs. No reasons have been shown why the usual order should not be made as regards this. It does not appear that the learned District Judge exercised any discretion or considered the matter. As far as I can see, he seems to have considered this question of costs such a trifling matter as to be beneath the notice of the litigants. That obviously is not so. The parties are entitled to have the ordinary rule observed, namely, that usually costs follow the event. In this case nothing has been shown why the usual practice should not be adhered to. In that view, we must allow the cross-objection of the defendant and direct that the plaintiff's suit be dismissed with costs both in this and in the two lower Courts.

WALMSLEY, J.—I agree.

*Appeal dismissed;
Cross-objection allowed.*

ROOPCHAND JANKIDAS v. NATIONAL BANK OF INDIA, LTD.

CALCUTTA HIGH COURT.
ORIGINAL CIVIL SUIT No. 65 of 1917.

July 18, 1918.

Present:—Justice Sir Asutosh Chaudhuri, Kt.
ROOP CHAND JANKIDAS—PLAINTIFF

versus

THE NATIONAL BANK OF INDIA,
LTD., AND OTHERS—DEFENDANTS.*Contract Act (IX of 1872), ss. 108, Exception (1), 178—“Possession,” meaning of—Juridical possession—Transfer, fraudulent, of shares by person in possession, whether confers good title on bona fide transferee—Share certificate accompanied by transfer deed, whether negotiable.*

The word “possession” in Exception (1) to section 108 of the Contract Act does not apply in the case of qualified possession, such as that of a hirer of goods or where the possession is for a specific purpose. *Juridical* possession is different from mere possession. [p. 975, col. 2; 976, col. 1.]

Greenwood v. Holquette, 12 B. L. R. 42; 20 W. R. 467, followed.

A pledgee's possession is not such possession as entitles him to deal with the goods in fraud of the rights of the owner. [p. 976, col. 1.]

Biddomoyee Dabee Dabee v. Sittaram, 4 C. 497; 3 C. L. R. 398; 2 Ind. Dec. (N. S.) 316, *J. W. Seager v. Hukma Kessa*, 24 B. 458; 2 Bom. L. R. 403; 12 Ind. Dec. (N. S.) 837, *Naganada Davay v. Bappu Chettiar*, 27 M. 424; 14 M. L. J. 69, relied upon.

Share certificates accompanied by transfer deeds endorsed in blank by the last registered owner cannot be considered as negotiable instruments. [p. 976, col. 2.]

Defendant Bank purchased certain jute shares for one of their constituents and deposited them with the officer in charge of their safe custody department. The latter handed over the shares to A, the head clerk of the department, for the purpose of getting them registered in the name of the constituent for whom they had been purchased. A fraudulently disposed of the shares to S, who sold them to M, who sold them to B, from whom the plaintiff purchased them in good faith:

Held, that inasmuch as the possession of A. did not come within the purview of section 108, Exception (1) of the Contract Act, he could not transfer a good title to S. and that the subsequent sellers did not pass a good title to their respective purchasers. [p. 976, col. 2.]

Mr. A. N. Chaudhuri (with him Mr. N. N. Sarkar), for the Plaintiffs.

Mr. Langford James (with him Mr. Surita), for the Defendants.

Mr. H. D. Bose (with him Mr. S. Ghosh), for the other Defendants.

JUDGMENT.—In this case the plaintiff firm purchased 25 Kelvin Jute shares on the 2nd November 1916 from the defendant firm of Baijnath Champalal. Baijnath Champalal bought them from Mungiram Banger and Co., who purchased them from one Shamdas Sil, who in his turn purchased them from one Asutosh Ghose

on the 1st November 1916. Before Asutosh Ghose obtained possession of these shares, they belonged to the National Bank of India, who are defendants in this action. The Bank purchased them for one of their constituents through their brokers, Place, Siddons and Gough. The purchase was made about the end of October 1916. Following the rule in the Bank these shares were made over to the officer in charge of their safe custody department. It is also the practice of the Bank to get the shares registered in the Company in the name of their constituents on whose behalf they are purchased. With that object these shares were made over by Ross, the officer then in charge of the safe custody department, to Asutosh Ghose, the head clerk of that department, who, without sending the shares to the Company for such registration, fraudulently disposed of them to Sham Das Sil. The Bank did not know that any fraud had been committed, or that these shares had been dealt with by Asutosh Ghose, until sometime about the end of November 1916. In the meantime these shares passed from hand to hand as above stated. The purchase by the plaintiff from Baijnath Champalal and by Baijnath Champalal from Mungiram Banger and Co. and even the purchase by Shamdas Sil were bona fide purchases; full value was paid for these shares and they passed from hand to hand. Attached to the share certificate was a deed of transfer endorsed in blank by the last registered owner, one H. P. Stringfellow. It was contended that inasmuch as Asutosh Ghose was in possession of these documents, he could transfer good title to Shamdas Sil, and the subsequent sellers passed good title to their respective purchasers. Now the use of the word “possession” in section 108, Exception (1), does not include possession of this character. These shares were in the custody of an officer of the Bank and were made over to Asutosh Ghose for a particular purpose and he dishonestly dealt with them. It was held in *Greenwood v. Holquette* (1) that the Exception did not apply in the case of qualified possession, such as that of a hirer of goods or where the possession was for a specific purpose. A clear dis-

(1) 12 B. L. R. 42; 20 W. R. 467.

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inction has been made in this Court in respect of juridical possession and mere possession. The same word is used in section 178 of the Contract Act in respect of pledges and it has been held in, amongst other cases, *Biddomoyee Dabee Dabee v. Sittaram* (2), *J. W. Seager v. Hukma Kessa* (3) and *Naganada Navay v. Bappu Chettiar* (4) that a pledgee's possession was not such possession as entitled him to deal with the goods in fraud of the rights of the owner. The Bank never intended Asutosh to deal with these shares, never authorised him to deal with them and did not do anything by which it might be presumed that he had authority, express or implied, to deal with these shares. It was an absolutely dishonest dealing by him without knowledge of the defendant Bank.

It was next contended that the share certificates accompanied by the blank transfer deed were negotiable instruments by mercantile usage and were transferable freed from all equities and complete title passed from purchaser to purchaser upon delivery of the certificate and transfer deed. I have just dealt with the question as to whether such share-certificates can be considered as negotiable instruments in my judgment in Suit No. 337 of 1918, [*Hazarimul Shohanlal v. Satish Chandra Ghosh* (5)], and, therefore, it is unnecessary to repeat myself. There is a little more evidence in this case about usage than there was in Suit No. 337. [*Hazarimull Shohanlal v. Satish Chandra Ghosh* (5)]. A member of the firm of Place, Siddons and Gough stated that if the purchaser wanted his name registered and if the Company refused to register the document then they, as his brokers, would not consider the script as good delivery but would return it to the vendor. There was some evidence from the Bank of Bengal which does not purchase shares on its own account, but purchases them on account of their constituents. The officer in charge of that department of the Bank said that they did not recognise these documents until registration was effected in the name of the purchaser. There is evidence that in

the market these shares, accompanied by transfer deeds blank endorsed by the last registered holder, pass from hand to hand and registration is effected by the last purchaser if he desires to register his name, but apparently in order to avoid the cost of stamps and to save time registration is not usually effected; but that does not, in my opinion, give a negotiable character to the certificate. The defendant Bank at the same time lost another lot of shares, which curiously came back to them after having passed from hand to hand. This is relied upon as a strong circumstance showing the negotiable character of the documents. I do not think that a circumstance of additional value. The document on the face of it does not show that it is transferable, and it is well known that registration is necessary for a legal title and that registration has to be effected in terms of the articles of association. Several purchasers in fact want registration to be effected and do not accept the delivery of the certificate with a transfer deed blank endorsed as effective. For the reasons I have already given, I cannot treat the transfers in this case as transfers of a negotiable instrument. I, therefore, hold that the Bank is entitled to recover these documents. They held these shares originally as banker for their constituent, but they have made over shares of equal value to him and are now entitled to possession of these shares on their own account, and the plaintiff is not entitled to the declaration he seeks for. I hold that the plaintiff is entitled to recoup his loss from his vendor and I make an order that he is to be paid by Baijnath Champalal the value paid by him for these shares with interest at 6 per cent. from the date of his purchase.

Asutosh Ghosh who abstracted these documents was prosecuted, but the Jury differing, a re-trial was ordered, but before the re-trial took place he committed suicide.

I shall deal with the question of costs after hearing Counsel, who have expressed a desire to be heard.

Order accordingly.

(2) 4 C. 497; 3 C. L. R. 398; 2 Ind. Dec. (N. S.) 316.
(3) 24 B. 458; 2 Bom. L. R. 403; 12 Ind. Dec. (N. S.) 837.

(4) 27 M. 424 at p. 425; 14 M. L. J. 69.

(5) 48 Ind. Cas. 966; 22 C. W. N. 1036.

EMPEROR v. HANUMAN.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 15 of 1915.

February 18, 1915.

Present:—Mr. Pridemox, A. J. C.

EMPEROR—PROSECUTOR

versus

HANUMAN—ACCUSED.

Criminal Procedure Code (Act V of 1893), ss. 30, 207, 254, 347—Offence exclusively triable by Sessions Court, committal for, by Magistrate empowered under s. 30—Commitment, legality of.

The committal of a case triable exclusively by the Court of Session is not illegal merely because the Committing Magistrate is himself empowered under section 30 of the Criminal Procedure Code to try the case. [p. 977, col. 2.]

The words "ought to be tried" in sections 207 and 347 of the Criminal Procedure Code must be read with section 254 of the Code. [p. 978, col. 1.]

Under section 207 of the Criminal Procedure Code a Magistrate who is competent to commit to the Court of Session can commit to that Court cases triable exclusively by that Court and cases which in his opinion ought to be tried by that Court. [p. 977, col. 2.]

Queen-Empress v. Kayemullah Mandal, 24 C. 429; 1 C. W. N. 414; 12 Ind. Dec. (N. S.) 954 and *King-Emperor v. Pema Ranchod*, 4 Bom. L. R. 85, followed.

A commitment, however, made on the sole ground that the accused has been committed in another case is bad in law. [p. 978, col. 1.]

Reference by the Sessions Judge, Chhatisgarh Division, under section 435, Criminal Procedure Code, with a view to set aside the order of commitment of the accused to the Court of Session passed by the Magistrate, 1st Class, Bilaspur.

Mr. Dick, for the Crown.

ORDER.—This case has been reported by the Sessions Judge, Chhatisgarh Division, for quashing a commitment. A Rule having issued the learned District Magistrate shows cause as follows:—

(a) The committal of a case triable exclusively by the Court of Session does not become *ipso facto* illegal merely because the Magistrate is empowered under section 30 of the Criminal Procedure Code.

(b) That some High Courts have even gone so far as to hold that where an accused is charged as this accused with two offences, one of which he was competent to try and the other he was not, the proper course is committal, *Empress v. Ramanand* (1).

(c) It has also been held that a commitment should not be quashed on the ground that the Sessions Judge on perusal of the record found the case triable by a Magistrate of the 1st Class, *Empress v. Mailu Shah* (2).

(d) That in the present instance the two offences with which the accused is charged, murder and arson, were practically part of the same transaction and some of the witnesses are the same in both cases. The Committing Magistrate had, therefore, some grounds for considering that the accused would be to some extent embarrassed by a trial in different Courts.

In conclusion, however, the District Magistrate admits that he has no practical objection to offer to the quashing of the commitment.

It goes without saying that the committal of a case triable exclusively by the Court of Session is not illegal merely because the Magistrate is empowered under section 30 of the Criminal Procedure Code, and it may be admitted that there may be cases where an accused charged with two offences, one triable by a Magistrate the other by a Judge, should properly be committed to the Sessions for the trial of both. It may be conceded that it would be improper to quash a commitment merely on the ground that the offence the accused is charged with is triable by a Magistrate, for a Sessions Court can try any offence under the Indian Penal Code (Section 28, Criminal Procedure Code). There can be nothing to prevent a Magistrate committing even a summons case for good reasons. It has been held that under section 207, Criminal Procedure Code, "A Magistrate who is competent to commit to the Court of Session can commit to that Court both cases triable exclusively by that Court and cases which in his opinion ought to be tried by that Court;" *Queen-Empress v. Kayemullah Mandal* (3). In a warrant case the Magistrate is bound by the provision of section 254, that is, when he is of opinion that the accused has committed an offence triable under Chapter XXI which he is competent to try and which

(2) 22 P. R. 1582 Cr.

(3) 24 C. 429; 1 C. W. N. 414; 12 Ind. Dec. (N. S.) 954.

(1) A. W. N. (1883) 199; 3 Ind. Dec. (N. S.) 612.

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he can adequately punish, he shall proceed to charge the accused, but if the Magistrate considers that he cannot adequately punish the accused there is nothing to prevent him committing the case.

The words "ought to be tried" of sections 207 and 347, Criminal Procedure Code, it has been held, must be read with section 254 of the Code. Thus a case which the Magistrate is not competent to try should be committed; also one in which in the Magistrate's opinion he cannot inflict adequate punishment: *King, Emperor v. Pema Ranchod* (4).

In the case before me the accused, one Hanuman, has been committed to the Court of Session for an offence under section 436, Indian Penal Code, by the 1st Class Magistrate, Bilaspur, a Magistrate empowered under section 30, Criminal Procedure Code. It is said the accused set fire to a house and that immediately after doing so, went to another house and wounded a woman who has since died of her wounds. Accused has, in a separate case before the same Magistrate, been charged under section 302, Indian Penal Code, and committed for trial to the Sessions Court. The only reason given by the Magistrate for the commitment in the arson case is that the same accused has been committed in the murder case. The Magistrate does not say that the fine and sentence which he can impose will not be adequate to meet the ends of justice. The commitment made on the sole ground that the accused has been committed in another case is bad in law. I accordingly quash the commitment of the accused in this case and direct that the First Class Magistrate, Bilaspur, do proceed with the trial of the accused and complete it according to law.

Commitment quashed.

(4) 4 Bom. L. R. 85.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION APPLICATION NO. 38 OF 1918.

May 9, 1918.

Present:—Mr. Pratt, J. C., and Mr. Kemp,
A. J. C.

Musammam JANKIBAI—APPLICANT

versus

SHIVRAM BABAJI—OPPONENT.

*Criminal Procedure Code (Act V of 1895), s. 438—
Hindu wife leaving husband's house without cause—
Maintenance, right to, on return to husband's house.*

The duty of a husband to maintain his wife under the Hindu Law is absolute and under the Criminal Procedure Code it is subject only to the wife's chastity. When a Hindu wife, therefore, leaves her husband's house without good cause, her right of maintenance is only suspended and she has the right to return to her husband's house at any time and claim to be maintained by him. [p. 978, col. 2; p. 979, col. 1.]

Application for revision of an order of the Additional City Magistrate, Karachi.

Mr. U. B. Chandiramani, for the Applicant.

Mr. Parsram Tolaram, for the Opponent.

Mr. T. G. Elphinstone, Public Prosecutor, for the Crown.

JUDGMENT.—This is an application for revision of an order made by the Additional City Magistrate, Karachi, under section 488, Criminal Procedure Code, refusing the applicant's petition to order her husband, opponent, to pay her maintenance.

The applicant left her husband on the 4th June 1916, alleging that her husband ill-treated her. On 8th June 1916 the husband gave notice accusing her of theft and forbidding her to enter his house. Next month the applicant filed a suit for restitution of conjugal rights, but it was dismissed for want of prosecution in December 1916. She then filed this application for maintenance on the 18th January 1918 and on this application the Magistrate, holding that cruelty was not proved and that she left her husband of her own accord, concluded there was no justification for the application. But the allegation of cruelty is only relevant to the claim for separate maintenance under the proviso to sub-section (3) and sub-section (5).

Under Hindu Law the duty of the husband to maintain his wife is absolute: *Parami Ramayya v. Mahadevi* (1), and under the Criminal Procedure Code

(1) 5 Ind. Cas. 960; 34 B. 278; 12 Bom. L. R. 196.

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it is subject only to the wife's chastity, section 488 (4).

Further even if she left her husband's house without good cause, her right of maintenance is only suspended. See *Surampalli Bangaramma v. Surampalli Brambaze* (2). She has the right to return to her husband's house at any time and claim to be maintained by him.

The husband's refusal to maintain her is avowed in his notice of the 8th June 1916, but Mr. Parsram relies on the dictum in *Gavarishanker v. Bai Reva* (3) that if the wife voluntarily leaves the husband without being justified in doing so, she is not entitled to claim maintenance. That passage only refers to the wife's claiming separate maintenance. This is evident from the context, which implies that cruelty or ill treatment is evidence of refusal to maintain, as was subsequently held in *Bhikaini v. Maneckji* (4).

The applicant is clearly entitled either to maintenance by her husband in his house or to receive a separate maintenance allowance.

We accordingly reverse the order of the Additional City Magistrate and remand the application for disposal on the merits.

Application remanded.

(2) 31 M. 333; 3 M. L. T. 266; 18 M. L. J. 254.

(3) 5 Bom. L. R. 614.

(4) 9 Bom. L. R. 359; 5 Cr. L. J. 334.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 212 OF 1918.

November 1, 1918.

Present:—Mr. Findlay, Offg. A. J. C.

EMPEROR—PROSECUTOR

versus

NURKHAN—ACCUSED

Criminal Procedure Code (Act V of 1898), ss. 435, 439, 562—Accused released under s. 562—Revision—Sentence of imprisonment, whether can be passed.

Section 439 of the Criminal Procedure Code presupposes that a sentence has been imposed. Therefore where an accused is released on good probation under section 562 of the Code, the High Court cannot

substitute a sentence of imprisonment or of whipping in revision. [p. 980, col. 1.]

Emperor v. Ghasite, 26 Ind. Cas. 635; 37 A. 31; 12 A. L. J. 1244; 16 Cr. L. J. 43, followed.

Case reported by the Sessions Judge, Wardha, under section 438, Criminal Procedure Code.

Revision of the order of the Magistrate, 1st Class, Wardha, dated the 13th August 1918.

The Hon'ble Mr. G. P. Dick, for the Crown.

Mr. M. Y. Sharif, for the Accused.

ORDER.—This case has been reported under section 438, Criminal Procedure Code, by the District and Sessions Judge, Wardha. The accused Nurkhan was convicted by the Sub-Divisional Magistrate, Wardha, of an offence under section 380, Indian Penal Code, viz., the theft of a silver necklace from the person of a child. He was released under section 562, Criminal Procedure Code, no substantive sentence being imposed. The District and Sessions Judge represents that the case was one in which a sentence of whipping or imprisonment should have been imposed. Notice was issued to the accused to show cause why such an order should not be passed. He has been represented by Counsel who has shown such cause and the Standing Counsel has appeared in support of the reference.

The case is a very clear one. The accused entered the house where the child was asleep at noon and removed the necklace from her person; there were, it may be mentioned, no adults in the house at the time. I see no reason to doubt the soundness of the conclusions arrived at by the trying Magistrate and the Sub-Divisional Magistrate on the questions of fact involved in the case, nor would it be the custom of the Court to do so in such a reference as the present.

Counsel for accused, however, relies on *Emperor v. Ghasite* (1), in support of his position that a sentence of imprisonment or whipping cannot be imposed in the present case. That decision, if accepted, no doubt concludes the present case, but the learned Government Advocate has argued that the learned Judge who was responsible for the above decision has overlooked the provisions of section 435 of the Criminal Procedure (1) 26 Ind. Cas. 635; 37 A. 31; 12 A. L. J. 1244; 16 Cr. L. J. 43.

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Code. On the whole, however, I am of opinion that section 439 pre-supposes that a sentence has been imposed: it is no doubt an unintentional omission of the Legislature that no specific provision has been made in that section by a use like the present but until this omission has been supplied, I think this Court is debarred from interfering. That the accused should escape on what is after all a technicality is perhaps regrettable, for an offence of this nature committed on a defenceless child doubtless merited a substantive sentence.

The learned Standing Counsel also urged that the offence amounted to robbery and that, therefore, the order under section 562, Code of Criminal Procedure, was in any case wrong. I am unable, however, on the evidence to hold that the necessary constituents of the offence of robbery are present: no hurt or wrongful restraint was caused or threatened to be caused to the child.

In the circumstances, therefore, I decline to interfere. Let the proceedings be returned accordingly.

Proceedings returned.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REPORT No. 10 OF 1918.

February 28, 1918.

Present:—Mr. Pratt, J. C., and

Mr. Crouch, A. J. C.

EMPEROR—APPLICANT

versus

SUMAR AND OTHERS—OPPONENTS.

Criminal Procedure Code (Act V of 1898), s. 250—Compensation, order to pay, against person instigating the giving of false information, validity of.

Section 250 of the Criminal Procedure Code does not warrant an order to pay compensation against a person who only instigates the giving of false information but who does not himself make the complaint or give the information to the Police. [p. 981, col. 1; p. 980, col. 2.]

Report made by the 2nd Additional Sessions Judge, Hyderabad, against the order of the City Magistrate, Hyderabad.

Mr. T. G. Elphinstone, 1st Assistant Public Prosecutor, for the Crown.

JUDGMENT.—This is a report by the Additional Sessions Judge, Hyderabad, under section 438, Criminal Procedure Code, for revision of an order passed by the City Magistrate, Hyderabad.

The case before the City Magistrate was one in which 2 accused were prosecuted for the offence of theft on an information to the Police by Din Mahomed, who had been instructed to do so by Haji Ahmed, the owner of the stolen cattle. The City Magistrate discharged the accused and finding that the prosecution was frivolous or vexatious, made an order, under section 250, Criminal Procedure Code, requiring Haji Ali Ahmed, whom he describes as the complainant, to pay to the accused Rs. 100 as compensation.

The Additional Sessions Judge refers the case to us on the ground that it was not competent for the City Magistrate to make that order.

The Magistrate was clearly wrong in describing Haji Ahmed as the complainant, for no complaint had been filed in the case. The case was instituted not upon complaint, but upon information to the Police which was lodged by Din Mahomed. If the Magistrate considered that Din Mahomed was responsible for the false accusation, it was open to him to require Din Mahomed to pay compensation. But if the Magistrate found that Din Mahomed was not responsible for the false accusation, he could not make an order against Din Mahomed for the reasons given by this Court in the case of *Emperor v. Kouro* (1), viz., that the object of the section is that compensation should be recoverable from the person responsible for the false accusation. But as pointed out by the Additional Sessions Judge, the effect of that ruling is that when the person who actually gives the information does not know his complaint to be false, he cannot be made to pay compensation, and it does not imply the converse proposition that the person responsible for the false accusation can be made to pay the compensation, even if he does not himself make the complaint or give information to the Police.

(1) 42 Ind. Cas. 738; 11 S. L. R. 55; 18 Cr. L. J. 1005.

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Section 250, Criminal Procedure Code, does not warrant an order to pay compensation against a person who only instigates the giving of false information.

We, therefore, reverse the order of the lower Court and direct that the compensation, if paid, be refunded to Haji Ahmed.

Order reversed.

MADRAS HIGH COURT,
CRIMINAL REVISION CASE No. 675 OF 1917.
(CRIMINAL REVISION PETITION No. 534 OF 1917).

June 6, 1918.

Present:—Mr. Justice Kumaraswami Sastri.
P. J. MELLOR, CUSTODIAN OF ENEMY
PROPERTY AND LIQUIDATOR OF
HOSTILE FIRMS, BOMBAY, BROUGHT ON
RECORD IN THE PLACE OF MENASCHI—
COMPLAINANT—PETITIONER

versus

A. M. MUTHIAH CHETTY—ACCUSED—
RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 253, 435, 439—Revision against order of discharge—High Court, jurisdiction of—Interference, limits of—Alien enemy trading under license, whether competent to file complaint or move High Court in revision—Internment after filing of revision petition under Enemy Ordinance, effect of—Confession, extra-judicial, value of.

In dealing with revision petitions against orders of discharge of accused persons by Magistrates, the High Court will apply the same principles as are applicable to cases of petitions to revise orders of acquittal. In either case the High Court will not interfere where there is no clear error or defect in the proceedings of the lower Courts which has resulted in grave injustice but the question is merely one as to the appreciation of doubtful evidence. [p. 984, col. 1.]

It is competent to an alien enemy residing in British India by license of the King to complain against crimes directed against his person or property and to apply in revision to the High Court against any order of a Magistrate discharging the accused on the materials placed before him. [p. 982, col. 2; p. 983, col. 1.]

The internment of an alien subject, after he has filed a revision petition, does not necessarily stay the hands of the High Court. [p. 983, col. 1.]
Porter v. Freudenberg, (1915) 1 K. B. 857; 84 L. J. K. B. 1001, explained.

Evidence as to extra-judicial confessions of his guilt by an accused person is by itself of very little importance, as such evidence is easy to adduce and difficult to rebut. [p. 984, col. 2.]

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order, dated the 8th October 1917, of the Court of the Chief Presidency Magistrate, Egmore, in Calendar Case No. 9220 of 1917.

FACTS appear from the judgment.

The Crown Prosecutor, on behalf of the Crown, and Mr. Nugent Grant (with him Messrs. S. Guruswami Chetti and K. G. Babu Row), on behalf of the Accused, took the preliminary objection that the petitioner, being an enemy subject, who was under internment, was not entitled to invoke the aid of the Criminal Court and to continue the proceedings in revision filed by him in the High Court.

The Hon'ble Mr. T. Richmond, for the Petitioner.—The petitioner was trading in British India under a license both when he filed the complaint and when he filed the revision petition in the High Court. He is thus placed on a footing of equality with other subjects of His Majesty the King. Besides, the disability to institute civil proceedings does not extend to criminal proceedings. It will lead to disastrous results if persons could be allowed to commit offences against the person or property of alien enemy subjects with impunity. In all criminal cases the prosecution is in the name of the King-Emperor on the information of a private party, and there is nothing to prevent an alien enemy from moving the machinery of the Criminal Court. In revision the High Court is empowered to act *suo motu* and any statutory disability of the complainant arising after the filing of the revision petition in the High Court will not stop proceedings or prevent justice taking its course. The internment of the original complainant is no impediment to the revision proceedings being conducted to the end.

On the merits, the lower Court has not correctly appreciated the evidence, or considered the effect of the accused's confessions as to the pledge of diamonds. The High Court can interfere, in revision against orders of discharge, on questions of fact though in cases of acquittals, its interference is generally more limited.

Mr. Nugent Grant for the Respondent.—The complainant's license had already been cancelled when the revision petition filed by

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him was ripe for hearing, and he has no *locus standi* to continue the proceedings.

The Magistrate has considered all the prosecution evidence and arrived at the conclusion that there was no case for the accused to meet. His finding should not be interfered with by the High Court unless it is opposed to the evidence or is manifestly unjust. The principles governing revisions against acquittals are equally applicable to petitions filed to revise orders of discharge. The lower Court had the witnesses before it when giving evidence and was competent to judge of their demeanour and its conclusion should not be lightly disturbed.

ORDER.—This is an application to revise the order of the Chief Presidency Magistrate discharging the accused under section 252 of the Criminal Procedure Code.

Both the complainant and the accused were diamond merchants, the former carrying on business in Bombay and the latter in Madras. The case for the prosecution is that complainant used to send on approval diamonds to the accused in parcels bearing prices, weights in carats, and numbers, that accused used to communicate his acceptance of the price or make counter-offers, that in the event of the parties agreeing as to the price the same was paid by the accused either in cash or by means of *Hundis* according to the terms under which they carried on business, and that the accused got from the complainant four packets of diamonds marked 4695, 4696, 4665 and 4666 which were sent to him at his request, which packets he pledged before any property in them passed to him without the knowledge or consent of the complainant. It is also alleged that the accused was in a hopelessly insolvent condition when he asked for the diamonds and that he asked the complainant to send them to him, not for any *bona fide* purpose of his trade, but to raise money thereon for his own benefit and that he was guilty both of criminal breach of trust and of cheating.

The Chief Presidency Magistrate was of opinion that no case had been made out which would justify his calling upon the accused to enter upon his defence and discharged him under section 253, Criminal Procedure Code. He held that it had not been shown that the accused was in

insolvent circumstances when he asked the complainant to send him the diamonds and that it had not been proved that the diamonds sent by the complainant had been pledged by the accused. The learned Magistrate also was of opinion that the complainant knew that the accused was dealing with the diamonds sent before prices had been settled and that the complainant, with a view to pushing on his trade, threw all caution to the winds.

A preliminary objection has been taken that the complainant, who is an alien enemy now interned, has no right to invoke the aid of the Court and that the criminal revision petition filed by him ought to be dismissed. No objection was taken in the lower Court as to his competence to file the complaint, the objection being raised for the first time when the criminal revision petition was taken up by me for disposal. There is no dispute as to the facts. The complainant who is an enemy subject was carrying on business in Bombay under license both when he filed the complaint in the Presidency Magistrate's Court and the revision petition in the High Court. His license was cancelled by an order of Government dated 8th December 1917, and the business carried on by him was directed to be wound up. On the 5th February 1918 Mr. Mellor as custodian of enemy property applied to the High Court for permission to be brought on record and to continue proceedings in the High Court, and permission was granted by Mr. Justice Bakewell on the 8th February 1918.

There is, so far as I can see, nothing to warrant the view that an alien enemy has no right to complain against crimes directed against his person or property or that a subject of His Majesty the King-Emperor can with impunity violate the provisions of the Indian Penal Code simply because the offence is committed in respect of an alien enemy. In criminal cases it is the King Emperor who prosecutes in vindication of his peace and though the complainant brings the facts to the cognizance of those charged by the Crown to administer justice, it is the Crown that prosecutes. I do not think that Courts exercising criminal jurisdiction, whether original or appellate, can decline to exercise

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it simply because the offence is committed against the person or property of an alien enemy.

So far as criminal revision petitions to the High Court are concerned, sections 437 and 439 of the Criminal Procedure Code empower the High Court to proceed either *suo motu* or on the facts being brought to its notice by any persons, not necessarily the complainant. There is, therefore, nothing to prevent the High Court from revising the order of the Chief Presidency Magistrate discharging the accused on the application of the custodian of enemy properties, where the offence is committed in respect of property which would in law vest in him.

It is also clear that the complainant was living and carrying on business in India under a trading license both when he filed the complaint and the criminal revision petition. When an alien enemy resides in the country by license of the King and under his protection, he stands on the same footing as an alien friend or an ordinary subject so far as the right of maintaining actions is concerned, the right of suit being incidental to the right of protection. *Porter v. Freudenberg* (1), *Volkl v. Rotunda Hospital* (2), *Princess of Thurn and Taxis v. Moffitt* (3) and *Rex v. Vine Street Police Superintendent* (4) are authorities clearly in point. The complaint and revision petition were, therefore, instituted by a person legally competent to do so.

As a criminal revision petition is not in the nature of an appeal, which under the Code of Criminal Procedure must necessarily be filed by the accused in the case of a conviction or by the Government in the case of an acquittal, and as under sections 437 and 439 of the Code the High Court can act in revision where facts are brought to its notice by any person and not necessarily by a party to the original proceeding, the internment of the complainant after the filing of the criminal revision petitions does not necessarily stay the hands of the High Court. All that was decided in *Porter v. Freudenberg* (1) was that the appeal filed by an alien enemy

plaintiff before the war should be suspended till the restoration of peace. The position of a person who was residing and carrying on business in the country under a license from the Crown and so entitled to file a criminal appeal or revision but whose license has been revoked before the appeal or revision petition comes on for trial, could not be worse. In any view the revision petition cannot be dismissed as contended for by the Crown Prosecutor and Counsel for the accused. It can at the most only be ordered to lie over till the end of the war. For the reasons already given, I am of opinion that it is open to the High Court to dispose of the criminal revision petition against the order of discharge on the application of the custodian of enemy property. I overrule the preliminary objection and shall proceed to deal with the case on the merits.

As the learned Chief Presidency Magistrate heard all the evidence adduced by the prosecution and has written an order giving his reasons for not acting on the prosecution evidence, oral and documentary, the order, though not technically an order of acquittal, should, in my opinion, be dealt with on the same principles as would be applied to a case of acquittal. There is, in my opinion, very little difference in substance between the case of a person who has been discharged after all the prosecution evidence has been taken and weighed by the Magistrate and that of a person who is acquitted after a charge has been framed. In the former case the Magistrate considers that the prosecution evidence is so weak that there is nothing for the accused to meet and in the latter case the evidence, though sufficiently strong to call upon the accused to meet it, has, in the opinion of the Magistrate, been met by the defence. There is no reason why different tests should be applied in revision or why an accused against whom the prosecution evidence is weak should be in a worse position than one against whom it is strong enough to warrant a charge being framed. The observations in *Emperor v. Kiru* (5) are in point.

In the case of revision petitions against orders of acquittal Courts have been either

(1) (1915) 1 K. B. 857; 84 L. J. K. B. 1001.

(2) (1914) 2 K. B. Ir. 543.

(3) (1915) 1 Ch. D. 53; 84 L. J. Ch. 220.

(4) (1916) 1 K. B. 233; 85 L. J. K. B. 210.

(5) 11 Ind. Cas. 132; 12 Cr. L. J. 364 at p. 369; 10 P. R. 1911 Cr.; 24 P. W. R. 1911 Cr.; 205 P. L. R. 1911 (F. B.).

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unwilling or very reluctant to interfere in revision at the instance of private parties. *Thandavan v. Periana* (6), *Heera Bai v. Framji Bhikaji* (7), *Sheikh Amin-ud-din, In the matter of* (8), *Emperor v. Madar Bakhsh* (9) and *Faujdar Thakur v. Kasi Choudhuri* (10). It is well settled that Courts will not interfere, when there is no clear error or defect in the proceedings of the lower Courts which has resulted in grave injustice but the question is merely one as to appreciation of doubtful evidence. I need only refer to *Sinnu Gounden, In re* (11), *Emperor v. Madar Bakhsh* (9), *Faujdar Thakur v. Kasi Choudhuri* (10), *Natesa Padayachi, In re* (12), *Emperor v. Lakshminarayana Aiyar* (13), *Ahmedabad Municipality v. Maganlal Kushaldas* (14) and *Vellayanambalam v. Solai Servai* (15). I am of opinion that a rule equally strict should be applied to cases of revision against orders of discharge based on a consideration of all the prosecution evidence, when no evidence has been shut out and there is no illegality or irregularity in the procedure adopted by the Court.

Applying these considerations to the facts of the present case, I do not think I ought to interfere with the order of discharge. So far as the charge of cheating is concerned, I do not think it has been satisfactorily established before the Magistrate that the accused, when he asked the complainant to send the diamonds, was unable to pay for them. The arrangement between the parties was that he was to have credit for £7,000 and that he was to pay Rs. 6,000 a week. The complainant admits that till February 1917 the accused was making payments regularly and that in February complainant raised accused's credit to £7,000 and gave him

additional facilities for payment. It is not alleged that, when the accused asked the complainant to send him the parcels which formed the subject-matter of the complaint, he had dishonoured any of the Hundis drawn on him by the complainant. The fact that he was in financial difficulties in July would not necessarily show any dishonest intention in April, especially as the accused to the knowledge of the complainant used to sell diamonds to other parties and remit moneys out of the sale-proceeds when the Hundis fell due.

As regards the charge of criminal misappropriation in respect of parcels 4695 and 4696, these diamonds are *melee* or small diamonds. There is nothing particular by which they can be identified. It is difficult from the complainant's evidence or the documents filed by him to arrive at any date from which it can be reasonably certain that the diamonds pledged by the accused are the diamonds which were sent by the complainant in packets numbered 4695 and 4696. I attach very little importance to the evidence adduced by the complainant as to the accused having orally admitted his having pledged the diamonds. Such evidence is easy to adduce and difficult to rebut. I agree with the Chief Presidency Magistrate that no *prima facie* case has been made out as regards parcels 4695 and 4696.

Turning to parcels 4665 and 4666 the learned Magistrate, though admitting that the case was somewhat stronger, was not prepared to accept the evidence of the complainant that the parcels pledged with P. W. No. 1 were the diamonds sent by him. He observes: "In Court P. W. No. 2 (the complainant) has been put to several tests to see if he can identify the stones now before the Court as those described in his mixture book, but I am bound to say that though he has made a good bid for it, he has failed to satisfy me that he can with absolute certainty describe his own diamonds, and even the prosecution does not press this point in the identification of stones." The Magistrate also believed that the letters of hypothecation were genuine and was of opinion that there was a difference between the number and weight of the stones sent by the complainant and those

- (6) 14 M. 363; 2 Weir 571; 5 Ind. Dec. (N. S.) 253.
- (7) 15 B. 349; 8 Ind. Dec. (N. S.) 238.
- (8) 24 A. 346; A. W. N. (1902) 89.
- (9) 25 A. 128; A. W. N. (1902) 200.
- (10) 27 Ind. Cas. 186; 19 C. W. N. 184; 42 C. 612; 21 C. L. J. 53; 16 Cr. L. J. 122.
- (11) 23 Ind. Cas. 188; 26 M. L. J. 160; (1914) M. W. N. 273; 15 Cr. L. J. 236; 38 M. 1028.
- (12) 29 Ind. Cas. 830; 28 M. L. J. 690; 17 M. L. T. 457; (1915) M. W. N. 411; 16 Cr. L. J. 658.
- (13) 5 Criml. Law Review 78.
- (14) 9 Bom. L. R. 156; 5 Cr. L. J. 171.
- (15) 30 Ind. Cas. 152; 28 M. L. J. 692; (1915) M. W. N. 540; 16 Cr. L. J. 600; 39 M. 505.

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pledged by the accused. The case as regards those stones was fully argued by both sides, and giving it my best consideration I cannot say that there is any such error or defect in this judgment of the Magistrate as would justify me in setting aside the discharge and sending the case back for enquiry. If I had to try the case as an Original Court, I would probably have on the materials placed before me framed a charge and put the accused on his defence; but the question is whether, sitting in revision, I would be justified in setting aside the order of the trial Judge who had the advantage of seeing the demeanour of the witnesses and who was not favourably impressed with the complainant's evidence. As a civil suit will probably be filed, I do not think it expedient to go into the facts in detail or give my opinion as to the various points that have been urged. It is sufficient for me to say that the present case has not satisfied the requisites laid down by the cases above referred to and I do not think it proper to re-open the enquiry.

I, therefore, dismiss the petition. The diamonds which are with the pledgees will be kept by them on the same terms as at present till 15th July.

M. G. P.

Petition dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 100-B OF 1916.

November 1, 1916.

Present:—Sir Henry Stanyon, Kt., J. C.

EMPEROR—PROSECUTOR

versus

RAI SINGH AND ANOTHER—ACCUSED.

Criminal Procedure Code (Act V of 1898), ss. 107, 112, 537—Security for breach of peace—Accused agreeing to give security—Breach of peace, proof of, absence of—Order, legality of—Disregard of express law, whether irregularity or illegality.

A Magistrate called upon the accused under section 112 of the Criminal Procedure Code to show cause why they should not furnish security to keep the

peace under section 107, Criminal Procedure Code, on the ground that they were members of an unlawful assembly which passed a mosque with loud music and which intended to cause a breach of the peace by repeating this procedure. The accused denied these allegations but expressed their willingness to execute bonds to keep the peace. Thereupon the Magistrate directed them to execute bonds for Rs. 100 to keep the peace for one year.

Held, that the order was illegal, inasmuch as the accused denied every allegation on the basis of which they were considered liable to furnish security and no evidence was taken to prove those allegations. [p. 986, col. 2.]

Ram Chandra Halder v. Emperor, 35 O. 674; 8 C. L. J. 68; 8 Cr. L. J. 128, *Palaniappa Asary, In re*, 6 Ind. Cas. 682; 34 M. 139; 7 M. L. T. 304; (1910) M. W. N. 228; 11 Cr. L. J. 393, *Prathipati Venkatasami v. Emperor*, 30 M. 330; 17 M. L. J. 407; 2 M. L. T. 329; 6 Cr. L. J. 278, *Mul Chand v. Emperor*, 26 Ind. Cas. 653; 37 A. 30; 12 A. L. J. 1262; 16 Cr. L. J. 61, followed.

A disregard of the express provisions of the law is not a mere irregularity which can be condoned or remedied but an illegality and the Court cannot maintain or overlook an illegal order upon any ground of administrative convenience. [p. 986, col. 1.]

Subrahmania Ayyar v. King-Emperor, 25 M. 61; 11 M. L. J. 283; 3 Bom. L. R. 540; 28 I. A. 267; 5 O. W. N. 866; 2 Weir 271; 8 Sar. P. C. J. 160 (P. C.), followed.

Report made by the Sessions Judge, West Berar, under section 438, Criminal Procedure Code, against the order of the Magistrate, 1st Class, Akola, in Criminal Case No. 3 of 1916, on 25th August 1916, under section 107, Criminal Procedure Code, ordering each of the accused to execute a bond of Rs. 100 with one surety for Rs. 100 to keep the peace for one year.

Messrs. P. S. Kotwal and Ghate, for the Non-Applicant.

JUDGMENT.—This case has been reported under section 438 of the Criminal Procedure Code, 1898, as applied to Berar, by the Sessions Judge of West Berar. The facts are these. A Magistrate of the 1st Class at Akola made an order under section 112 of the said Code declaring that two Hindus, namely, Rai Singh and Daolat, had allegedly been members of a procession which, contrary to established usage, had passed by a Musalman mosque on the 31st July 1916 accompanied by loud music and that they apparently intended to cause a breach of the peace by repeating this procedure at the coming Pola festival. The same order called upon Rai Singh and Daolat to show cause why they should not furnish security under section 107 of the same Code. In answer to this Rule the

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said persons appeared before the Magistrate, who asked them to show cause. Rai Singh and Daolat denied having been members of the procession of the 31st July 1916, expressed their readiness to observe the custom of stopping clamorous music while passing the mosque, denied that they had any intention of disturbing the peace on the Pola day, added that they are willing to execute a bond to convince the Magistrate of their peaceful intentions. Thereupon the Magistrate directed Rai Singh and Daolat each to execute a bond in Rs. 100 to keep the peace for a year. The learned Sessions Judge reports this order as illegal. A Rule issued to the District Magistrate, in response to which he candidly admits the irregularity of the order but asks that it may be maintained as expedient.

I have every sympathy for the view put forward by the learned District Magistrate, and I fully appreciate the difficulties which sometimes arise from Hindu musical processions going past Musalman mosques and the advisability of doing nothing to weaken the hands of the executive by undue interference with preventive action upon technical grounds. But as pointed out by the Supreme Tribunal in *Subrahmanya Ayyar v. King-Emperor* (1), the disregard of express provisions of law is not a mere irregularity which can be condoned or remedied, but an illegality and this Court cannot maintain or overlook an illegal order upon any ground of administrative convenience.

The provisions of the Criminal Procedure Code are clear enough as to the procedure which must be followed where an accused person disputes the truth of the information laid against him, but if it is necessary to supplement the eventually published judicial interpretation of it, that requirement can be satisfied by referring to *Ram Ohandra Haldar v. Emperor* (2), *Palaniappa Asary, In re* (3), *Prathipati Venkatasami v. Emperor* (4) and *Mul Ohand v. Emperor* (5).

(1) 25 M. 61; 11 M. L. J. 232; 3 Bom. L. R. 540; 28 I. A. 257; 5 C. W. N. 866; 2 Weir 271; 8 Sar. P. C. J. 160 P. C.).

(2) 35 C. 674; 8 C. L. J. 68; 8 Cr. L. J. 128.

(3) 6 Ind. Cas. 682; 84 M. 139; 7 M. L. T. 304; (1910) M. W. N. 223; 11 Cr. L. J. 393.

(4) 30 M. 330; 17 M. L. J. 407; 2 M. L. T. 329; 6 Cr. L. J. 278.

(5) 26 Ind. Cas. 653; 37 A. 30; 12 A. L. J. 1262; 16 Cr. L. J. 61.

The accused denied every allegation upon the basis of which they were considered liable to furnish security and not a shred of evidence was taken to prove them. A Magistrate cannot enter into a compromise with an accused person for the purpose of disposing of a criminal case. Criminal liability arises out of acts and intentions which, if not admitted, must be legally proved. That is not an abstruse proposition of law, it is an obvious rule of common sense. Suppose these two persons having been brought before the Magistrate accused of assault or theft had denied the offence but added that they were willing to undergo conviction in token of their innocence, would the Magistrate have been justified in convicting them, even for the purpose of dealing with them as first offenders and releasing them on probation of good conduct? Obviously not. Yet that is very like what he has done in this case. He has convicted them without evidence of acts and intentions which they denied. The order was absolutely illegal and cannot be sustained.

For the above reasons the order directing Rai Singh and Daolat to execute security bonds is set aside and the bond or bonds executed by them are discharged.

Order set aside.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REPORT No. 16 of 1918.

March 14, 1918.

Present:—Mr. Pratt, J. C., and

Mr. Crouch, A. J. C.

EMPEROR—APPLICANT

versus

NADAR—OPPONENT.

Criminal Procedure Code (Act V of 1898), s. 250—Compensation, order to pay, where complaint vexatious in one particular, validity of.

An order for compensation under section 250, Criminal Procedure Code, cannot be justified merely because the complaint filed was vexatious in one particular. An award of compensation can only be made where there has been a complete discharge or acquittal of the accused on all the heads of the charges against him. [p. 987, cols. 1 & 2.]

Report made by the Additional Sessions Judge, Sukkur, against the order of the First Class Magistrate, Tando Adam,

JAIWANTI V. EMPEROR.

Mr. T. G. Elphinstone (Acting Public Prosecutor for Sind), for the Crown.

JUDGMENT.—This is a report by the Additional Sessions Judge, Sukkur, inviting our revision of an order made by the First Class Magistrate, Tando Adam, under section 250, Criminal Procedure Code, directing the complainant to pay the accused a sum of Rs. 50 as compensation for bringing a false or vexatious complaint.

The complainant, a Bania and a petty land-owner, refused to grant the accused a further lease of his land; and this refusal led to a quarrel in the course of which the complainant sustained injuries which necessitated his going to hospital. The complainant then filed a complaint against the accused for hurt under section 323, Indian Penal Code, and criminal intimidation under section 506, Indian Penal Code, and theft under section 379, Indian Penal Code. The charge of theft referred to the loss of complainant's ear-ring. The complainant said that the ear-ring was dropped on the ground in the course of a quarrel and the accused picked it up and refused to return it.

The Magistrate discharged the accused on each of these offences, but it cannot be said that the charges under section 323 or 506 were frivolous or vexatious. A threat was uttered and the Bania did receive injuries in the quarrel and his witnesses depose that those injuries were inflicted by the accused. But the Magistrate has discharged the accused only because he thinks the witnesses are unreliable and their evidence perhaps exaggerated. There is, however, reason for thinking that the charge under section 379 was vexatious. The Magistrate disbelieves the evidence that the accused took the ear-ring and accusations of theft are very often introduced into complaints of petty assaults in the hope of the complainant receiving immediate attention either from the Magistrate or from the Police.

But we do not think the order for compensation can be justified merely because the complaint filed was vexatious in one particular. No doubt the words used in section 250 are that the accusation is frivolous or vexatious, and this wording might be construed as referring to the accusation in respect of each individual charge.

But if this be the correct construction of the section, it would lead to the result that the accused might under the same complaint be convicted and sentenced on one head of charge and yet awarded compensation on another head. It was held in the case of *Mukti Beva v. Jhotu Santra* (1) that this was not the correct construction of the section and the award of compensation could only be made when there has been a complete discharge or acquittal. We think the intention of the section is that an accused person who has been unnecessarily brought to Court should receive compensation from the person making the false accusation. That is not the case here, for whether the accused did or did not steal the ear-ring there were good grounds for the complainant obtaining process to enforce his attendance in Court to answer other charges of hurt and criminal intimidation.

We accordingly reverse the order made by the Magistrate under section 250, Criminal Procedure Code, and direct the compensation, if paid, to be refunded.

Order reversed.

(1) 24 C. 33; 1 C. W. N. 17; 12 Ind. Dec. (N. S.) 700.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 42-B OF 1916.

June 17, 1916.

Present:—Mr. Pridéaux, A. J. C.

Musammat JAIWANTI—APPLICANT

versus

RAMRAO—NON-APPLICANT.

Criminal Procedure Code (Act V of 1898), ss. 145 (4), 148, 435, 439—Proceedings under Chapter XII—Local enquiry—Procedure—Order passed without taking evidence—Jurisdiction—Revision—High Court, power of interference of.

A High Court cannot ordinarily interfere in revision under sections 435 and 439 of the Criminal Procedure Code with proceedings under Chapter XII of the Code, but it has power to interfere where the subordinate Court has passed an order without giving the parties an opportunity of calling evidence, and has thus acted without jurisdiction. [p. 988, col. 2.]

GURUMURTHI CHETTI, *In re*.

Kolha Koer v. Muneswar Tewari, 34 C. 840; 6 Cr. L. J. 452, followed.

Where in a proceeding under section 145 of the Criminal Procedure Code, a local inquiry is directed to be made, the result of the local enquiry becomes a part of the proceeding and the party affected by it is entitled to be made acquainted with the result thereof and should be given an opportunity of rebutting the report.

A Magistrate deputed to hold a local enquiry under the provisions of section 148 (1), Criminal Procedure Code, should hold the enquiry himself and should not delegate it to somebody else.

Revision of the order of the Sub-Divisional Magistrate, Amraoti, in Miscellaneous Case No. 150 of 1915, decided on the 9th December 1915.

Mr. K. K. Gandhi, for the Applicant.

Mr. S. K. Barlingay, for the Non-Applicant.

ORDER.—The procedure adopted by the Magistrate who had tried this case is contrary to the provisions of section 145 (4) of the Criminal Procedure Code. The local enquiry directed was made by the Naib-Tahsildar, a Third Class Magistrate, and not by the Tahsildar, the First Class Magistrate, but on this ground alone I would not interfere. The order-sheet shows, the parties put in their written statements on the 30th August 1915, on which date the case was adjourned to the 16th September 1915 for the Tahsildar's report. This was not returned by that date and the order passed then ran.

"No local enquiry papers have been received from the Tahsildar, Amraoti. Parties told not to attend this Court as the result of this case will be made known to them through the Tahsildar. Put up on the 30th September 1915."

This order is written by some clerk and initialled by the Magistrate. There are three similar adjournment orders written by a clerk, the last being of the 15th November 1915. It is: "put up on the 30th November 1915."

The next order, apparently passed without notice to the parties, is the final order of the 9th December 1915, directing that Ramrao was entitled to possession of the field No. 16 of suit.

When the local enquiry had been made and the result reported, it became part of the proceedings, and the party affected by it was entitled to be acquainted with the result thereof and should have been given an opportunity of rebutting the report. In

the present case it is clear that applicant has had no opportunity of calling the evidence contemplated by section 145 (4) of the Criminal Procedure Code.

I know of the ruling laying down that a High Court cannot interfere in revision under sections 435 and 439 with proceedings under Chapter XII of the Criminal Procedure Code, but it is settled law that this Court can interfere where the subordinate Court has acted without jurisdiction, and it seems to me that in the present case I must hold following *Kolha Koer v. Muneswar Tewari* (1), that the order passed without giving a party an opportunity of calling evidence is without jurisdiction, and as such I have power to set it aside. I do so and direct that the Magistrate will come to a fresh decision after giving the parties an opportunity of adducing evidence. I may add that in these cases a Tahsildar, deputed to hold a local enquiry under the provisions of section 148 (1) of the Criminal Procedure Code, should not pass on the enquiry to his Naib. He has not legally the power to do so. Many Naib-Tahsildars are now Third Class Magistrates, and they can be employed for this purpose by the Magistrate trying the case direct. A local enquiry should not, as a rule, be directed on matters, which may be proved by evidence, such as actual possession. It is the business of the Magistrate to record this himself.

Order accordingly.

(1) 34 C. 840; 6 Cr. L. J. 452.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 270 OF 1918.
(CRIMINAL REVISION PETITION No. 213 OF 1918).

September 27, 1918.

Present:—Mr. Justice Kumaraswamy Sastri.
In re GURUMURTHI CHETTI—ACCUSED—
PETITIONER.

Explosives Act (IV of 1884), s. 4 (1), (2)—China crackers, whether explosives—Rules framed under the Act, rr. 3, 71—Toy fireworks—Presumption—Possession of explosives—License to possess certain quantity for specified period—Contravention of conditions of license—Offence.

GURUMURTHI CHETTI, *In re*.

China crackers are explosives within the meaning of clauses (1) and (2) of section 4 of the Explosives Act. [p. 939, col. 2.]

The onus is on the person in possession of explosives to show that they are toy fireworks under rule 3 of the rules framed under the Act. [p. 990, col. 1.]

Emperor v. Rachapa Gurappa Hattarvat, 37 Ind. Cas. 491; 18 Bom. L. R. 556; 18 Cr. L. J. 139 and *Emperor v. Bansidhar*, 5 Ind. Cas. 911; 5 P. R. 1910 Cr.; 9 P. W. R. 1910 Cr.; 11 Cr. L. J. 287, distinguished.

The whole scheme of the rules framed under the Explosives Act is to require a separate license for possession, at any one time and place, of explosives in addition to a license to import, during a particular period. Where a permit for possession is granted limiting the quantity to be possessed at any specified period or at any particular place, the permission to import a larger quantity during the longer period must be read subject to the quantity in possession being exhausted or reduced below the maximum for which possession is permitted. [p. 990, col. 1.]

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Sub-Divisional Magistrate, Cuddalore, in Criminal Appeal No. 3 of 1918, preferred against the judgment of the Court of the Stationary 2nd Class Magistrate, Chidambaram, in Civil Case No. 19 of 1917.

Mr. T. V. Gopalaswamy Mudaliar, for the Petitioner.—The accused was in possession only of China crackers which are not explosives. Under rule 3 of the rules framed under the Act toy fireworks are not within the meaning of section 4, *Emperor v. Rachapa Gurappa Hattarvat* (1) and *Emperor v. Bansidhar* (2). Crackers are toy fireworks only. The fact that petitioner, obtained license for possession of crackers will not place them in the category of explosives.

Then again, under the terms of the last license Exhibit A, the petitioner was at liberty to import 10,000 lbs. of fireworks till 31st December 1917. This virtually superseded the earlier permits, which restricted the quantity to be possessed still further. The petitioner could not be charged for possessing any quantity under 10,000 lbs. The permission is available to him till 31st December.

The Public Prosecutor, for the Crown.—Crackers are explosives which fall under the mischief of section 4 of the Explosives

Act. The section is wide enough to include crackers. Petitioner has not shown, by evidence, that they are toy fireworks which are excepted under rule 3. The cases relied on by petitioner's Vakil bear on their facts and do not lay down any rule of general or universal application.

The petitioner could not possess more than 1,000 lbs. at a time. He cannot take shelter under the terms of the last license, which prescribes the maximum quantity that may be stocked by him during the year. All the 3 licenses should be read together. The earlier licenses define the quantity which the licensee may be in possession of for a given period, and it is only when that quantity is diminished or exhausted that he could import more. The fixing of the maximum was made on grounds of convenience and so as to obviate the necessity for applying for licenses at each reduction of the stock below 1,000 lbs.

ORDER.—The petitioner obtained in April 1917 a license Exhibit C, which licensed him to possess and sell fireworks. It limited the maximum quantity possessed at any time to (fifty) 50 lbs. In August 1917 he obtained the permit Exhibit B to possess fireworks not exceeding 1,000 lbs. for a period of seven days from 7th November 1917 to 13th November 1917. In October 1917 he got a license Exhibit A to import 10,000 lbs. of fireworks, the license being valid till 31st December 1917. He was charged and convicted for possessing 2,325 lbs. of China crackers on 7th November 1917 and thus contravening the terms of the license Exhibit B. His plea before the Magistrate was as follows: 'I admit what I did is wrong I did so misunderstanding the rules. I am guilty.' He was sentenced to pay a fine of Rs. 100 which, on appeal, was reduced to Rs. 50.

Two points are urged in revision. It is argued (1) that China crackers are not explosives, and (2) that the license to import being for 10,000 lbs., he is not guilty of any offence.

As regards the first point, section 4, clauses 1 and 2 of the Indian Explosives Act, IV of 1884, are wide enough to include crackers and the only question is, whether the crackers in the possession of the accused fall under rule 3 of the rules framed,

(1) 37 Ind. Cas. 491; 18 Bom. L. R. 556; 18 Cr. L. J. 139.

(2) 5 Ind. Cas. 911; 5 P. R. 1910 Cr.; 9 P. W. R. 1910 Cr.; 11 Cr. L. J. 287.

PILAJI V. DARYA.

which exclude toy fireworks from the operation of the Act. The onus is on the accused to show that the fireworks in his possession fall within the description of toy fireworks. This is in all cases a question of fact and, in the present case, I do not see how in the absence of any evidence I can hold that the crackers are toy fireworks, especially when he took the trouble of getting licenses for crackers on the footing that they fell under the Explosives Act. *Emperor v. Kachapa Gurappa Hattarvat* (1) and *Emperor v. Bansidhar* (2) referred to by the petitioner's Vakil proceeded on the nature of the fireworks in question in those cases, and cannot be taken as authorities to show that crackers are as a rule to be excluded from the category of explosives.

The second objection is that the possession of the import license superseded the terms of the license Exhibits Band C. I am unable to agree with this contention, the effect of which will be to enable an importer to keep in his possession at one time and in one place quantities of fireworks more than 1,000 lbs. Rule 71 states that a permit may be granted to a holder of a license in forms A, B, C or D to possess any quantity of manufactured fireworks not exceeding 1,000 lbs., and rule 35 states that an explosive shall not be possessed except in accordance with the conditions of a license granted under the rules. An exception is made in cases of permits granted under rules 68, 69, 70 or 71.

I am of opinion that the whole scheme of the rules is to require a separate license for possession, at any one time and place, of explosives in addition to a license to import during a particular period. Where permit for possession is granted limiting the quantity to be possessed at any specified period or at any particular place, the permission to import a larger quantity during the longer period must be read subject to the quantity in possession being exhausted or reduced below the maximum for which possession is permitted. The permission to import a larger quantity is given for purposes of preventing a separate application each time the stock is reduced or exhausted and it will be unreasonable to suppose that, while the rules framed under the Act fixed 1,000 lbs. as the

maximum in the case of manufacturers or retail dealers, it left importers free from any restrictions as to the quantity they can keep or store so long as they did not exceed the maximum quantity they were allowed to import during any year. Public safety was the reason for fixing the maximum quantity which a person can possess and the public danger is the same whether the explosives are stocked by an importer or retail dealer.

The rules framed are not quite clear but the construction placed by me seems to follow from the various provisions and safeguards as to possession of explosives.

I see no grounds to interfere and dismiss the petition.

M. C. P.

Petition dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 74 of 1918.

May 29, 1918.

Present:—Mr. Kotwal, Offg. A. J. C.

PILAJI—APPLICANT

versus

DARYA AND OTHERS—NON-APPLICANTS.

Criminal Procedure Code (Act V of 1898), ss. 145 147—Enquiry under s. 147—Procedure—Order passed without giving parties opportunity to produce evidence, legality of—Jurisdiction—Order affecting persons not parties to proceedings.

An enquiry under section 147, Criminal Procedure Code, has to be made in the manner provided by section 145 of the Code and the Magistrate conducting such enquiry must receive the evidence of the parties. Failure to give an opportunity to the parties of calling evidence affects the jurisdiction of the Magistrate. [p. 991, cols. 1 & 2.]

Musammnat Jaiwanti v. Ramrao, 48 Ind. Cas. 987, followed.

Section 147, Criminal Procedure Code, contemplates an order to be passed between parties to the proceedings only. An order affecting persons who are not parties to the proceedings is not within the purview of the section and is, therefore, liable to be set aside as affecting jurisdiction. [p. 992, col. 1.]

Revision of the order of the Sub-Divisional Magistrate, 1st Class, Tahsil Sansar, District Chindwara, in Criminal Case No. 16/26 of 1917 of his Court decided on the 5th January 1918.

Messrs. K. K. Gandhe and S. K. Barlingay, for the Applicant.

PILLAJI v. DARYA.

Mr. K. V. Deosker, for the Non-Applicant.

The Hon'ble Mr. G. P. Dick, Standing Counsel, for the Crown.

ORDER.—The order of the Sub-Divisional Magistrate under section 147, Criminal Procedure Code, must be set aside on two grounds affecting jurisdiction, *first*, that he failed to receive the evidence of the first party before making the order against him; *second*, that the order is not one within the purview of section 147, inasmuch as it is not an order between the parties to the proceeding.

As to the *first* ground the order-sheet shows that the parties put in their written statements on the 19th November 1917, and the 30th November 1917 was fixed for hearing evidence. On that day two witnesses for the first party and five for the second were present, but owing to the other work the case was adjourned to the 1st December 1917. This day's order sheet runs thus:—

"Pillaji by Mr. Mishra and the parties No. 2 in person and by Mr. Triwedi. Arguments of both parties heard and it is decided to go for spot enquiry. Their witnesses be discharged at present. Case for 5th January 1918. Put up on 3rd January 1918."

The next entry in the order-sheet, dated 20th December 1917, is as follows:—

"The spot was inspected on my way today. Pillaji's son was present and all the accused also. Settlement papers were seen in this connection. The case is for 5th January 1918 here. Parties were asked to be present here."

On 5th January 1918 the order-sheet runs thus:—

"Pillaji present in person and only Kishan and Yeshwant are present for the other party. Order passed. Police informed."

An enquiry under section 147 has to be made in the manner provided by section 145 and the Magistrate must receive the evidence of the parties. It is clear from the entries in the order-sheet reproduced above that the Magistrate failed to receive the oral evidence of the parties. The first party had obtained against three of the second party a decree of the Civil Court which had considered the settlement entry and he might have succeeded on the same evidence in convincing the Sub-Divi-

sional Magistrate that the settlement entry was not justified or conclusive.

As regards the District Magistrate's remarks that the order of the Settlement Officer was incorporated in the village administration papers which appear to have been signed on the 10th May 1917, it appears from the record of this case (see leaves Nos. 18, 19 and 20) that the entry was made by the Revenue Inspector in the *wajib ul-arz* on the 27th or 28th September 1917. Failure to give an opportunity to the parties of calling evidence affects jurisdiction [*Musammatt Jaiwanti v. Ramrao* (1)].

As regards the *second* ground the Magistrate's order is as follows:—

"(1) This is a case under section 147, Criminal Procedure Code, started on the Police report. It is alleged that a dispute over the right of way over field No. 232/1 of Pillaji exists between Pillaji on one side and Dasrya, Kishan, Jago son of Narsu and Jago and Praja sons of Nago and Bapuji on the otherside.

"The dispute is about the right of way to the platform of Maroti during the time of Pola for one day.

"(2) The parties filed their written statements. I went over to see the spot along with the Patwari and find according to the new settlement *misl* that the right of way exists in favour of the villagers during Pola. *In fact this application is regarding the dispute over it between Pillaji and the whole village.*

"(3) The documentary evidence, specially the settlement record, clearly proves that Pillaji has no right to restrain the public or the second party as named above from proceeding to the Maroti platform on the Pola day. If his crops are damaged by the bullocks that day, he has his right of action for damages against the individuals liable for them.

"(4) Accordingly I order Pillaji not to restrain any person on Pola day to carry his bullocks to pay homage to the Maroti platform through his field No. 232/1, unless the same is prohibited by the Civil Court in due course, as it is clear that the villagers did exercise the right on the last Pola day also, except Dasrya, Kishan and Jago and Govinda who are restrained by the Civil Court."

(1) 43 Ind. Cas. 987.

KRISHNADHON GHOSE v. MAHENDRA NATH DUTT.

I cannot take this to be an order between the parties to the proceedings in view of the passages underlined (italicised) by me. Section 147 does not contemplate an order like the one passed in this case.

I set aside the order of the Sub-Divisional Magistrate dated the 5th January 1918 and direct that the Magistrate take such evidence as the party may wish to adduce and then pass a proper order. I may add that it is advisable to draw up a final order separate from the judgment or order dealing with the merits of the case on the lines of Form No. XXIV, Schedule V, Criminal Procedure Code.

Order set aside.

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 661 OF 1918.

August 28, 1918.

Present:—Mr. Justice Tennon and

Mr. Justice Cuming.

KRISHNADHON GHOSE AND ANOTHER—
PETITIONERS*versus*MAHENDRA NATH DUTT—OPPOSITE
PARTY.

Criminal Procedure Code (Act V of 1898), ss. 403 (4), 530 (k)—Penal Code (Act XLV of 1860), ss. 408, 409, 477 A—Acquittal by Magistrate not empowered to try case, whether bars subsequent trial—Procedure—Jurisdiction.

A complaint was made against the accused disclosing offences punishable under sections 409 and 477A of the Penal Code. The case was by some mistake made over for trial to an Honorary Magistrate exercising the powers of a Magistrate of the Second Class. He proceeded to deal with the case as one under section 408, Indian Penal Code, and finally acquitted the accused. Subsequently the complainant presented a further complaint to the District Magistrate praying for the trial of the accused under sections 409 and 477A of the Penal Code. The District Magistrate thereupon took cognizance of the case and referred the complaint to a First Class Magistrate for disposal.

Held, that inasmuch as the Second Class Magistrate who had dealt with the case was not empowered to commit accused persons for trial to the Court of Session, the District Magistrate had jurisdiction to take cognizance of the second complaint having regard to the provisions of section 350 (k) and section 403 (4) of the Criminal Procedure Code.

Criminal revision against the order of the District Magistrate, Burdwan, dated the 27th June 1918.

Babus Manmathanath Mukerjee and Rishindra Nath Sarkar, for the Petitioners.

Babus Dasarathi Sanyal and Pankaja Kumar Ganguly, for the Opposite Party.

JUDGMENT.—In this case against the petitioners before us a complaint was made disclosing offences punishable under section 409 and section 477A of the Indian Penal Code. The case was by some mistake made over for trial to an Honorary Magistrate exercising the powers of a Magistrate of the Second Class. He proceeded to deal with the case as one under section 408, Indian Penal Code, and finally acquitted the accused. After certain intermediate proceedings to which we need make no further reference, the complainant presented a further complaint to the District Magistrate praying for the trial of the accused under sections 409 and 477A, Indian Penal Code. The Magistrate thereupon took cognizance of this complaint and has referred the same to a Magistrate of the First Class for disposal.

It appears that the Magistrate of the Second Class who has dealt with the case is not empowered to commit accused persons for trial to the Court of Session. If he had been so empowered, we might possibly have considered his order of acquittal under section 408, Indian Penal Code, as tantamount to an order of discharge under sections 409 and 477A. That not being so, having regard to the provisions of section 530 (k) and section 403 (4), Criminal Procedure Code, and the decision of this Court in *Abdul Ghani v. Emperor* (1), we are unable to say that in taking cognizance of this second complaint the learned District Judge has erred. It is contrary to the practice of this Court to interfere with a prosecution at the initial stage, and in the present case notwithstanding the Honorary Magistrate's discussion of the evidence adduced before him, we are not prepared to do so in this case.

We, therefore, discharge this Rule.

Rule discharged.

(1) 29 C. 412.

UPENDRA KISHORE MONDAL v. NOBO KISHORE MONDAL.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 53
OF 1916.

August 5, 1918.

Present:—Mr. Justice N. R. Chatterjea and
Mr. Justice Smither.UPENDRA KISHORE MONDAL AND
ANOTHER—PLAINTIFFS—APPELLANTS

versus

NOBOKISHORE MONDAL AND OTHERS—
DEFENDANTS—RESPONDENTS.

Hindu Law—Widow, alienation by—ijara granted to de facto manager—Necessity—Burden of proof—Recital as to necessity, effect of, where independent evidence available—"Benefit of estate," meaning of—Estoppel—Reversioner receiving rent due for period prior to death of widow, whether ratifies lease—Property acquired by widow with savings out of income of husband's estate, whether follows corpus.

A *de facto* manager of the estate of a Hindu widow taking an *ijara* of the properties inherited by the widow from her husband must show that there was legal necessity for the grant of the *ijara* or that the *ijara* was granted for the benefit of the estate. [p. 996, col. 2, p. 997, col. 2.]

R. a Hindu died leaving three sons, T., M. and H., each of whom got one-third share of the estate left by R. H. died and his one-third share passed to his widow B. Then T. died and his one-third share passed to his brother M., who thus got a two-thirds share in the estate left by R. Thereafter M. died leaving his widow P., who thus inherited a two-thirds share of the properties. P. and B. then granted an *ijara pattah* of their respective shares in favour of one K., who was the brother's son of P. and who had been living with P. from his infancy and who was managing the estate for P. and B. The recital in the *pattah* was that it was granted for the purpose of liquidating the debts incurred in the life time of M. and in the time of the widows' possession of the estate and the debts incurred for meeting the expenses of the *shraddhs*.

Held, (1) that as the evidence that was available as to the pecuniary condition of the estate at the time of the alienation proved that the money that came into the hands of the widows was sufficient for paying off the debts left by their respective husbands, as no legal necessity for the grant of the *ijara* was made out and as the *ijara* was not granted for the benefit of the estate, the *ijara* could not be binding upon the reversioners; [p. 1001, col. 2.]

(2) that had the *ijaradar* been a stranger he could not have been expected to account for the money that came into the hands of the widows, nor would he have been responsible for the previous mismanagement, if any, of the estate, but that the lessee, being the *de facto* manager of the estate, must show that there was legal necessity for the grant of the *ijara*. [p. 996, col. 2.]

When independent evidence is available as to the pecuniary condition of the estate at the time of an alienation by the widow, such evidence might be accepted in preference to the recital in the deed of alienation alleging the existence of legal necessity. [p. 996, col. 2; p. 997, col. 1.]

Nanda Lal Dhur Biswas v. Jagat Kishore Acharjya, 36 Ind. Cas. 420; 43 I. A. 249; 20 M. L. T. 835; 31 M. L. J. 563; (1916) 2 M. W. N. 336; 4 L. W. 458; 18 Bom. L. R. 565; 14 A. L. J. 1103; 24 C. L. J. 487; 1 P. L. W. 1; 21 O. W. N. 225; 44 C. 186; 10 Bur. L. T. 177 (P. C.), *Murugesam Pillai v. Manickavasaka Desika*, 39 Ind. Cas. 659; 44 I. A. 98; 32 M. L. J. 369; 15 A. L. J. 281; 21 M. L. T. 288; 1 P. L. W. 457; 5 L. W. 759; 21 C. W. N. 761; 40 M. 402; 19 Bom. L. R. 456; 25 C. L. J. 589; (1917) M. W. N. 487 (P. C.), referred to and distinguished.

The expression "benefit of the estate", although it cannot be precisely defined, includes the preservation of the estate from extinction, its defence against hostile litigation, its protection from inundation and similar circumstances. [p. 997, col. 2; p. 998, col. 1.]

Powers of a Hindu widow to deal with family property discussed and case-law reviewed.

The recovery by the reversioner from lessees of arrears of rent due to the widow for a period prior to the death of the widow does not amount to a ratification of the lease granted by the widow. [p. 1001, col. 2.]

Modhu Sudan Singh v. Rooke, 25 C. 1; 24 I. A. 164; 1 C. W. N. 433; 7 M. L. J. 127; 7 Sar. P. C. J. 194; 13 Ind. Dec. (N. S.) 1, distinguished.

In deciding whether the property acquired or purchased by a Hindu widow with savings out of the income from her husband's estate is to descend with the husband's estate or is to be treated as separate estate of the widow, the matter to be considered is whether the widow has made any distinction between the original estate and the after-purchases. In each case the question is one of intention. If the widow intended to treat the purchased properties as part of the original estate, they must follow the *corpus*. [p. 1001, col. 2; p. 1002, col. 1.]

Isri Dutt Koer v. Hansbatti Koerain, 10 I. A. 150; 10 C. 324; 13 C. L. R. 418; 7 Ind. Jur. 557; 4 Sar. P. C. J. 459; 5 Ind. Dec. (N. S.) 217; *Sheelochun Singh v. Sahab Singh*, 14 C. 387 at p. 393; 1 I. A. 63; 11 Ind. Jur. 231; 5 Sar. P. C. J. 1; 7 Ind. Dec. (N. S.) 257, followed.

Appeal against the decree of the Subordinate Judge, 1st Court, 24 Perganas, dated the 29th June 1915.

Babus Ram Chandra Mazumdar, Manmatha Nath Roy, Norendra Nath Set, Bijoy K. Bhattacharjee and Sitaram Banerjee, for the Appellants.

Babus D. N. Chackerburty, Tarak Chandra Chackerburty, Jatindra Nath Lahiri, Bimola Chandra Deb, Apurba Charan Mukherjee and Profulla Ch. Chakraburty, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for a declaration that certain transactions entered into by a Hindu widow were not binding upon the reversioners, and for recovery of possession of the properties in suit [under the] following circumstances.

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One Raghunath had three sons, Thakur Das, Madhu Sudan and Hari Narain, each of whom got $\frac{1}{3}$ rd of the estate left by Raghunath. Hari Narain died leaving his widow Bamakali and his $\frac{1}{3}$ rd share devolved on her. Then Thakur Das died; his $\frac{1}{3}$ rd share passed to his brother Madhusudan, who thus got $\frac{2}{3}$ rd share. Then Madhusudan died on the 13th August 1867, leaving his widow Prosanna Kumari, who thus inherited $\frac{2}{3}$ rd share of the properties. After the death of Madhusudan, Prosanna Kumari settled all the properties left by him, excepting the Thakurbati, Kacharibati, dwelling house, tank and garden at the back of the house and a Taluk No. 395, in permanent lease with her brother's son Khetra Mohan Samanta on the 17th September 1869. Bamakali, widow of Hari Narain, joined in this settlement and gave a lease of her $\frac{1}{3}$ rd share to the said Khetra Samanta. Bamakali died on the 14th February 1891. After her death a suit was instituted by Prosanna Kumari as guardian of Basanta Kumar, the alleged adopted son of Madhusudan, for a declaration of Basanta's preferential right to the share of Hari Narain against Kailash and certain other persons who were then the reversionary heirs of Hari Narain. The suit was dismissed as the adoption was not proved and the reversioners obtained a decree for costs against Prosanna Kumari.

In execution of the decree for costs, Prosanna Kumari's interest in the property covered by the Ijara was put up to sale and purchased by one Radha Mohan. In the certificate of sale it was stated that only her life-interest was sold.

On the same day in execution of another decree obtained by Kailash Chandra and others against Ram Chandra father of Khetra Samanta and Syama Sundari, the aunt of Khetra, their interest in the Ijara, namely, $\frac{1}{3}$ rd share, was purchased by or on behalf of Raj Kishore Mondal, the predecessor of defendants Nos. 1 to 6. On the 5th May 1895 Prosanna Kumari sold certain lands which had been purchased by her to the said Raj Kishore. Prosanna Kumari died on the 7th August 1907. At that time Srikanta and Nilkanta Mondal were the actual reversionary heirs and they gave a permanent lease of the properties to the plaintiffs on the 3rd December 1912.

The plaint, as it originally stood, comprised three estates Nos. 396, 397 and 398, and plots Nos. 1 to 1161. The claims with regard to Taluks Nos. 396 and 397 and plots Nos. 1 to 602 have been compromised with the defendants who set up rights to the same.

The main defence was that Madhusudan at his death was involved in debts, that the Ijara was granted by Prosanna Kumari in order to pay off these debts, that Prosanna acquired an absolute right to the properties covered by the Kobala of 5th May 1895 and that she had absolute power of disposal over the same, and that the share of Madhusudan in estate No. 395 had been sold away for arrears of revenue.

The learned Subordinate Judge found that the Ijara to Khetra Samanta was executed for legal necessity, at any rate, the alienation could be justified on the ground that it was beneficial to the estate, that the properties covered by the Kobala of 1895 were acquired out of the income of the properties left by Madhusudan, that Prosanna Kumari was justified in dealing with them, as she did not express any intention to treat them as part of her husband's estate, that the sale in respect of estate No. 395 was binding on the reversioners and that the remaining plots of land were not shown to have been included in the estate of Madhusudan.

The plaintiffs have appealed to this Court. The appeal relates to estate No. 398 and plots Nos. 603 to 1161.

The main contentions in this appeal are that the Ijara was a collusive transaction and that even if not collusive, it was not justified by legal necessity, nor was it beneficial to the estate so as to be valid against the reversioners, that the properties covered by the Kobala, dated the 5th May 1895, formed part of the *corpus* of the estate inherited by Prosanna Kumari from her husband and could not be alienated, that only her life-interest had passed under the conveyance and that the remaining plots of land actually belonged to Madhusudan's estate. With respect to estate No. 398, the learned Pleader for the appellant admitted that regard being had to the current of recent decisions, he could not press his claim against the purchasers.

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The first question for consideration, therefore, is as to the validity of the Ijara dated the 17th September 1869. As stated above, Madhusudan died on the 13th August 1867, that is, about 2 years before the Ijara was granted. He undoubtedly left some debts. The defendants' case is that he was in a hopelessly embarrassed condition at the time of his death. So far as the documentary evidence goes, there were only two debts due by him, namely, one a Kistibundi bond for Rs. 7,900 executed on the 3rd August 1863 in favour of Radha Mohan Mondal and the other a Kut Kobala in favour of one Lebrani Dasi, dated 3rd Jaista 1269 B. S. corresponding to 6th May 1862, for Rs. 800 which was to become absolute on the 16th Pous 1271 if the mortgage was not redeemed before that date. It does not appear whether the Kut Kobala was redeemed by Madhusudan or was made absolute before his death, which took place before 1867. A number of Howlati slips and letters have been produced on behalf of the defendants to show that Madhusudan was in constant need of money and had to borrow even petty sums from Radha Mohan Mondal. These Howlati slips and letters were for the period 1261 to 1236 B. S. and the Kistibundi bond dated 3rd Falgoun 1269, which was substituted by another Kistibundi bond dated 3rd August 1863, shows that it was in respect of monies borrowed from time to time and that it was executed for money due on adjustment of account. It appears, therefore, that the monies borrowed from time to time during the period 1261 to 1266 under the Howlati slips and letters (Exhibit C series) were covered by the Kistibundi bond. Oral evidence has been adduced to show that Madhusudan had various other creditors; but the witnesses who speak about these creditors cannot say whether there was any document in respect of the debts, nor can they say what the amount of debts was, nor whether they were paid off by Madhusudan.

Ram Kumar Bag, witness No. 1 for the defendant, was in the service of Madhusudan up to his death and afterwards was in the service of Prosanna Kumari till her death. He says that the debts left by Madhusudan including his Sradh expenses amounted to Rs. 10,000 or Rs. 11,000.

Another witness, Mohesh Chandra Haldar,

who was also in the service of Madhusudan, says that the debts of Madhusudan gradually rose to Rs. 15,000 or Rs. 16,000. There is no evidence, either oral or documentary, to shew that the debts left by the deceased exceeded Rs. 15,000.

It appears from the evidence that Madhu at the time of his death left shares in four Taluks, namely, estates Nos. 395, 396, 397 and 398, and 2591 *bighas* of land, some of which, however, appear to be small and scattered pieces of land. One of them Taluk No. 395 was sold after his death by Prosanna Kumari to one Shama Sandari, aunt of Khetra Samanta, for Rs. 10,000. There is no documentary evidence as to the sale, but there is no doubt that it was sold after the death of Madhusudan and before the Ijara to Khetra Samanta, as it was not included in the Ijara which comprised all the properties with the exception of the dwelling house and a few other houses and garden mentioned above. The sale of this Taluk is referred to in the Kobala Exhibit A1, dated 18th December 1888, produced on behalf of the defendant, and it appears from the evidence of the defendant's witness Mohesh Chandra Haldar that Khetra had offered Rs. 10,000 for the property and he (Mohesh) was told that Khetra's aunt had purchased it. So that at any rate about Rs. 6,600 came into the hands of Prosanna Kumari by the sale of the property, assuming that Bamakali had a $\frac{1}{3}$ rd share in the property.

Then it appears from the application of Prosanna Kumari, dated 21st January 1868, for the collection of the debts due to Madhusudan under Act XXVII of 1860 that Rs. 9,000 was due to him: and the witness Ram Kumar says that the amount was realized. It also appears from the evidence of that witness that Madhusudan left moveable properties of considerable value, about Rs. 20,000. However that may be, we have it upon the evidence of the witnesses for the defendants themselves that at least Rs. 15,600 came to the hands of Prosanna Kumari after the death of Madhusudan and before the grant of the Ijara. This, together with the income of the properties for two years, appear *prima facie* sufficient for paying off the debts left by the deceased which, it may be noted, were Rs. 7,000 or Rs. 8,000 according to the

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finding of the learned Subordinate Judge or Rs. 15,000 or Rs. 16,000 according to the witness Mohesh Chandra Haldar.

The plaintiff alleged in the plaint that the income of the estate left by Madhu was Rs. 4,000 a year, and one of his witnesses said that the income of Prosanna Kumari and Bamakali exclusive of revenue and costs (of collection) was Rs. 5,000 or Rs. 6,000. The defendants' witness Ram Kumar also says that the nett income excluding *jama* and collection charges was Rs. 5,000 or Rs. 6,000. The learned Subordinate Judge, referring to the statement in the plaint that the income was Rs. 4,000, says that the evidence was not satisfactory, but he has apparently overlooked the evidence of the defendants on the point, and he has also overlooked the fact that by the sale of estate No. 395, Rs. 10,000 came to the hands of the ladies. He has further erred in holding that the amount of Rs. 9,000, for the collection of which Prosanna Kumari applied and obtained succession certificate, was not available to her, when the defendants' witness says that the amount was realized by Prosanna Kumari.

The Ijara was granted to Khetra Samanta, but it appears that it was taken on behalf of his family, i.e., his father and uncles. Khetra was the son of Prosanna Kumari's brother. Prosanna had no child of her own and this nephew Khetra was brought up by her from his infancy. He was married at the costs of Prosanna and he lived in her house with his wife and children. It was he who looked after Prosanna's estate up to the death of Madhusudan and it was to him that the Ijara was granted, which comprised shares in the three Taluks Nos. 393, 397, 398, and all the rent-free and rent-paying lands, excepting the "dwelling house-Kacharibati, Thakurbati and the tank and garden at the back of the house." The whole estate was let out at a rent of Rs. 3,901 and a *selami* of Rs. 1,000. The revenue and rents payable for the Taluks and the lands amounted to about Rs. 3,200 and Rs. 700 appears to be the only profit which the ladies were to get under the Ijara. No boundaries of the lands were stated in the Pattah, only Mouzaha in which they were situated being set out in the Pattah.

Some of the witnesses for the defendants stated in a general way that the debts of Madhusudan were paid off by sale of some of the properties and by the grant of the Ijara. But assuming that Rs. 1,000 was paid as *selami* to Prosanna and Bamakali, it is not shown what became of the Rs. 10,000 obtained by the sale of the Taluk No. 395 and of the large sum of Rs. 9,000 which came to the hands of Prosanna when the succession certificate was taken out by her. Besides the above two sums the income of the properties for two years since the death of Madhu came to her hands. Had the Ijaradar been a stranger, he could not have been expected to account for the money, nor would he have been responsible for the previous management, if any, of the estate. Here the lessee was Khetra Samanta who was the *de facto* manager of the estate, and it was for the defendants to show that there was necessity for the grant of the Ijara. It was recited in the Ijara Pattah that the lease was granted "for the purpose of liquidation of debts incurred in the lifetime of the late Madhusudan Mondal and in the time of our possession of the estate and the debts incurred in the Adya Sradha of the said Mondal."

In the case of *Nanda Lal Dhur Biswas v. Jagat Kishore Acharya* (1) the Judicial Committee, in referring to the recital of legal necessity in a conveyance executed by a Hindu widow, observed: "But in such a case as the present their Lordships do not think that these recitals can be disregarded, nor on the other hand can any fixed and inflexible rule be laid down as to the proper weight which they are entitled to receive. If the deeds were challenged at the time or near the date of their execution so that independent evidence would be available, the recitals would deserve but slight consideration and certainly should not be accepted as proof of the facts. But as time goes by, and all the original parties to the transaction and all those who could have given evidence on the relevant points have grown old or

(1) 36 Ind. Cas. 420; 43 I. A. 249; 20 M. L. T. 335; 31 M. L. J. 563; (1916) 2 M. W. N. 336; 4 L. W. 458; 18 Bom. L. R. 868; 14 A. L. J. 1103; 24 C. L. J. 487; 1 P. L. W. 1; 21 C. W. N. 225; 44 C. 186; 10 Bur. L. T. 177 (P. C.).

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passed away, a recital consistent with the probability and circumstances of the case assumes greater importance and cannot lightly be set aside, for it should be remembered that the actual proof of the necessity which justified the deed is not essential to establish its validity. It is only necessary that a representation should have been made to the purchaser that such necessity existed and that he should have acted honestly and made proper enquiry to satisfy himself of its truth."

In the present case, however, although the transaction is more than 40 years old, two of the witnesses examined on behalf of the defendants were in the service of Madhusudan and Prosanna Kumari. Evidence, therefore, is available as to the pecuniary condition of the estate at the time of the alienation. Besides the alienation in the case before the Judicial Committee was made to strangers, in the present case it was to a person who in fact managed the estate for the lady. If the nett income of the estate of the two ladies was anything like five or six thousand rupees (about Rs. 4,000 in Prosanna Kumari's share, as deposed to by Ram Kumar and Mohesh Chandra), the grant of an Ijara at a rent of Rs. 3,901 and a *selami* of Rs. 1,000, which left only Rs. 700 as profit ($\frac{2}{3}$ of which represented Prosanna Kumari's share), was certainly detrimental to the estate.

Reliance was placed on behalf of the respondents upon the case of *Murugesam Pillai v. Manickavasaka Desika* (2), where the Judicial Committee commented upon the non-production of books of accounts, which would have shown that the lease executed by the manager of a Hindu temple (in that case) had been recognised by his successors. In the present case it does not appear that the plaintiffs-lessors had got the books and accounts of the estate on the death of Prosanna Kumari and we think, therefore, that the observations made in that case do not apply to the present.

It is true that Bamakali joined in granting the Ijara; but she had no son and she was living apparently amicably with

Prosanna Kumari in the same house. Khetra was managing the estate for both the ladies and Bamakali might have thought it convenient to join with Prosanna Kumari who had a $\frac{2}{3}$ share. Having regard to all the circumstances, we do not think that legal necessity for the grant of the Ijara has been made out.

The learned Subordinate Judge was of opinion that the Ijara could be supported on the ground that it was beneficial to the estate. Referring to the litigation which Madhusudan had with Kailash, he observes: "This litigation is continued for some years after his death and it naturally interfered with collection of rent. Besides, it was a source of constant drain on the slender means of the widows Prosanna Kumari and Bamakali. Obviously it was difficult for them to husband the resources so as to be able to meet the cost of litigation and at the same time pay off the existing debts. Madhusudan could not himself do it. If the widows had allowed the old state of things to go on, the entire estate might be lost. Such was the position of the widows when the Ijara was granted. It secured them a nett profit of about Rs. 700 a year; relieved them from the pressure of litigation costs and at the same time enabled them to save the properties from the clutches of creditors. Having regard to all the circumstances, the permanent Ijara in favour of the Samantas must be taken as a step beneficial to the estate, and apparently it was more advantageous than the permanent Ijara which the reversioners have granted to the plaintiffs. It has been beneficial to the reversioners in that it has saved the estate. On this consideration alone, apart from legal necessity, the Ijara must be held binding on the reversioners."

On behalf of the appellant, reliance was placed on the case of *Palaniappa Ohetty v. Sreemath Deivasi kamony Pandara* (3). In that case Lord Atkinson in delivering the judgment of the Judicial Committee states: "The phrase 'benefit of the estate', as used in the decisions with regard to the circumstances justifying an alienation by the

(2) 39 Ind. Cas. 659; 44 I. A. 98; 32 M. L. J. 369; 15 A. L. J. 281; 21 M. L. T. 298; 1 P. L. W. 457; 5 L. W. 759; 21 O. W. N. 761; 40 M. 402; 19 Bom. L. R. 456; 25 C. L. J. 589; (1917) M. W. N. 487 (P. C.).

(3) 39 Ind. Cas. 722; 44 I. A. 147; 21 O. W. N. 729; 15 A. L. J. 485; 1 P. L. W. 697; 33 M. L. J. 1; 19 Bom. L. R. 567; 22 M. L. T. 1; (1917) M. W. N. 477 & 507; 26 C. L. J. 153; 40 M. 769; 6 L. W. 222 (P. C.).

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manager of an infant heir or by the trustee of a religious endowment, cannot be precisely defined, but includes the preservation of the estate from extinction, its defence against hostile litigation, its protection from inundation and similar circumstances."

It is contended on behalf of the respondents that those observations were made with reference to the powers of a Shebait of a religious endowment or the manager of an infant heir, and are inapplicable to the case of a Hindu widow, who unlike a Shebait or a guardian does not hold the property for another. A Hindu widow is not a tenant for life, but is owner of her husband's property, subject to certain restrictions on alienation and subject to its devolving upon her husband's heirs upon her death, and it is argued that she has greater latitude in dealing with her property than a Shebait or a guardian where it is for the benefit of the estate, and certain cases have been relied upon. It is unnecessary in the present case to discuss the question whether the words "benefit of the estate" should be understood in the same sense in relation to the powers of a Hindu widow in which they have been used with reference to the powers of a Shebait or a guardian in the case cited above, because in our opinion the Ijara was not for the benefit of the estate in any sense of the term, and the cases relied upon do not help the respondents.

In the first case cited before us, *Dayamani Debi v. Strinibash Kundu* (4), it was held that a permanent lease granted by a Hindu widow which was for the benefit of the estate was binding upon the reversioner. But it was found, in that case that "the previous tenants on the property would not adhere to it, because it was not profitable, and that it was impracticable, the land being jungle, to bring it under cultivation without spending a substantial sum on its improvement," and the lease was granted under those circumstances. It was also found that the bargain was a good one, that both the bonus and the rents went into the pockets of the plaintiffs (who were the sons and reversioners of the lady) and that

what the mother did was for the good of the plaintiffs who had been benefited by her act.

The next is that of *Bijoy Gopal Mukerji v. Girindra Nath Mukerji* (5), when the question was as to the validity of an Ijara for 60 years, dated the 7th September 1863, which had been executed by a Hindu widow aged 42 with the consent of the then reversioners and which was part of an arrangement or settlement in which all the branches of her husband's family shared. In a suit brought after the death of the widow by the reversionary heirs of her husband, this Court (Caspersz and Coxe, JJ.) said, "if we find that the arrangement was for the benefit of the estate and did actually benefit the estate, we should apply and even broaden the principle adopted in the case of *Dayamani Debi v. Strinibash Kundu* (4)," and after referring to the principle laid down in that case observed, "the principle is based upon the decisions of their Lordships of the Judicial Committee and it was applied in *Venkaji Shridar v. Vishnu Babaji* (5), where Sir C. Sargent, C. J., said: 'A widow like a manager of the family must be allowed a reasonable latitude in the exercise of her powers, provided she acts fairly to her expectant heirs,' a fortiori if Sayamani Debi made a good bargain for herself, and if that bargain did not prejudice the position of the then reversioners it should be given effect to, and the present reversioners ought not to be allowed to obliterate the history of nearly half a century." [See *Bijoy Gopal Mukerji v. Girindra Nath Mukerji* (5).]

The case was taken up to the Privy Council, see *Bijoy Gopal Mukerji v. Girindra Nath Mukerji* (5), and the decision of this Court was upheld. Their Lordships held that the arrangement of which the Ijara formed part was in truth dictated by the necessities of the case and that the choice of the term of 60 years as the term of the Ijara was made for the benefit of the estate, and did not injure any one. It was pointed out that from 1882 to 1893 when the widow died, the persons who now

(5) 23 Ind. Cas. 162; 41 C. 793; 18 C. W. N. 673; 19 C. L. J. 620; 27 M. L. J. 123; 16 M. L. T. 68; (1914) M. W. N. 430; 1 L. W. 533; 16 Bom. L. R. 425; 12 A. L. J. 711 (P. C.).

(6) 18 B. 534 at p. 536; 9 Ind. Dec. (N. S.) 865.

(4) 33 C. 842.

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sought to set the Ijara aside acquiesced in and took the benefit of the arrangement which, it might therefore be inferred from their conduct, had, in their opinion, been made in good faith and under such circumstances of necessity as would give it validity according to Hindu Law; and the conduct of the appellants themselves during those years afforded evidence on which the respondents were entitled to rely. Their Lordships observed: "They are of opinion that the case depends entirely on the facts, and that it raises no new question of law as to the powers of a Hindu widow to deal with family property in case of necessity with the consent of the then present reversioners and they are, therefore, of opinion that the appeal fails."

In that case the fact that some of the then reversioners took a Dur-ijara was relied upon and our attention has been called to the fact that in the present case also Kailash, one of the then reversioners, took a sub lease from Moaraja Dasi, the aunt of Khetra Nath, in respect of $\frac{1}{3}$ rd share of the Ijara, in the *benami* of one Baikuntha Majhi. But Kailash was one of many of the then reversioners, and any inference which may be drawn from his taking a Dur ijara of the said share is weakened if not destroyed by the fact that he along with several others, the then reversioners, had put up the $\frac{1}{3}$ rd share of the Ijara right, expressly stating that it was good only for the lifetime of the widow Prosanna Kumari.

The last case relied upon is that of *Upendra Nath Bose v. Bindeshri Prosad* (7). In that case a permanent *mokarari* lease granted by the daughter of a deceased Hindu of some properties belonging to his estate in settlement of a *bona fide* dispute was held binding on the reversioners, and it was pointed out that the test to be applied in determining the validity of an alienation by a limited owner is whether the purpose for which the alienation was made was in the circumstances of the case proper and legitimate and the existence of legal necessity "in the narrow sense of actual pressure on the estate or the danger

to be averted" is not the only test. In that case the permanent lease was not only attested by the reversioner, but he later on set up the lease in answer to a suit of the grantee claiming the entire estate by survivorship as the undivided co-partner of the last male owner and ultimately joined in a compromise by which the plaintiff in the suit admitted that he had no title to the estate and the reversioner affirmed the Mokarari Pattah.

All the cases relied upon, therefore, are clearly distinguishable. In the present case the learned Subordinate Judge no doubt says that the litigation with Kailash continued for some years after Madhusudan's death and it naturally interfered with the collection of rent, and that if the widow had allowed the old state of things to go on, the entire estate might have been lost. Some witnesses have said in a general way that the litigation continued for 20 years, but we do not know the nature of the litigation, nor what the cost of the litigation was. The Ijara was granted within 2 years of Madhusudan's death, and it does not appear with whom the litigation continued after the grant of the Ijara. The only documentary evidence about litigation placed before us relates to the suit brought by Prosanna Kumari as guardian of Basant Kumar, the alleged adopted son of Madhusudan, for recovery of the properties of Harinarain as his reversionary heir on the death of Bamakali. The suit was dismissed on the ground that the adoption was not proved. Basant Kumar, who was set up as the adopted son of Madhusudan, was the son of Khetra Nath. We fail to see how this litigation about the adoption which took place long after the grant of the Ijara, and which was conducted presumably for the benefit of the son of Khetra Nath the Ijaradar, can be taken into consideration in determining whether the Ijara was for the benefit of the estate. It appears that the widows made some savings, and purchased some lands, so there could not have been any drain on their "slender means" by any litigation, and there is no evidence to show that the Ijaradar was involved in any litigation with Kailash and others. It is pointed out that there were a large num-

(7) 32 Ind. Cas. 468; 20 C. W. N. 210; 22 C. L. J. 452.

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ber of small plots of land and that the rental payable for the lands was heavy. But if the nett income in Prosanna Kumari's share was anything like Rs. 4,000, the rent payable cannot be said to be heavy.

The estate was being managed by Khetra since the death of Madhusudan and it was to him or his family (father and uncles) that the Ijara was granted. If the estate was well-managed by Khetra as Ijaradar, there does not appear to be any reason for saying that it was not equally well-managed by him before the Ijara. There is no suggestion that Khetra, who had been brought up by Prosanna Kumari from his infancy and who was living with her with his wife and children, had refused to manage the estate for her unless the Ijara was granted to him; there is no mention of any such reason in the Ijara Pattab, nor even that it would be convenient to let out the properties in Ijara, and there is no evidence to show that they could not be let out except under a permanent lease. The only reason assigned for the grant was that there was necessity for raising money for liquidating the debts. The management appears to have been continued after the Ijara in the same way as before the grant. The property was practically transferred subject to the profit of Rs. 700, and it seems to us that the grant of the Ijara was not for the benefit of the estate, but for the benefit of Khetra and his family, Khetra being the object of affection of Prosanna Kumari.

It appears that in 1876, i.e., 7 years after the Ijara, Prosanna Kumari and Bamakali sold some rent-free lands to Radha Mohun, *vide* Exhibit B (2). Radha Mohun excavated a tank and constructed a brick built *ghat*. He then made a gift of it to his son in 1296. There is another sale by the two widows in favour of Umamoyee, brother's wife of Radha Mohan. Umamoyee also after her purchase in the name of her daughter excavated a tank, constructed a brick built *ghat* and planted trees in the garden. These sales took place after the grant of the Ijara when the widows were entitled only to the Ijara rent, and there is no explanation as to how Radha Mohun or Umamoyee obtained *khas* possession of these properties. These transactions are relied upon as show-

ing the collusive nature of the Ijara. They throw some doubt about the real nature of the Ijara. But apart from these two transactions, there is nothing to show that the widows had anything to do with the lands covered by the Ijara. Having regard to the object of granting the Ijara which was to benefit Khetra and his family and the subsequent dealings with the Ijara, we think that it was not proved that the Ijara was a collusive one. We have, however, found that the Ijara was not justified by legal necessity and not beneficial to the estate.

The strongest argument in favour of the respondent is that the reversioners themselves had let out the entire estate to the plaintiff at a rent of Rs. 200 taking a *selami* of Rs. 1,000, and that this shows that the terms upon which the Ijara was granted by Prosanna Kumari were beneficial to the estate. It is contended on behalf of the respondents that the reversioners were entitled to the proprietary right as only the life-interest of Prosanna Kumari had been sold, and, therefore, entitled at any rate to two-thirds of the Ijara rent (Rs. 700 $\frac{1}{3}$) and that in the circumstances the rent reserved by the widow, as compared with that reserved by the plaintiff, was certainly beneficial to the estate.

But the Ijara did not contain the boundaries of the lands let out. The plaintiff claims 1,161 plots of land in the suit. As a matter of fact, the learned Subordinate Judge found that some of the plots have not been shown to form part of the estate of Madhusudan. Then the Ijara by Prosanna Kumari and Bamakali comprised the three Taluks Nos. 396, 397 and 398, which were the only revenue-paying lands included in the estate, and they have already been sold away since the grant of the Ijara.

Two other properties were sold away by the widows to Radha Mohun and Umamoyee as stated above, and it is not clear from the record what are the relative values of the Taluks and the two properties and the lands included in the Ijara.

The defendants contested even the proprietary right of the reversioners, and the plaintiffs in taking the lease took upon themselves the burden of a heavy and costly litigation,

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The Ijara right of Khetra, his brother and Shama Sundari, namely, 2/3rds share of the Ijara, was put up to sale on the 15th August 1895 at the instance of Kailash and others who were some of the then reversioners, and was purchased by Raj Kishore father of defendants Nos. 1 to 6 in the name of his servant. It is stated in the sale certificate that "the Ijara Pattah granted by Prosanna Kumari one of the proprietors and Zemindars of the judgment-debtors in respect of the properties sold at auction shall remain in force during her lifetime so far as her right is concerned." It is pointed out on behalf of the respondents that in the certificate of sale by which Prosanna Kumari's Maliki right to the land, namely, 2/3rds share was purchased by Raj Kishore on the 15th August 1895, although the Maliki right was described as a life-interest only, it was stated that "the judgment-debtor has only a life-estate in the properties described in the above schedule and the Maliki right only to get the said permanent Ijara rent during her lifetime has been sold."

It is contended on behalf of the appellant that the words in the original mean: "Lasting for the lifetime of the judgment-debtor" (Prosanna), and do not mean permanent Ijara right. But we think that the original, as it stands, means a permanent Ijara right, though it cannot be said to be quite clear. The decree-holders, however, at whose instance the two sales took place were the same persons, namely, Kailash and others, and the sales took place on the same day. In the certificate of sale relating to the Ijara right, it was distinctly stated that the Ijara was to remain in force only for the lifetime of Prosanna Kumari, and it is difficult to see why the same Ijara right was described as a permanent Ijara right in the sale certificate in connection with the Maliki right. The statement in the sale certificate Exhibit 3 (1) might have been due to some mistake. In any case, having regard to the clear terms in which the Ijara was described in the certificate of sale relating to the sale of that right, we are unable to hold that there was any recognition of the permanent Ijara right by Kailash and others.

It appears that Prosanna and Bamakali brought a suit for arrears of rent against

the Ijaradar and that on the death of Bamakali, the reversioners got themselves substituted in her place. It is accordingly contended on behalf of the respondent that that amounted to ratification of the Ijara: and reliance was placed on the case of *Modhu Sudan Singh v. Rooke* (8). But in that case the rent, which was deposited by the Patnidar, and was withdrawn by the reversioners, was for a period subsequent to the death of the widow. In the case before us, the arrears of rent were for a period prior to the death of Bamakali and the reversioners could recover the amount due to the deceased only by getting themselves substituted in her place and proceeding with the cause of action upon which the suit had been brought by Bamakali. We do not think that under those circumstances it could be said that there was any ratification of the Ijara by the reversioners, at any rate so far as Prosanna Kumari's share was concerned. We are accordingly of opinion that the Ijara is not binding upon the plaintiff.

The next question relates to the lands conveyed by Prosanna Kumari by the Kobala (Exhibit B), dated 5th May 1908, in favour of Raj Kishore Mondal for Rs. 800, in which it was recited that the lands had been purchased with her Stridhan. These lands, it appears, were certain *jamas* situated within the estate and were purchased in lieu of arrears of rent due to the estate of Madhusudan. The defendant's contention was that the rent being due to the widows, the properties purchased in lieu of such rent must be taken to be the Stridhan of the ladies.

The question for consideration, therefore, is whether the properties so acquired were her absolute properties or were accretions to the estate.

As laid down by the Judicial Committee in the case of *Isri Dutt Koer v. Hansutti Koerain* (9), the matter which has to be looked at in deciding whether the property acquired or purchased by the widows is to descend with the husband's estate or is to be treated as a separate estate, is whether

(8) 25 O. L. 1; 24 I. A. 164; 1 O. W. N. 433; 7 M. L. J. 127; 7 Sar. P. C. J. 194; 13 Ind. Dec. (N. S.) 1 (P. C.).

(9) 10 I. A. 150; 10 C. 324; 13 O. L. R. 418; 7 Ind. Jur. 557; 4 Sar. P. C. J. 459; 5 Ind. Dec. (N. S.) 217 (P. C.).

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the widows have "made any distinction between the original estate and the after-purchases." In *Sheolochun Singh v. Sahab Singh* (10) their Lordships observed: "Where a widow comes into possession of the property of the husband, and receives the income and does not spend it, but invests it in the purchase of other property, their Lordships think that *prima facie* it is the intention of the widow to keep the estate of the husband as an entire estate, and that the property purchased would *prima facie* be intended to be accretions to the estate. There may be no doubt circumstances which would show that the widow had no such intention, that she intended to appropriate the savings in another way." The question in each case is one of intention.

It appears that the *jamas* were purchased by the two widows Prosanna Kumari and Bamakali jointly in proportion to their shares in the original estate, namely 2/3rds and 1/3rd respectively. Prosanna Kumari while selling the property declared in the Kobala that it was her Stridhan. And it is contended that the lands were purchased in the *benami* of one Mohesh who executed a conveyance in favour of the ladies, and that indicates an intention to keep the lands separate from the estate. But the land covered by the Kobala Exhibit B was 97 *bighas*, and Mohesh says that only 22 *bighas* 2 *cottas* had been purchased in his name. On the other hand, in a suit brought by her as guardian of her alleged adopted son Basanta for recovery of the properties of Hari Narain on the death of Bamakali referred to above, 1/3rd share of this purchased property, though described as "self-acquired property of Prosanna Kumari and Bamakali purchased with their own money," was claimed as part of Hari Narain's estate. No doubt it was a suit by Basanta but Prosanna Kumari brought this suit as his guardian. The fact that the properties were claimed as Hari Narain's estate shows the intention to treat the property as part of the original estate. The learned Subordinate Judge says that as the boundaries of the lands are not given in the plaint, it is difficult to say if these lands are identical with the lands transferred

by the Exhibit B. But it is not suggested that Prosanna Kumari or Bamakali had purchased any lands other than those covered by the conveyance. We think that the intention of the widows was to treat the purchased properties as part of the original estate, and, therefore, they must follow the *corpus*.

The appellants do not press their claim, and rightly so, with regard to Taluk No. 398 which has been sold for arrears of rent.

With regard to the remaining lands which are not covered by the Kobala (Exhibit B) nor by the certificate of sale, the plaintiffs' claim must fail. It is contended that no question was raised by the defendants that these lands did not form part of Madhusadan's estate, but there was a distinct issue raised on the point and it was found against the plaintiffs. We are of opinion that the decision of the Court below is right on this point.

The result is that the decree of the lower Court will be modified and the claim of the plaintiffs will be decreed only in respect of the plots Nos. 603 to 1161 covered by the Ijara Pattah and the Exhibit B.

The plaintiffs are entitled to mesne profits from the date of the institution of the suit until the delivery of possession, to be ascertained in further proceedings. As regards the period prior to the institution of the suit, however, we think having regard to the circumstances of the case that the plaintiffs should get profits for 3 years prior to the date of the suit, calculated on the basis of the Ijara rent payable in respect of Prosanna Kumari's share in proportion to the lands decreed out of the properties covered by the Ijara, after deducting therefrom the proportionate rents and other demands payable in respect of the said lands, the amount of such profits being ascertained in further proceedings.

The parties will be entitled to costs in the proportion of two-thirds (appellants) and one-third (respondents).

Decree modified.

(10) 14 C. 387 at p. 393; 14 I. A. 63; 11 Ind. Jur. 281; 5 Sup. P. O. J. 1; 7 Ind. Dec. (N. S.) 257 (P. C.).

DEPUTY COLLECTOR, MADURA v. MUTHIRULA MUDALI.

MADRAS HIGH COURT.

APPEAL SUITS NOS. 267 TO 270 OF 1917.

March 16, 1918.

Present:—Mr. Justice Abdur Rahim and
Mr. Justice Seshagiri Aiyar.

THE DEPUTY COLLECTOR, MADURA
DIVISION—PETITIONER—APPELLANT

versus

MUTHIRULA MUDALI AND OTHERS—

CLAIMANTS—RESPONDENTS.

Land Acquisition Act (I of 1894), s. 54—Civil Procedure Code (Act V of 1908); O. XLI, rr. 22, 33, applicability of, to land acquisition cases—Appeal against part of decree—Memo. of objections, maintainability of, against other parts covered by decree but not subject of appeal.

Under Order XLI, rule 22 of the Civil Procedure Code, a memorandum of objections may be filed against a decree as a whole or against a part of it which may not be the subject-matter of the appeal. [p. 1004, col. 2; p. 1005, col. 1.]

National Society for the Distribution of Electricity by Secondary Generators v. Gibbs, (1900) 2 Ch. 280; 69 L. J. Ch. 457; 52 L. T. 443; 48 W. R. 499; 16 T. L. R. 348; 17 R. P. C. 303, considered.

Where the Collector preferred an appeal against the valuation of some of the plots in a land acquisition case fixed by the District Judge:

Held, that it was competent to the claimant to file a memorandum of objections in respect of other plots which were covered by the petition, though not the subject of appeal. [p. 1004, col. 1.]

Per Seshagiri Aiyar, J.—Section 54 of the Land Acquisition Act makes no departure from the ordinary rule of the Civil Procedure Code which allows a party to appeal not only against the whole decree but also against parts of it. [p. 1005, col. 1.]

A memorandum of objections need not be confined to the subject-matter of the appeal. [p. 1005, col. 1.]

What the appellant objects to is not to be the criterion, but the question in each case must be whether the respondent's rights have in any way been imperilled by the action taken by the appellant. [p. 1005, col. 1.]

Appeals against the decrees of the District Court, Madura, in Original Petitions Nos. 622, 624, 625 and 627 of 1916 respectively.

FACTS appear from the judgment.

Mr. V. Ramesam (Government Pleader), for the Appellant.—The memorandum of objections is unsustainable. It relates to plots of lands which are not the subject-matter of appeal and the respondent is not entitled to be heard with reference to them. The provisions of the Civil Procedure Code with regard to cross-objections should not be followed in appeals under the Land Acquisition Act. The language of section 54 of the latter enactment that "an appeal shall lie from any part of the award," indicates that the decree under appeal is that part of it to which the appellant has taken

objection, and that is the decree appealed against within the meaning of the section.

Mr. A. Sambamurthy Ayyar (with him Messrs. C. V. Ananthakrishna Ayyar, Subbaraya Ayyar, S. Subramania Ayyar and W. Kothandaramiah), for the Respondents.—The provisions of Order XLI, rule 22, Civil Procedure Code, are applicable to appeals under section 54 of the Land Acquisition Act. A memorandum of objections could be filed against any part of the decree, whether the subject matter of appeal or not. Section 54 of the Land Acquisition Act makes no departure from the ordinary rule. The provisions of the Civil Procedure Code are not expressly excepted.

JUDGMENT.

ABDUR RAHIM, J.—These appeals in my opinion must fail. Objection is taken to the valuation of the District Judge in respect of plots Nos. 611F, 611G, 383, A2. The District Judge has awarded Rs. 1,143 per acre for all these plots. Mr. Ramesam contends that these are back lands and that, therefore, they ought not to be valued at the same rate as the lands with frontage. But I think the District Judge is right in holding that the purchase by the Madura Mills Company in 1915 of lands similarly situated furnishes a good index of the proper market price. We have considered the question carefully and are not prepared to dissent from the District Judge's estimate.

The appeals are dismissed with costs. The time for payment will be three months from this date.

A preliminary objection has been taken with reference to the memoranda of objections. The memoranda of objections relate not merely to the plots covered by the appeals but also to other plots, though all the plots to which the memoranda of objections relate are the subject of the same petition to which the appeals relate. I should take it that each petition forms a separate case in the land acquisition proceedings and the award on each petition is a separate decree. Section 54 of the Land Acquisition Act incorporates by reference the provisions of the Civil Procedure Code applicable to appeals from original decrees. Order XLI, rule 22 (1), of the Civil Procedure Code provides for memorandum of objections in these words: "Any respondent, though he may not have

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appealed from any part of the decree, may not only support the decree on any of the grounds decided against him in the Court below, but take any cross-objection to the decree which he could have taken by way of appeal, provided he has filed such objection in the Appellate Court within one month from the date of service on him or his Pleader of notice of the day fixed for hearing the appeal, or within such further time as the Appellate Court may see fit to allow." The section is expressed in very general language, but after having heard the matter fully discussed I have little doubt that a memorandum of objections may be filed against the decree as a whole or against a part of it which may not be the subject-matter of the appeal. One of the strongest cases that have been brought to our notice is that reported in *Kamat v. Kamat* (1), the judgment of Sargent, C. J. There the appeal was with respect to costs disallowed by the lower Court, and the memorandum of objections related to the decree on the merits and it was held that such cross-objections could lie. There is also a Full Bench ruling of this Court in *Munisami Mudaly v. Abbu Reddy* (2). There by a memorandum of objections a question which affected a co-respondent to the appeal was allowed to be raised. Our attention has also been drawn to a judgment of the Bombay High Court, *Raghunathdas v. Secretary of State* (3). The case there arose out of a matter under the City of Bombay Improvement Act. The appeal was with reference to a certain percentage allowed for water cess while the memorandum of objections raised a question as regards the allowance for vacancies, and it was held that such a memorandum of objections was valid. Mr. Ramesam, while conceding that under the Civil Procedure Code it is not necessary that the memorandum of objections should be only with reference to that part of the decree which is the subject-matter of the appeal, argues that section 54 of the Land Acquisition Act makes a difference so far as appeals

in land acquisition cases are concerned. He lays stress on the provision of that section "an appeal shall lie to the High Court from the award or from any part of the award of the Court in any proceedings under this Act," and argues that the Legislature in expressly saying that an appeal shall lie from any part of the award wanted to imply that the decree under appeal must be taken to be that part of it to which objection was taken by the appellant. He then argues that the memorandum of objection must be confined to the subject-matter of the appeal itself, as that is the decree that is appealed against within the meaning of section 54. But what section 54 enacts is in no way different from the ordinary provisions of the Civil Procedure Code, because an appeal may be filed against the entire decree or any part of it. Once an appeal is filed, a memorandum of objections may be filed by the respondent with reference to any portion of the decree to which he objects. I do not think, therefore, that section 54 of the Land Acquisition Act makes any difference in the law and I hold that the respondents are entitled to press their memorandum of objections.

On the merits, I am satisfied that the District Judge has given a perfectly fair price for the plots referred to in the memorandum of objections and I dismiss them with costs.

SESHAGIRI Aiyar, J.—I agree. On the merits, although there is this that must be said in favour of Mr. Ramesam's contention that the frontage should be differently valued from the back portion, having regard to the fact that the valuation on which the District Judge has relied was given a year before the proclamation, I agree with my learned brother in holding that the value fixed by the District Judge does not err on the side of giving the claimants too much and that the appeals must be dismissed.

On the question of the memorandum of objections, my mind had been vacillating a good deal during the course of the argument and, after having had the matter fully discussed, I have also come to the conclusion that the respondents are entitled to be heard. There is a great deal to be said in favour of the view taken by

(1) 8 B. 368; 8 Ind. Jur. 687; 4 Ind. Dec. (N. S.) 619.

(2) 27 Ind. Cas. 323; 38 M. 705; 27 M. L. J. 740; (1915) M. W. N. 45.

(3) 29 B. 514; 7 Bom. L. R. 569.

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Lindley, M. R., in *National Society for the Distribution of Electricity by Secondary Generators v. Gibbs* (4). The learned Lord Justice points out that if a cross notice is given in respect of a matter which is not the subject-matter of the appeal, ordinarily a party should not be heard about it. But the language of the Civil Procedure Code is very wide. Reading Order XLI, rule 22, and rule 33 of the same Order together, it looks as if the Legislature intended to give a party every means of remedying the injustice which has been done to him by the action of the lower Courts. It is arguable that as the inherent powers vested in the Court by rule 33 are wide enough to cover all cases of injustice, rule 22 should be confined to cases where the objection relates to the subject-matter in appeal; but it is doubtful whether the party's right of invoking the aid of the Court was intended to be less extensive than the right of the Court to move *suo motu*, having regard to the language of rule 22. In my opinion, it is safe to say that wherever the right of a respondent has been imperilled by the appellant preferring an appeal, it is apparently the intention of the Legislature that every facility should be given to him to get his rights adjusted by filing a memorandum of objections. The decision to which my learned brother referred in *Kamat v. Kamat* (1) is a very strong illustration of this view. The decision in *Munisami Mudaly v. Abbu Reddy* (2) also seems to point to the fact that what the appellant objects to is not to be the criterion, but the question in each case must be whether the respondent's rights have in any way been imperilled by the action taken by the appellant. As regards section 54 of the Land Acquisition Act to which the learned Government Pleader drew our attention, I have little hesitation in holding that it makes no departure from the ordinary rule of the Civil Procedure Code, which allows a party to appeal not only against the whole decree but also against parts of it. For these reasons I agree that the memorandum of objections should be disposed of on the merits.

(4) (1900) 2 Ch. 280; 69 L. J. Ch. 457; 82 L. T. 443; 48 W. R. 499; 16 T. L. R. 348; 17 R. P. C. 303.

On the merits, I agree that the memorandum of objections must be dismissed.

M. C. P.

*Appeals and Memo. of
Objections dismissed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 229 of 1914.

February 21, 1916.

Present:—Sir Henry Drake-Brockman, Kt., J. C.

DOMA AND OTHERS—DEFENDANTS—

APPLICANTS

versus

DAYARAM.—PLAINTIFF—NON-APPLICANT.

Civil Procedure Code (Act V of 1908), s. 115, O. XXIII, rule 1 (2)—Withdrawal of suit, leave for, grant of, for reasons not covered by sub-rule (2)—Revision—High Court, whether can interfere—Misapplication of law—Jurisdiction, illegal exercise of.

The main object of sub-rule 2, rule 1, Order XXIII of the Civil Procedure Code, is to prevent a defect of justice on technical grounds. Where no formal defect necessitating failure of the suit is shown to exist, there must still be a defect which has the effect of shutting out a fair trial on the merits and arises out of some error made in good faith by the plaintiff which can only be effectively set right by a trial *de novo*. [p. 1006, col. 2.]

The High Court has power to interfere in revision in a case where withdrawal of a suit has been allowed without reasons which can properly be regarded as covered by Order XXIII, rule 1, sub-rule 2 of the Civil Procedure Code. [p. 1006, col. 2.]

Hira Lal Mitra v. Uday Chandra Dey, 14 Ind. Cas. 33; 16 C. W. N. 1027; 16 C. L. J. 103; and *Bai Kashibai v. Shidappa Anapa Pujari*, 21 Ind. Cas. 24; 37 B. 68; 15 Bom. L. R. 823, followed.

To apply a provision of law to a case to which it has no application is to act without jurisdiction or at any rate to act illegally in the exercise of jurisdiction within the meaning of section 115 of the Civil Procedure Code. [p. 1006, col. 2.]

Brajabala Devi v. Gurudas Mundle, 33 C. 487 3 C. L. J. 293, followed.

Revision of the order, dated the 8th July 1917, passed by the District Judge, Bhandara, in Civil Appeal No. 28 of 1914.

Mr. V. R. Pandit, R. B., for the Applicants.

Mr. Atmaram Bhagwant, for the Non-Applicant.

ORDER.—The plaintiff in the suit out of which this application for revision arises sued several defendants, three of whom are the applicants to this Court, to obtain

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possession of a plot of land between the premises of the parties. The plot in dispute is marked E F G H I in the plan annexed to the plaint. The defence set up was that the plaintiff had no right whatever over the plot and after a trial in which both sides examined a number of witnesses the trial Judge gave a decree, the effect of which was to declare the plaintiff entitled to retain possession of a narrow strip on the west side of the said plot, the boundary being held to be a fencing which was admittedly erected by the defendants.

The plaintiff appealed re-stating his claim to the plot, while the defendants preferred cross-objection urging that the trial Judge should have dismissed his claim entirely seeing that in his plaint he alleged himself to be in possession right up to the fencing.

The plaintiff sought leave to withdraw his suit with liberty to institute a fresh one in respect of the subject-matter. He advanced two reasons, *viz.*—

(1) That since his suit was instituted the premises in the defendants' occupation had been held in another litigation to belong to one Gulab Sao.

(2) That he had failed to claim a relief by way of declaration that the defendants had no right of way over the southern half of the plot to the exit at the southern end.

The defendants objected that the grounds stated were insufficient and that since the termination of the other suit referred to, Gulab Sao had given them the premises they occupied. The District Judge, however, allowed the application for a single reason which he stated baldly as follows:—

"His suit is likely to fail owing to the plaint being defective in not claiming certain reliefs."

This Court is asked to interfere on the ground that sub-rule (2), rule 1, Order XXIII, First Schedule to the Civil Procedure Code, has no application to the facts. For the plaintiff it is urged that even if the District Judge erred in thinking the sub-rule applicable, this Court cannot interfere, the error being one of law only; also that the new suit was launched in August 1914 and should not be interrupted after being so long in progress.

There is recent authority for interference in a case where withdrawal has been allowed without reasons which can properly be regarded as covered by the provisions cited. See *Hira Lal Mitra v. Uday Chandra Dey* (1) and *Bai Kashibai v. Shidappa Anapa Pujari* (2). In both these cases it was held that the circumstances did not come within the scope of the sub-rule 1, and *Brayabala Devi v. Gurudas Mundle* (3) is authority for the view that to apply a provision of law to a case to which it has no application is to act without jurisdiction or at any rate to act illegally in the exercise of jurisdiction. In the present case it seems to me perfectly clear that there was no merely formal defect in the plaint, much less one which necessitated failure of the suit. The omission of Gulab Sao as a party could not lead to dismissal of the suit for possession as against the defendants who did not claim under Gulab Sao. As for the omission of the particular relief said before the District Judge to have been overlooked, it is not intelligible how the plaintiff could claim to prevent the defendants using the southern part of the plot unless he could make good his own claim to possess that area. No sort of basis for the new claim other than title to the plot was suggested to the District Judge or is shown here.

The main object of the sub-rule under consideration was explained in *Sitarum v. Ohhotkai* (4) as being to prevent a defect of justice on technical grounds. When no formal defect necessitating failure of a suit is shown to exist, there must still be a defect which has the effect of shutting out a fair trial on the merits and arises out of some error made in good faith by the plaintiff which can only be effectively set right by a trial *de novo*.

In the present case the only effect of the permission given will be to afford the plaintiff a fresh opportunity of making good the title he failed to establish to the satisfaction of the trial Judge. He should not in such circumstances be allowed to

(1) 14 Ind. Cas. 33; 16 C. W. N. 1027; 16 C. L. J. 103.

(2) 21 Ind. Cas. 24; 37 B. 682; 15 Bom. L. R. 823.

(3) 33 C. 487; 3 C. L. J. 293.

(4) 3 Ind. Cas. 61; 5 N. L. R. 88.

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put the defendants to the trouble and annoyance of a fresh suit.

The fact that the new suit was launched in August 1914 seems to me no sufficient reason for declining to interfere. The applicants moved this Court on the 28th of that month; the District Judge's order complained of having been passed on the 8th July preceding and copy of that order having been obtained on the 18th idem., greater promptitude could hardly be looked for.

In a very recent case cited at the Bar, *Bansi Singh v. Kishun Lal Thakur* (5), it seems to have been held that the Court is powerless to interfere with an order of the kind in question, inasmuch as it does not decide any case. This view involves placing a very limited meaning upon the word "case", which I held in *Mahadeo v. Nago* (6) should be understood in its widest and most ordinary sense.

The order permitting withdrawal with liberty to bring a fresh suit in respect of the same subject-matter is hereby set aside. The District Judge will now proceed to dispose of the appeal and the cross-objections. The plaintiff will pay the costs of this application. I allow Rs. 15 as Counsel's fee in this Court.

Order set aside

(5) 26 Ind. Cas. 203; 41 C. 632.

(6) 12 Ind. Cas. 357; 7 N. L. R. 130.

OUDEH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEALS NOS. 29-30 OF 1916.

January 8, 1918.

Present:—Mr. Stuart, A. J. C., and Pandit Kanhaiya Lal, A. J. C.

MANGAL AND ANOTHER—PLAINTIFFS—
APPELLANTS

versus

Rani INDAR KUAR—DEFENDANT—
RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 151,
O. XLI, r. 27—Execution of deed—Additional evidence,

admission of—Substantial cause—Appellate Court, power of.

In a suit the plaintiffs had some reason to suppose that the execution of the deeds on which the suit was based would not be seriously challenged. But it was seriously challenged. The plaintiffs then produced formal evidence of the execution of the deeds, by examining a witness to prove the signature of one of the attesting witnesses to the deeds. The trial Court, however, disbelieved this witness and dismissed the suit.

Held, that under these circumstances there was substantial cause to justify the Appellate Court under section 151 and Order XLI, rule 27, Civil Procedure Code, in permitting the plaintiffs to produce additional evidence as to the execution of the deeds. [p. 1008, cols. 1 & 2.]

Appeal from the decree of the Subordinate Judge, Sitapur, Tahsil Biswan, dated the 11th March 1916.

Mr. St George Jackson, Babus Ram Ohandra and Chhail Bihari Lal, for the Appellants.

Pandit Gokaran Nath Misra and Pandit Harkaran Nath Misra, for the Respondent.

JUDGMENT.—Appeals Nos. 29 and 30 of 1916 relate to suits instituted on the basis of two mortgage-deeds which are alleged to have been executed on the 13th February 1902 by Raja Karan Singh. The suits have been brought against Rani Indar Kuar, the mother of Raja Karan Singh, and Rani Khem Kuar, the widow of Raja Karan Singh. The alleged mortgages purport to transfer property which, as found by the learned Subordinate Judge, belonged to Rani Indar Kuar but which she permitted to be recorded first in the name of her husband, Raja Dip Singh, and then in the name of her son, Raja Karan Singh, both of whom managed it in their own right. The learned Subordinate Judge found that in these circumstances the mortgagees could claim the benefit of section 41, Act IV of 1882, and proceed against the property transferred. But as he found that the two deeds of mortgage in question had not been proved to have been executed by Raja Karan Singh, he dismissed the suits. The position with regard to the execution of these two deeds of mortgage is as follows:—The deeds were registered. The Sub-Registrar's endorsement shows that Raja Karan Singh whom he knew personally admitted execution of these deeds in his presence. In a deed of agreement made between Rani Indar Kuar and Rani Khem Kuar it is stated that

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Rani Indar Kuar will be responsible for the payment of the amount due on these two deeds. In these circumstances the plaintiffs-appellants had some reason to suppose that the execution of the deeds in question would not be seriously challenged. But it was seriously challenged. Sufficient evidence was produced in the lower Court to prove the signature of one of the attesting witnesses to both deeds. The appellants considered it sufficient to prove the execution of the deeds by Raja Karan Singh through the production of a certain witness Sheo Ratan Lal. They were not in a position to know the view that the learned Subordinate Judge had taken as to the evidence of this witness. The learned Subordinate Judge found that this witness was an unreliable person and thus that there was not sufficient evidence of the execution of the deeds in question by Raja Karan Singh, and dismissed the suits. As this decision must necessarily have taken the appellants by surprise, for they had no reason to suppose that the evidence of the execution of these deeds need be anything but formal, we consider that they have had some grievance in not being given an opportunity to prove the execution of the deeds by other evidence. Under the pro-

visions of Order XLI, rule 27, we can give permission to the appellants to produce other evidence for substantial cause, and we think that there is a substantial cause in this case which would justify us in permitting them to produce such additional evidence. We consider that apart from the provisions of Order XLI, rule 27, we have authority to pass this order under the provisions of section 151, Act V of 1908, as we consider our order necessary for the ends of justice. We, therefore, send back the case with the following additional issues:—

1. Did Raja Karan Singh sign the mortgage-deeds in suit?

2. Did he admit having signed and executed the said deeds before the Sub-Registrar at the time of registration?

Both sides will be permitted to produce any evidence that they may wish to produce upon these remitted issues. The learned Subordinate Judge's successor will record such evidence as may be produced and decide these remitted issues and return the evidence certified with his findings on or before the 8th March 1918. Ten days will then be allowed for objections.

Issues remitted.

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Per *Oldfield, J.*—The action for money had and received is still to be regarded, as it was originally, as based on an implied or fictional promise. The authorities, however, negative the possibility of such a promise being deduced from the *exquum et bonum*, as it may appeal to the sympathy of the Court in the particular case or from circumstances in which the defendant having no privity with the plaintiff, when

Action for money had and received—concl'd.

the money was received, need not be supposed to have given and had no duty to give any promise.

Per *Sadasiva Aiyar, J.*—While privity of contract between the parties is not necessary to sustain an action for money had and received, there must be what might be called some privity of a legally recognizable nature; such as some knowledge of particular facts in the man who received the money and some mistake or ignorance of fact on the part of the man who paid the money, or some relation of trust or confidence between the person who received the money and the person claiming the money or a portion thereof, on which the Court could fasten as creating the relation of principal and agent (though by fiction) between the plaintiff and the defendant.

A co-sharer may, by a stretch of language, be treated as standing in a position of confidence towards his co-sharers, but a person who ignorantly purchases from a co-sharer the whole of the claim of all the co-sharers cannot be said to be in such a position. *M RAMASAMI NAIDU v. MUTHUSAMIA PILLAI*, 35 M. L. J. 581; 41 M. 923; (1918), M. W. N. 746

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Administration of estate—Executor, duty of.

B. by her Will appointed G., H., L. and T. her executors. It was also provided that S. would be able to act as executor when he attained majority. G., H. and L. obtained Probate in 1882 and went on administering the estate until 1888, when T. was appointed executor. T. died in 1908. There was a legacy in favour of S. who presented an application for Probate long after the death of the testatrix:

Held, that it was not necessary or proper to grant Probate 30 years after the death of the testatrix in order that S. might get the property bequeathed to him, when the genuineness of the Will and the right of the parties under the Will had been established by the previous grant of Probate.

The duty of an executor is to administer the estate of the deceased only so far and so long as to enable him to carry out the terms of the Will of which he is executor. After the property has ceased to be the estate of the deceased and has become the property of the residuary legatee under the Will, the executor as such has no authority to manage the estate on his behalf. *C SANKAR NATH MUKHERJI v. BIDDUTLATA DEBI*, 28 C. L. J. 271-295

Administration suit, decree in, directing administration under supervision of Court—Court, power of, to grant allowances to beneficiaries pending administration—Discretion, exercise of.

Where the administration of an estate is being carried on under the supervision of a Court, that Court has power, in a proper case, to grant an allowance, pending the administration, to any of the parties who will eventually be entitled to share in the property. That power ought, however, to be exercised with proper discretion and having regard to the claims that are likely to be made upon the estate, and the Court ought not to grant to any of the beneficiaries properties by way of an allowance unless it is satisfied that the assets will be sufficient to satisfy the creditors. *PAT FAZLUR RAHMAN v. KALI MUZAFFAR*

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The High Court has no appellate or revisional authority over administrative orders of a District Magistrate. *M ARUNACHALAM PILLAI v. PONNUSWAMI PILLAI*, 35 M. L. J. 454; 8 L. W. 422; 24 M. L. T. 396; (1918) M. W. N. 824; 20 C. L. J. 78

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Admissions of parties, effect of.

The Courts should not lightly ignore admissions made by parties to proceedings *M KUNNATH MADAMPIL KUNJUNNI v. MANNARGHAT RAMANUNNI*, 35 M. L. J. 212; (1918) M. W. N. 666

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Adverse possession between co-heirs—Co-heir remaining in exclusive possession of estate to knowledge of others—Possession, whether adverse

The plaintiff claimed her share of the properties left by her father, who died 37 years before the date of the institution of the suit, from her brother who had been in exclusive possession of the same to the knowledge of the plaintiff since the death of their father:

Held, that the possession of the brother was adverse to the plaintiff, even though it was not shown that there was any demand made by the plaintiff which was refused by the brother. *C CHAND. BIBI v. LAL MOHAMAD*

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Mortgagor and mortgagee—Death of mortgagor—Mortgagee claiming to succeed as heir against the proprietary body—Mutation in favour of mortgagee, effect of.

Where on the death of a mortgagor without issue and without leaving any reversioner related to him in a definite degree of relationship, the mortgagee claimed to succeed to the land as heir of the mortgagor as against the proprietary body of the village and mutation was effected in his favour:

Held, that the possession of the mortgagee became adverse to the proprietary body of the village from the date of the mutation. *P RAM SINGH v. BASTI*, 89 P. W. R. 1918

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Possession of widow against will of sons, whether adverse.

The possession of a small residential house by a widow, against the will of her sons in exercise of her right of residence, cannot be said to be adverse to the sons. *P CHUEAR BAI v. RAMA NAND*, 113 P. W. R. 1918

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Agra Tenancy Act (II of 1901), s.

167—Jurisdiction of Civil and Revenue Courts—Ejectment of tenant, decree for, by Revenue Court—Declaration, suit for, in Civil Court, maintainability of.

Where a Revenue Court has exclusive jurisdiction to try a certain question and it tries that question as between the parties, the finding arrived at by it is binding upon the parties and cannot be questioned in a Civil Court.

Defendant brought a suit in the Revenue Court to eject the plaintiff from certain fields on the ground that the latter was a sub-tenant, and obtained a decree. During the pendency of that suit the plaintiff brought a suit in the Civil Court for a declaration that he was a co-owner of the occupancy right with the defendant and was not, therefore, liable to ejectment:

Held, that having regard to the provisions of section 167 of the Agra Tenancy Act the suit in the Civil Court was not maintainable. *A KISHORE SINGH v. BAHADUR SINGH*, 16 A. L. J. 938

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Appeal (Civil)—*Appellate Court, interference by, on finding of fact—Evidence, weighing of.*

By THE DIVISION BENCH.—(Sir Dawson Miller, C. J., and Justice Sir Ali Imam).—A Court of Appeal should not readily disturb the findings of fact arrived at by the trial Judge even if it might be inclined to take a different view from reading the evidence, but if the Appellate Court is satisfied beyond all reasonable doubt on considering the evidence that the findings are erroneous, then it ought to interfere. Or again, if the reasons given by the Judge of the lower Court for arriving at his conclusions are such that they cannot be supported then the Court of Appeal is clearly entitled to disregard those findings and form its own independent judgment of the facts from the evidence and probabilities of the case. **PAT UMA SHANKAR PRASAD v. NAGESWARI KOERI**, 3 P. L. J. 663 **625**

Documentary evidence, conflicting—Appellate Court, duty of.

Per Sanderson, C. J.—Where a case has been decided on documentary as well as oral evidence, if the documentary evidence is conflicting, great weight should be given by the Appellate Court to the opinion of the trial Judge who has seen and heard the witnesses.

The Court of Appeal should not allow an appeal unless they are satisfied that the Judge who tried the case was wrong. If they are in doubt at the end of the argument whether the Judge was right or wrong, since the burden of proof is on the appellant and he has not satisfied them that the Judge was wrong, the appeal should be dismissed. The Judge in the Court below may have heard witnesses and if so, the Court of Appeal should be more unwilling to set aside his judgment especially if there was a conflict of evidence, than in a case tried on written evidence, where the witnesses were not before the Judge, because of the opportunity afforded of judging how far the witnesses were worthy of credit. **C MARIAM BIBEE v. MUHAMMAD IBRAHIM**, 28 C. L. J. 306 **561**

to Privy Council—Question of fact—Burden of proof

An appellant must realise that by bringing a question of fact, which has been carefully examined by Judges fully conversant with the habits and practices of the country, before the Privy Council he takes a heavy burden upon himself. **P C JURAWAN LAL v. BALDEO SINGH**, 21 O. C. 104; 5 O. L. J. 410 **225**

(Second)—*Finding of fact not deduced from evidence, whether binding.*

A finding of fact, in order to be binding in second appeal, should be one that can be reasonably deduced from the evidence. If it is not such a finding, the High Court has authority to interfere with it. **N RAMCHANDRA v. DATTATRAYA** **742**

Question of law raised for first time, whether can be entertained.

When a question of law is raised for the first time in a Court of last resort, upon the construction of a document or upon facts either admitted or proved beyond controversy, it is not only competent but expedient in the interests of justice to entertain the plea. **C SHIB CHANDRA KAR v. DULCKEN**, 28 C. L. J. 123 **78**

Approver, evidence of—Corroboration, whether necessary.

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s. 19—Appeal, right of, against order under s. 19 of Arbitration Act—Staying or refusing to stay suit—“After appearance,” meaning of—Stay of suit—Duty of Court—Burden of proof.

An appearance by a defendant for the purpose of making a stay application can be treated as an appearance in the suit.

The expression “after appearance” in section 19 of the Arbitration Act is merely directory, and neglect of this procedure would not invalidate an order of stay made by the Court.

Under section 19 of the Arbitration Act, where there is an agreement to refer, it is *prima facie* the duty of the Court to stay a suit and the onus is on the plaintiff to show why he should not be bound by his agreement.

The provision of English Law whereby an arbitrator can be compelled to refer a point of law for the opinion of the Court does not apply in India. Under the Arbitration Act an arbitrator is the sole judge of both questions of fact as well as of law arising under the reference and it is discretionary with him to apply for the Court's opinion on any question of law. **S KODUMAL KALUMAL v. VOLKART BROS.**, 12 S. L. R. 34 **434**

Arms Act (XI of 1878), ss. 4, 19—
“Arms,” what are.

The definition of the expression “arms” as given in the Arms Act is not, and is not intended to be exhaustive, and the true meaning of the term must be arrived at by consideration of the circumstances in each case.

Neither the length, breadth or the form of the blade of a weapon, nor the handle, afford any certain test of its classification as “arms.” Whatever can be used as an instrument of attack or defence and is not an ordinary implement for domestic purposes falls within the purview of the Act. **P EMPEROR v. RALLA SINGH**, 32 P. R. 19.8 Cr.; 20 Cr. L. J. 11 **486**

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Attestation of document, proof of—
Evidence, conflicting, effect of—Court, discretion of.

Where there is one class of evidence showing that a document was properly attested and another class of evidence suggesting that it was not so, it is open to the Court on a consideration of the probabilities of the case to reject the one and accept the other. The fate of a document is not necessarily at the mercy of attesting witnesses. The mere fact that they repudiate their signatures or make statements suggesting that they attested at the instance of persons other than the executant or in his absence, does not invalidate the document, if it can be proved by evidence of a reliable character that they have given false testimony. **O MAHARAJ LAL BIHARI v. ANJUMAN-UN-NISA**, 5 O. L. J. 667 **538**

Benami transaction *Possession or title—*
deed not with purchaser—Presumption.

Where from the circumstances surrounding a sale it is probable that the transaction is a *benami* one,

Benami transaction—concl'd.

the probability becomes a certainty when it is found that the ostensible purchaser is neither in possession of the property nor of the sale-deed. **PAT BISHAN DAYAL SINGH v JAISAI KUER**, (1918) PAT. 323 **746**

Test for determining nature of transaction.

Per **Mukerji, J.**—Where the question arises, whether the ostensible purchaser is also the real purchaser, the familiar test to apply is what is the source of the purchase-money. In a case of gift, however, when it is alleged that the transaction was fictitious, this test fails, and the Court must rely upon other aspects of the matter, namely, the surrounding circumstance contemporaneous with the gift and the subsequent conduct of the parties concerned.

The burden lies on the appellant to satisfy the Court that the finding of the trial Court which he assails is not supported by the evidence on the record. **C MARIAM BIBER v. MUHAMMAD IBRAHIM**, 28 C. L. J. 306 **561**

Bengal Land Law—Ghatwali tenure—Rights of ghatwali and his family over property subject to tenure, nature of.

In the Zemindari of Kharakpur in Bengal the *ghatwali* tenure is ordinarily hereditary, the estate descending to such male member of the family as the Zemindar approves as competent, and it is the right of the family, so long as they have male members competent to perform the duties, to have one or more of them appointed *ghatwals*, but the incidents of the tenure are not such as to give the family any rights over the property while it is in the hands of the *ghatwal*.

Where the Zemindar on being released from the performance of *ghatwali* duties gave a *pattah* to four *ghatwals*, members of a family, granting the lands (which were till then subject to the *ghatwali* tenure) in perpetuity at an annual fixed *jama*:

Held, that the members of the family other than the four grantees took no beneficiary interest in the lands granted. **P C DURG PRASAD SINGH v. TREBINI SINGH**, 24 M. L. T. 407; 26 C. L. J. 508; 9 L. W. 60 **527**

Bengal Tenancy Act (VIII B. C. of 1885), ss. 29, 52—Area of holding increased on measurement—Agreement to pay rent at rate considerably in excess of original rate, whether enforceable.

The area of a holding for which the rent payable was Rs. 10-5-0 was described in the *dakhilas* (rent receipts) given to the tenant and in the papers kept by the landlord as 7½ *bighas*. On a fresh survey made by the landlord the area was found to be 9½ *bighas*: whereupon the tenant agreed to pay Rs. 16-14-0 as rent per annum for the holding as found by the measurement:

Held, that as the landlord could not point to any particular piece of land as being an excess area for which the tenant agreed to pay him so much rent in excess, the agreement of the tenant to pay Rs. 16-14-0 for the 9½ *bighas* found on measurement was unenforceable under section 29 of the Bengal Tenancy Act, since by it the original rate of rent per *bigha* was increased considerably in excess of the authorised increase of 2 annas in the rupee. **C SONAULLA SARDAR v. BHAGABATI DEBYA CHOWDHURANI**, 28 C. L. J. 142 **35**

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ss. 61, 62—Deposit of rent made by tenant—Tenant not entitled to make deposit—Deposit, whether operates as tender—Landlord, remedy of.

The receipt given by a Court on accepting a deposit under section 62 of the Bengal Tenancy Act cannot operate as a valid acquittance unless the tenant is entitled under section 61 of the Act to make the deposit.

If the tenant deposits his rent without first making a tender or without any of the other conditions existing which makes section 61 applicable, the landlord's only remedy is to sue for rent ignoring the deposit, which cannot even be treated as a tender of rent so as to suspend the running of interest. **C JADUPATI CHATTERJEE v. KAHETRA NATH** **445**

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s. 106, suit under—Court-fee payable—Court Fees Act (VII of 1870), Sch. II, Art. 17, cl. 3—Declaratory suit.

A suit instituted under the provisions of section 106 of the Bengal Tenancy Act is in fact a suit for a declaration that the Record of Rights is wrong. Therefore, such a suit, being one for a declaratory decree within the meaning of Article 17, clause 3 of Schedule II of the Court Fees Act, is not chargeable with an *ad valorem* Court-fee even where it is transferred to the Civil Court for the purpose of trial. **C SAILAJA NATH ROY CHAUDHURY v. CHANDI CHARAN LAHA**, 28 C. L. J. 301 **552**

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s. 161 (a)—Incumbrance, meaning of—Interest of purchaser of portion of tenancy, whether incumbrance.

The interest of the purchaser of a portion of a tenancy is not an incumbrance within the meaning of section 161 (a) of the Bengal Tenancy Act, which the purchaser of the tenancy in execution of a rent decree would have to annul under section 167 of the Bengal Tenancy Act. An incumbrance implies a limitation of the rights of the tenant, and not a total extinction of them. **C FAZARALI MAHALDAR v. POROO MIAN**, 28 C. L. J. 266 **300**

s. 170, cl. (3)—Purchaser at rent sale, whether can deposit money for release of holding attached in execution of subsequent rent-decree against original tenant—Benamidar of original tenant, right of, to make deposit.

A purchaser at a sale in execution of a rent-decree, who is not a party to a subsequent decree for rent obtained by the landlord against the original tenant, is not entitled under section 170 (3) of the Bengal Tenancy Act to deposit the decretal amount due under the latter decree, inasmuch as his interest is not voidable at the sale in execution of the decree against the original tenant.

If such a purchaser is a *benamidar* of the original tenant, he has got no interest at all in the holding voidable or otherwise, and, therefore, has no right, under section 170 (3) of the Bengal Tenancy Act to make the deposit. **C JOGENDRA NATH MALLIK v. SHRI NARAYAN MUKERJEE** **965**

Bengal Village Chaukidari Act (VI B. C. of 1870), s. 1, applicability of—
Services required, nature of—Evidence.

Each and every case that comes before the Courts in which there may be definite and conclusive evidence to satisfy the Court as to what was the nature of the services required from the service tenure-holder cannot be held to be governed by section 1 of the Bengal Village Chaukidari Act. **C SATS CHANDRA BANDOPADHYA v NATABAR DOME**, 28 O. L. J. 281

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Bombay Hereditary Offices Act (III Bom. of 1874), ss. 4, 18—Bombay Revenue

Jurisdiction Act (X Bom. of 1876), s. 4 (a):—Mahar Vatan, existence of, question as to, determination of—Jurisdiction of Civil and Revenue Courts—Procedure.

Plaintiffs, villagers, brought a suit for an injunction to prevent the skins of their dead animals being taken by the defendants, who were village Mahars claiming the right as Vatan-dars. The suit was dismissed by the lower Courts on the ground that it was not cognizable by a Civil Court under section 18 of the Bombay Hereditary Offices Act and section 4 (a) of the Bombay Revenue Jurisdiction Act:

Held, (1) that the question whether there was or was not a Mahar Vatan was within the jurisdiction of the Civil Courts:

(2) that *prima facie* the skins belonged to the owners of the dead animals and that the plaintiffs were entitled to their injunction unless the Mahars could succeed in showing that there was an hereditary office, in which case the parties would have to be referred for the settlement of their disputes to the Collector under section 18 of the Bombay Hereditary Offices Act. **B SAVLA TUKARAM MALI v. SANTYA PARSRA MAHAR**, 20 Bom. L. R. 993

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Bombay Revenue Jurisdiction Act (X Bom. of 1876), s. 4 (a)

Burden of proof

Calcutta Municipal Act (III B. C. of

1899), Sec. V, r. 2—Nomination paper, form of—Description of candidate, omission of, effect of—Proposer, whether can sign as approver—Alternative nomination papers, validity of.

What is contemplated by rule 2 of Schedule V of the Calcutta Municipal Act is that a nomination paper should be self-contained and complete and that the nomination paper which is presented by the candidate must contain all the matters which are specified in the rule, one of them being the description of the candidate.

It is clear from the wording of clause (d) of the rule that if a person signs the nomination paper of a candidate, either as proposer or seconder, he cannot also sign it as an approver.

The name of a firm which is not the signature of an individual voter is not a good signature of an approver under clause (d) of the rule.

The intention of the rule is that a nomination paper in order to be valid should, among other matters, contain the name of the candidate, and the names of the proposer and seconder, and then the names of the approvers.

Calcutta Municipal Act—concl'd.

Per Woodroffe, J.—Under rule 2 of Schedule V of the Calcutta Municipal Act alternative nomination papers may be sent to the Chairman, so that if one is held, either in whole or in part, to be invalid, the other may be used. In such case, however, each nomination paper should be complete in itself.

A candidate may send in a nomination paper with names of more than 18 voters as mentioned in the rule, in order to meet the case of possible objections to any of the voters whose names appear upon the paper. In such case, more than one nomination paper may be used but the papers must be connected by placing on each paper the name, description and address of the candidate as appearing in the first paper. **C NARENDRA NATH MITTER v. RADHA CHARAN PAL BAHADUR**, 22 O. W. N. 943; 23 C. L. J. 289

Sch. V, r. 2 (a)—Rai Bahadur, whe-

ther sufficient description of candidate

Quære.—Whether the addition of the words 'Rai Bahadur' to the appellant's name was a sufficient description of the appellant within the meaning of Schedule V, rule 2 (a) of the Calcutta Municipal Act. **C MANI LAL NAHAR v. MOWDAD RAHAMAN**, 22 O. W. N. 951

Caste Disabilities Removal Act (XXI of 1850), effect of

Cause of action—Mortgage—Puisne mortgagee, suit by, for possession

C. P. Land Revenue Act (XVIII of 1881), ss. 64, 65, 103, 116—Sale of malik makbuza plot for arrears of revenue payable to malguzar, effect of—Sale, whether free from incumbrances

Defendant purchased a *malik makbuza* plot in execution of a decree obtained by the *malguzar* for arrears of revenue payable in respect of the plot. The plaintiff thereupon sued to enforce his mortgage which comprised the *malik makbuza* plot. The defendant urged that the revenue payable under the sub-settlement being, under section 65 of the Central Provinces Land Revenue Act, the first charge on the plot, the plaintiff's mortgage could not be enforced against him as the sale was free from incumbrances:

Held, (1) that as the *malguzar* did not obtain a sale decree nor did he join the plaintiff as a party to the suit for the arrears of revenue, the defendant did not acquire a title free from all encumbrances;

(2) that the plaintiff was, however, bound to redeem the defendant's charge, before he could enforce his mortgage by sale of the plot.

Section 108 of the Central Provinces Land Revenue Act applies only when a sale under the provisions of the Land Revenue Act takes place for the recovery of arrears payable directly to Government. It does not apply to sales for the recovery of arrears of revenue payable to the *malguzar* in respect of a *malik makbuza* plot, as section 64 makes it clear that land revenue in respect of a *malik makbuza* plot is paid not directly to Government but through the *malguzar*. **N GUNESH PRASAD v. GHASITILAL**

s. 69, applicability of—Settlement record,

entry in, suit for correction of—Limitation applicable.

Section 63 of the C. P. Land Revenue Act relates to disputes as to whether or not land admittedly belonging to one particular proprietor is *sir land*

C. P. Land Revenue Act—concl'd.

or not. It has no application whatever to disputes as to whether A or B is the proprietor of a plot of land.

The special rule of limitation laid down in section 69 (4) of the C. P. Land Revenue Act has, therefore, no application whatever to a suit brought for the correction of a settlement entry in which the defendant has been recorded as a proprietor instead of as an occupancy tenant of *sir* land. **N HAZARILAL MOTILAL v. SHYANIBABU** 932

ss. 108, 116 92

C. P. Municipal Act (XVI of 1903),

s. 66—Application for permission to build—Delay in passing orders, effect of.

Under section 66 (3) of the C. P. Municipal Act, delay in passing orders on a valid notice given under section 66 (1) of the Act may, if followed by a failure to reply to a written reminder, lead to a conclusion that the proposed building has been absolutely sanctioned. **N MOHAMAD YACUB v. SECRETARY, MUNICIPAL COMMITTEE, NAGPUR**, 20 Cr. L. J. 89 889

s. 86—Notice to erect latrine, contents of—Directions, whether should be given—Committee, duty of.

It is clear from the language used in sub-section (1) of section 86 of the C. P. Municipal Act that a notice under that section is itself to contain the directions as to the nature and position of the required latrine. The law does not contemplate delegation to an individual officer of the power to give the necessary directions, though the Committee are at liberty to guide themselves by the advice of any expert in their employ. **N ABDUL SATTAR v. SECRETARY, MUNICIPAL COMMITTEE, NAGPUR**, 20 Cr. L. J. 82 882

s. 139—Continuing breach—Daily fines, whether can be imposed for future breaches

The daily fine which may be imposed under section 139 of the C. P. Municipal Act must relate to a period anterior to the Magistrate's order of conviction. There cannot be punishment under that section for a future breach. **N MOHAMAD YACUB v. SECRETARY, MUNICIPAL COMMITTEE, NAGPUR**, 20 Cr. L. J. 89 889

s. 159—Complaint, whether necessary in respect of each accused tried jointly.

A complaint has to be made as required by section 159 of the C. P. Municipal Act in order to enable a Court to take cognizance of an offence punishable under the Act. But once cognizance has been legally taken of an offence, the Magistrate is seized of the whole matter as to all other accused whose guilt may appear during the trial of the case. **N GAMBHIR CHAND v. SECRETARY, MUNICIPAL COMMITTEE, NAGPUR**, 20 Cr. L. J. 84 886

C. P. Tenancy Act (XI of 1898), s.

35 (4) Surrender, implied, doctrine of, applicability of—Occupancy tenancy, alienation of, by female holder—Necessity, want of—Alienee, possession of, whether adverse to reversioner.

The doctrine of implied surrender contained in section 35 (4) of the Central Provinces Tenancy Act is intended to apply to normal circumstances where the landlord or the person put in by him holds adversely to the tenant. Where, however, a female holder alienates an occupancy tenancy and the

C. P. Tenancy Act—cont'd.

alienation is not for legal necessity, the alienee does not begin to hold adversely to the ultimate reversioner until the death of the female holder, and the doctrine of implied surrender has no application to such a case. **N NAGO v. PAIKU** 623

s. 35 (4)—Surrender of tenancy—Non-cultivation of land.

The provisions as to implied surrender embodied in section 35 (4) of the Central Provinces Tenancy Act do not apply to a case where the non-cultivation of land and non-payment of rent are not voluntary but are due to obstruction which is the outcome of the landlord's improper behaviour. **N PANDU v. SITAL PRASAD**, 14 N. L. R. 176 188

s. 45, applicability of—Sir lands—Mortgage registered before commencement of Act—Award of Conciliation Board after passing of Act, effect of.

A mortgagee of certain villages including *sir* lands obtained the usual preliminary decree for foreclosure in a suit on the mortgage on 30th June 1899. The matter was then referred to a Conciliation Board which made its award on 20th February 1905, which provided that the amount payable under the said decree should be considerably reduced, that the reduced amount should be paid in the manner therein stated, and that in default of payment only seven of the mortgaged villages should be foreclosed. No mention was made of *sir* lands. The award was filed in Court under section 525 of the Code of Civil Procedure, 1882, and a decree was passed in terms of the award, and on 16th June 1905 that decree was made final as the foreclosure decree, in which the names of the seven villages to be foreclosed were given, but no mention was made of the *sir* lands. In execution the mortgagee decree-holder claimed actual possession of the *sir* lands in the seven villages.

Held, (1) that the conciliation award was a fresh origin of rights between the parties, and that although it came into existence in consequence of the registered mortgage and the transactions thereunder, it was, both for the purpose of enforcement and for the purpose of the application of section 45 of the Central Provinces Tenancy Act, 1898, as amended by Act XXI of 1899, the transaction between the parties which was the foundation of their rights;

(2) that sub-section (1) of section 45 of the Central Provinces Tenancy Act must be applied to the case and that, therefore, in spite of the terms of the award, the mortgagor could not so transfer his right to occupy *sir* lands as to divest himself of his right as an occupancy tenant under the Act;

(3) that consequently the mortgagee could only obtain symbolical or constructive possession of the *sir* lands, the actual possession remaining with the mortgagor as occupancy tenant of the lands. **P C NARAYAN GANESH GHATATE v. BALIRAM**, 24 M. L. T. 345; 14 N. L. R. 165; 28 C. L. J. 447; (1918) M. W. N. 895; 23 C. W. N. 297 141

s. 45 (2)—Lease of *sir* land—Sanction of Revenue Officer, failure to obtain, effect of.

Section 45 of the Central Provinces Tenancy Act requiring the sanction of a Revenue Officer for a lease of *sir* land has no application to an agricultural lease. **N PANDU v. SITAL PRASAD**, 14 N. L. R. 176 188

C. P. Tenancy Act—concl'd.

s. 60—Occupancy tenancy—Sub-lease—Ejection of sub-lessee—Notice to eject—Jurisdiction of Civil and Revenue Courts.

Under section 60 of the Central Provinces Tenancy Act a sub-lease of occupancy land cannot be made from year to year, it can only be made for a term of one year. If before the end of the year no notice is given, there may be a presumption that the parties intend to make a fresh lease for the ensuing year, but where a notice is given by the occupancy tenant to his sub-tenant, that he does not intend to renew the sub-lease, the sub-lease comes to an end with the end of the agricultural year, and the sub-tenant is thereafter in the position of a trespasser and can be ejected through a Civil Court. **N GOVINDA v. CHINDHOO** 948

Circumstantial evidence, conviction based on, when justified.

One of the cardinal principles of cases based upon circumstantial evidence is that in order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis other than that of his guilt. **P EMPEROR v. JAGAT RAM**, 19 Cr. L. J. 987 167

City of Bombay Improvement Act (IV Bom. of 1898), ss. 31, 41, 42, 45—City of Bombay Municipal Act (III Bom. of 1888), ss. 297, 300, 301—Compulsory expropriation and impropriation of owners of land adjoining streets—Owner, whether bound to pay for compulsory impropriation—"Street to be formed," meaning of.

The main object of the City of Bombay Improvement Act, 1898, by which the Bombay Improvement Trust was constituted, was to set up with sufficient powers a street-making authority, and when its function as such was expired, to have the street which had been re-constructed or made by the Trust thereupon handed back to the Corporation.

Section 41 and section 45 of the Act are correlative. They both refer to that site which is used as a street and for the purposes thereof and to no other. The "street to be formed" which vests in the Trust under section 41 of the Act is identical with the formed street which re-vests in the Corporation under section 45.

Where, therefore, the "regular line of a street" was altered and the owner of adjacent land was required to set forward his building on part of the old street:

Held, (1) that the strip of old street which was never formed into the new street had never vested in the Improvement Trust, that it remained the property of the Municipal Corporation; and that when such owner of adjacent land was ordered by the Commissioner to set forward his building upon it, it became his property in virtue of section 301 (3) of the City of Bombay Municipal Act;

(2) that as the Act made no provision for payment by such owner, no price was payable by him for the projection on which he was required or allowed to build. **P C RATANLAL GHONILAL PANALAL v. MUNICIPAL COMMISSIONER, BOMBAY**, 17 A. L. J. 1; 36 M. L. J. 1; 29 C. L. J. 138; 9 L. W. 171; 25 M. L. T. 103 404

ss. 41, 42, 45 404

City of Bombay Municipal Act (III Bom. of 1888), s. 297 404

ss. 297, 299, 301—Preservation of regular line in public street—Commissioner, powers of, exercise of—Acquisition of land—Compensation, calculation of, mode of.

There is nothing in the City of Bombay Municipal Act which prescribes the frame of mind in which the Municipal Commissioner is to exercise the powers given by section 297 of the Act, or which restricts the objects for which he is to exercise them to the mere regulation of the street in question or to the creation or preservation of a regular line in it. "Preservation of Regular Line in Public Streets," the heading to the group of sections beginning with section 297, does not limit the exercise of the powers given by the express words of the Act.

For the purpose of building a bridge in order to carry a street over a railway line the Municipal Commissioner wished to acquire additional land on a side of the street, and so he first prescribed a regular line of the street under section 297 of the City of Bombay Municipal Act and then under section 299 acquired a part of the appellant's land which fell within the line:

Held, that the exercise of the powers was within the terms of the Act and that the appellant was entitled to compensation for the land acquired under section 301 of the Act, and not under the Land Acquisition Act. **P C ABDUL RAHIM v. MUNICIPAL COMMISSIONER OF BOMBAY**, 24 M. L. T. 297; 20 Bom. L. R. 937; 8 L. W. 548; (1918) M. W. N. 840; 23 C. W. N. 110; 42 B. 462 63

s. 299 63

s. 300 404

s. 301 63, 404

Civil Procedure Code (Act XIV of 1882), ss. 320, 325A—Execution of decrees

—Transfer of decree affecting immovable property to Collector—Restriction on power of judgment-debtor to mortgage, extent of.

The incompetence to alienate without the Collector's permission, imposed upon a judgment-debtor by section 325A of the Civil Procedure Code, 1882, is absolute and is not limited to the time during which the property is under the Collector's control. Therefore, a mortgage created by a judgment-debtor in defiance of the prohibition is of no effect even after the property has come back into his hands.

P C GAURISHANKAR BALMUKUND v. CHINNUMIYA, 14 N. L. R. 181; 35 M. L. J. 733; 16 A. L. J. 995; 25 M. L. T. 64 312

s. 325A 312

Civil Procedure Code (Act V of 1908), ss. 2, 47, 96.

An order of Court dismissing an application for a final decree for sale in a mortgage suit is a "decree" within the meaning of section 2, Civil Procedure Code.

Such an order cannot be treated as one under section 47, Civil Procedure Code, in execution of the preliminary decree, but is an order in the suit itself and is appealable as a decree under section 96 of the Civil Procedure Code. **M SUBBALAKSHIMI AMMAL v. RAMALINGA CHETTY**, 8 L. W. 526; 35 M. L. J. 552; (1918) M. W. N. 792; 24 M. L. T. 486 298

ss. 2, 47—Execution—Sale set aside on ground of fraud—Order setting aside sale, whether "decree".

Civil Procedure Code—1903—contd.

It is not open to a party to impeach an execution sale under section 47 of the Civil Procedure Code, and if a Court does, professing to act under section 47, set aside a sale on the objection of the judgment-debtor in a proceeding between the judgment-debtor and the decree-holder, the order setting aside the sale will not be a decree. **PAT MAULA BUX v. RAGHUBAR GANJHU**, 3 P. L. J. 645 **560**

S. 11—Res judicata between co-defendants—Conflict of interests inter se, absence of, effect of—Implied adjudication, whether res judicata.

Actual adjudication on an issue in a suit is not necessary to constitute the decision *res judicata* in a subsequent suit. If the decision come to in the earlier suit impliedly decides the point which is in issue in a subsequent suit, it would be *res judicata*.

Where the parties to a suit were co-defendants in an earlier suit and there was nothing to show that there was a conflict of interests *inter se* between them, the decision in the earlier suit will not operate as *res judicata* in the subsequent suit. **M POYYALI NAICKER v. SUBBA NAICKER**, 8 L. W. 206; (1918) M. W. N. 567; 24 M. L. T. 205 **905**

S. 11—Res judicata—Decision of Subordinate Judge, whether res judicata in subsequent suit of Small Cause nature.

The decision of a Subordinate Judge in a previous suit is *res judicata* in a subsequent Small Cause suit between the same parties inasmuch as the inability of the Subordinate Judge to entertain a claim of a Small Cause nature arises not from incompetence but from the existence of another Court with a preferential jurisdiction. **N MADHURAO v. AMRIT RAO**, 14 N. L. B. 115 **268**

S. 11—Res judicata—Finding not necessary for decision of suit, whether res judicata.

Where it appears from the judgment of a Court that the real ground of decision is a particular finding, which alone is sufficient for the disposal of the case, and that it has given other findings as well which are not necessary for the decision of the suit, the former finding is the only finding which operates as *res judicata*, especially when it is found that the judgment has been appealed from and that the Appellate Court has taken into consideration that finding alone. **O PARMESHWAR DIN v. DEBI PRASAD**, 5 O. L. J. 647 **386**

S. 11—Res judicata—Hindu Law—Widow, decree against, whether bars suit of reversioner.

Where the estate of a deceased Hindu has vested in a female heir, a decree fairly and properly obtained against her in regard to the estate is, in the absence of fraud or collusion, binding on the reversionary heir; and where merits are tried and the trial is fair and honest, a Hindu lady otherwise qualified to represent the estate in litigation does not cease to be so qualified merely owing to a personal disability or a disadvantage as a litigant.

A Hindu widow sued for a declaration that she has not validly adopted the defendant as a son to her deceased husband. Both Courts in India dismissed the suit, holding that by her own acts she was personally estopped from denying the validity of the adoption. The Privy Council affirmed that decision and also held that she had authority from her deceased husband to make the adoption in question and that the defendant had been validly

Civil Procedure Code—1908—contd.

adopted. On the death of the widow the next reversioner sued to eject the adopted son, on the ground that inasmuch as the widow had no authority from her deceased husband to make an adoption the defendant had not been validly adopted.

Held, that though the rule of *res judicata*, as enacted in section 11 of the Code of Civil Procedure, was not strictly applicable to the case, the principle of *res judicata* applied, and that the decision in the widow's suit on the question whether the defendant had or had not been validly adopted, barred the suit of the reversioner. **P C RISAL SINGH v. BALWANT SINGH**, 24 M. L. T. 361; 23 C. L. J. 519; 40 A. 593; 9 L. W. 52 **553**

S. 21—Jurisdiction—Appeal, second, question of jurisdiction, whether can be raised in.

The question that the primary Court had no territorial jurisdiction cannot be gone into in second appeal, unless it was raised at the earliest possible moment in the course of the suit. **C CHANDRA MOYI CHOWDHURANI v. GREGSON** **465**

S. 22—Transfer of case—Application for transfer by defendant objecting to jurisdiction of Court, maintainability of—Inconvenience of defendant's witnesses, whether ground for transfer—Plaintiff's choice of forum, interference with.

A defendant in a suit, who takes objection to the jurisdiction of the Court in which the suit has been instituted cannot maintain an application for its transfer to another Court under section 22 of the Civil Procedure Code.

A plaintiff's right to choose his own *forum* cannot be taken away from him except for very cogent reasons.

The fact that a defendant's witnesses would be very much inconvenienced if the suit continues in the Court chosen by the plaintiff as his *forum* is not a sufficient ground for taking action under section 22 of the Civil Procedure Code. **O ASKARAN BAID v. BHOLA NATH**, 21 O. C. 217 **105**

S. 35—Costs—Practice.

As regards costs of suit the parties are, in the absence of any special reason, entitled to have the ordinary rule observed, namely, that usually costs follow the event. **C BIJOY CHAND v. THE SECRETARY OF STATE** **972**

ss. 47 **298, 560**

S. 47, O. XXI, rr. 2, 53 (6)—

Attachment of decree—Adjustment after attachment, effect of, on rights of attaching creditor—Notice, absence of, to judgment-debtor, effect of—Application by decree-holder to record adjustment—Attaching creditor brought on record—Order on application, whether appealable—"Either through Court or otherwise" in O. XXI, r. 53, meaning of.

Where a decree, which is under attachment at the instance of the decree-holder's creditor, is adjusted after the attachment, the adjustment does not bind the attaching creditor, whether notice of the attachment has been issued to the judgment-debtor or not under the provisions of Order XXI, rule 53 (6) Civil Procedure Code.

In such a case, if an application is made by the decree-holder to record the adjustment, it would be open to the attaching creditor to come in and object to the entering of satisfaction and any order passed

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by the Court would be appealable as one covered by section 47, Civil Procedure Code.

—If the attachment was after the adjustment, the attaching creditor has no *locus standi* and it would not be open to him to raise any question within the meaning of section 47.

Quære.—Whether the Court could *suo motu* make the attaching creditor party to the satisfaction or adjustment proceedings.

Per *Abdur Rahim, J.*—The words "either through Court or otherwise" in Order XXI, rule 53, Civil Procedure Code, refer to "payment or adjustment" and not to "notice" preceding it.

The attachment of a decree is complete without notice to the judgment-debtor and the holder of the decree has no right to deal with it after attachment. *M KUPPUSAMI IYER v. KUPPUSAMI IYER*, (1918) M. W. N. 874; 24 M. L. T. 497; 9 L. W. 32

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ss. 47, 144, 151—Decree, *ex parte*, set aside—Sale in execution of decree, whether can be set aside—Limitation Act (IX of 1908), Sch. I, Art. 181—Limitation for application to set aside sale, commencement of.

Plaintiff obtained an *ex parte* decree against the defendant and caused the latter's house to be sold in execution and purchased it himself. The defendant subsequently got the *ex parte* decree set aside but on a retrial of the case a decree was again passed against him. He then applied to have the previous sale of the house set aside.

Held, (1) that the *ex parte* decree having been set aside, the sale which was held in execution of that decree ought itself to be set aside as being no longer based on any solid foundation.

(2) that the application to set aside the sale could be treated as one under section 47, or section 144 or section 151 of the Civil Procedure Code;

(3) that the application was governed by Article 181 of Schedule I of the Limitation Act and that limitation began to run from the date on which the *ex parte* decree was set aside. *B SHIVBAI BABYA SWAMI v. YESU CHEOO NAYAKIN*, 20 Bom. L. R. 925

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ss. 47, 115, O. XXI, r. 96, O.

XLVII, r. 1—Execution of decree—Delivery of possession, proceedings for, nature of—Order directing delivery of possession—Review—Jurisdiction of Court—Revision, whether lies.

Proceedings for delivery of possession are not proceedings in connection with the execution of a decree, and, therefore, no appeal lies against an order passed in such proceedings.

Where, through no fault of the judgment-debtor, the fact that an application for delivery of possession is barred by time is kept from the knowledge of the Court, and an order is passed directing delivery of possession, the Court has, on the fact being brought to its notice, jurisdiction to review its previous order and to bring it in accordance with law, and the High Court has no power to interfere in revision with the order passed on review. *PAT DHANINDER DAS v. HARIHAR PRASAD SINGH*, 3 P. L. J. 571

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s. 47, O. XXI, r. 2—Execution of decree—Payment out of Court not certified—Adjustment, whether can be recognised—Sale, whether

Civil Procedure Code—1908—contd.

fraudulent—Mortgage suit—Transfer, pendente lite, validity of.

Plaintiff obtained a mortgage decree on foot of an unregistered mortgage and purchased the mortgaged property in execution of the decree. He obtained formal possession, but not actual possession, which was with the defendant who was a subsequent mortgagee of the property. During the pendency of the suit the mortgagor executed another mortgage in favour of the defendant. Subsequently the plaintiff brought a suit to redeem the earlier mortgage executed in favour of the defendant and the latter set up the plea that the Court sale under which the plaintiff claimed title was fraudulent, inasmuch as the decree had been satisfied before the sale was held:

Held, (1) that under section 47 of the Civil Procedure Code the question as to the satisfaction of the decree was a question arising in execution, which should have been tried by the executing Court under that section or, at the discretion of that Court, by suit;

(2) that in either case the Court would be precluded from recognising an uncertified adjustment;

(3) that under section 52 of the Transfer of Property Act, the mortgagor who was a party to the plaintiff's mortgage suit could not transfer the property by way of mortgage so as to affect the rights of the plaintiff to bring the property to sale free from such burden;

(4) that, therefore, the plaintiff was entitled to redeem the earlier mortgage held by the defendant and was not affected by the mortgage executed during the pendency of his suit. *B MORU NARSU GUJAR v. HASAN FATTEKHAN JUMMAL*, 20 Bom. L. R. 929

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s. 47, O. XXI, r. 21—Execution of decree—Sale, setting aside of—Judgment-debtor, remedy of—Suit, separate, maintainability of.

Where a judgment-debtor impeaches the validity of execution proceedings which preceded and led up to the sale of his property, and thus seeks to have the sale set aside, his remedy lies by application under section 47, Civil Procedure Code, and not by means of a separate suit.

Where an auction-purchaser though he be also the decree-holder sues to recover possession on the basis of his purchase, he does so as the representative of the judgment-debtor and therefore the questions that arise in the suit are questions between the judgment-debtor and his own representatives and are not covered by section 47 of the Civil Procedure Code.

The right to bring an application within a certain period is not a vested right but a matter of procedure.

O KANIZ MEHDI BEGAM v. RASUL BEG, 5 O. L. J. 551

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s. 64, scope of—Award made rule of Court—Attachment, prior, of properties allocated by award to persons other than judgment-debtors, whether avoids award—Purchase subsequent to decree on award, effect of.

Section 64, Civil Procedure Code, avoids only private transfers and not awards which have become merged in a decree of Court.

A dispute between the plaintiffs and defendants Nos. 1 to 3 having been referred to arbitration, the arbitrator passed an award directing the delivery

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of certain properties to the plaintiffs. The award was filed in Court and a decree was passed in terms thereof. The properties had been attached by defendants Nos 4 and 5 as the properties of their judgment-debtors, defendants Nos. 1 to 3, before the passing of the award, but were purchased by them in Court-auction after the decree. In a suit by the plaintiffs for possession of the properties:

Held, that as the attachment created no title in the defendants Nos. 4 and 5, it could not invalidate the award, but must be taken to be subject to the rights created by it, and that as the sale took place after the decree which was passed in terms of the award, it was subject to that decree. **M KASI VISVANATHA CHETTIAR v. RAMASWAMI ATHITHA NADAR**, 35 M. L. J. 441; 8 L. W. 582; 24 M. L. T. 477 **123**

s. 91—Public nuisance, suit for removal of, by private person—Special damage, proof of.

The fact that a person suffers in a special degree the inconvenience felt by the public arising from a public nuisance cannot be said to cause him special damage and does not give him any right to sue for the removal of the nuisance, unless he proves that it causes him damage in a way different from the general public. **N RUKHMI v. KISAN** **88**

s. 92 **833**

s. 92—Religious Endowments Act (XX of 1863), s. 14, scope of—Suit to recover trust property from persons claiming as trustees, maintainability of.

Plaintiff, who claimed to be the representative of the original donor of a Hindu temple and to be interested in the property dedicated to the temple and also claimed to be the Muktesar appointed by the Temple Committee in place of the defendants, sued the latter for (a) possession of what should be found to be the trust property on enquiry by the Court; (b) an account of the trust property, both capital and income, come to the hands of the defendants; (c) an account of all expenses properly incurred by the defendants; and (d) damages for breach of trust. The defendants claimed to be trustees entitled to hold the property from generation to generation subject to the due fulfilment of the trust:

Held, that the suit, being one practically for the removal of the defendants from their position as trustees, for the restoration of the trust property to the plaintiff as the Muktesar appointed by the Temple Committee, for taking accounts and for damages for breach of trust, was governed by section 92 of the Civil Procedure Code and could only be brought in conformity with the provisions of that section.

Per *Marten, J.*—There is much which is in common between section 92 of the Civil Procedure Code and section 14 of the Religious Endowments Act, but the former is substantially the wider section and provides *inter alia* for settling a scheme which is a jurisdiction of a very wide and beneficial nature. A plaintiff may proceed for appropriate relief under either section, and the opening words of section 92 (2) of the Civil Procedure Code mean only that if he elects to proceed under the Religious Endowments Act he is not to be prevented from so doing by

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section 92. **B HANSRAJ IADDASHE v. ANANT PADMA-NARH BHATT**, 20 Bom. L. R. 954 **514**

s. 92, scope of.

Section 92 of the Civil Procedure Code is mandatory, and a suit claiming any of the reliefs specified therein must be brought under, and in conformity with, its provisions or not at all. If a plaintiff sets up a trust, "created for public purposes of a charitable or religious nature," and claims "as a person having an interest in the trust" any of the reliefs specified in section 92 of the Civil Procedure Code, he must do so in accordance with the terms of the section. **A NAIMUL HAQ v. MOHAMMAD SUBHAN-ULLAH**, 16 A. L. J. 841 **94**

s. 92—Suit in respect of choultry—Person "interested," meaning of.

In a suit for settling the scheme of a public choultry, the residents of the locality where the choultry is situate and who are also members of the community for whose benefit the charity was founded, are persons having an 'interest' in the charity within the meaning of section 92, Civil Procedure Code. **M. GARUDA SANYASAYAYA v. NERELLA MUTHEMMA**, 35 M. L. J. 661; 9 L. W. 1; 25 M. L. T. 740 **86**

s. 96 **298**

s. 96, O. XLI, r. 22—Provincial Insolvency Act (III of 1907), ss. 46, 47—Appeal—"In regard to proceedings under this Act", meaning of—Memorandum of objections, whether can be presented—Appeal barred by time, effect of—"Procedure on hearing," meaning of.

A memorandum of objections can be presented in an appeal against a decision under the Provincial Insolvency Act.

Where, however, the appeal is dismissed as presented out of time, the memorandum of objections cannot be heard.

Per *Wallis, C. J.*—The expression "in regard to proceedings under this Act in Courts subordinate to them" in section 47 (2) of the Provincial Insolvency Act is wide enough to cover cases in the subordinate Courts which come before the High Court or District Court on appeal or revision as well as applications for transfer, etc. The procedure prescribed in the Civil Procedure Code is the standard procedure and applies not only to insolvency cases in original Courts but also to cases of appeal and revision provided for in the Insolvency Act.

The right of a respondent to proceed by way of memorandum of objections is strictly incidental to the filing of the original appeal in time, and it is open to a party against whom a memorandum of objections has been filed to set up the bar that the original appeal was filed out of time.

Per *Sadasiva Aiyar, J.*—The right to prefer an appeal by way of memorandum of objections is an extension of the right of appeal, which must be given by Statute. Statutory provisions relating to such rights should be strictly construed. Order XLI, rule 22, of the Civil Procedure Code must, if possible, not be extended in favour of the right of a respondent to file a memorandum of objections so as to prejudice parties who have obtained a decree in their favour in the lower Court and who might reasonably entertain the belief that, as the

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time for preferring an appeal has expired, the rights which have been established in their favour under the decision of the Court of first instance have become finally secure.

The expression "in regard to civil suits" in section 47 (2) of the Provincial Insolvency Act includes proceedings in appeal in civil suits.

Per *Spencer, J.*—The word "hearing" in the heading to Order XLI, Civil Procedure Code, means hearing on the merits, and the heading "procedure on hearing" indicates that the respondent's right to take cross-objections, which up to the time of the hearing was an inchoate right, becomes perfected at the hearing of the appeal. The words "upon the hearing" in section 561 of the old Code were probably omitted in the new Code as being redundant. **M** ALAGAPPA CHETTIAR v. CHOCKALINGAM CHETTY, 35 M. L. J. 236; 8 L. W. 240; 24 M. L. T. 137; (1918) M. W. N. 688; 41 M. 904 **203**

S. 97—*Preliminary decree, appeal against—Decree reversed or modified—Final decree passed before result of appeal, effect of.*

If a preliminary decree passed under section 97 of the Civil Procedure Code is reversed or substantially modified in appeal, the final decree passed on the footing of that preliminary decree before the decision in appeal ceases to be operative. **M** GUNNAH MUDALI v. RANGASWAMI MUDALI, 35 M. L. J. 861 **7**

S. 100 (1) (c)—*Procedure, mistake in, not affecting merits—Appeal, second, whether lies—Custom, evidence of—High Court, whether can go into evidence in second appeal.*

In a case where a custom differing from the general law is set up, the High Court is not precluded in second appeal from considering whether the evidence adduced suffices to establish all the elements (antiquity, continuity and certainty) necessary to constitute a valid custom.

During the pendency of a suit, the plaintiff having died, his son, who had been adjudged an insolvent during the lifetime of his father, was admitted to continue the suit. The defendants did not raise any objection in the Court of first instance to his substitution. An objection was raised in the first Appellate Court but was rejected. The objection being repeated in the second Appellate Court:

Held, that even if there was an error, the merits were unaffected thereby and section 100 (1) (c), Civil Procedure Code, precluded a second appeal on that point. **N** BALIBHADRADAS v. MIRCHILAL **236**

S. 104 (e)—*Arbitration Act (IX of 1899), s. 19—Appeal, right of, against order under s. 19 of Arbitration Act.*

An appeal lies under section 104 (e), Civil Procedure Code, against an order passed under section 19 of the Arbitration Act, staying or refusing to stay a suit, where there is an agreement to refer to arbitration. **S** KODUMAL KALUMAL v. VOLKART BROS., 12 S. L. R. 34 **434**

S. 109—*Appeal to Privy Council—Remand by High Court for retrial—Leave, grant of, conditions determining—Final judgment, test of—Judgment on merits on one issue and remand on another—Certificate, grant of, in respect of portion of judgment, propriety of.*

Where a High Court, on appeal, remands a case for retrial by the lower Court, there is no final

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judgment against which the High Court can grant a certificate to appeal to the Privy Council under section 109, Civil Procedure Code.

Where every issue of fact has been found by the Appellate Court and the remand is directed solely with a view to give the consequent reliefs dependent on the conclusions of the Appellate Court, the judgment must be regarded as final within the meaning of that expression in section 109 (a), Civil Procedure Code.

The mere fact that a judgment has not been given on a preliminary point will not render it necessarily a final adjudication. The question in each case will be whether the pronouncement by the Appellate Court has given a final decision upon all the rights litigated.

Where a final decision is given on one of the issues on the merits and a retrial is ordered in respect of the other points or issues, the judgment is not final under section 109 (a), Civil Procedure Code, and leave cannot be granted to appeal to the Privy Council in respect only of the adjudication on the merits. **M** VADDIPARTHI MANGAYYA v. VADDIPARTHI VENKATARAMANAMURTHI, (1918) M. W. N. 844 **132**

S. 110—*Appeal to Privy Council—Cross-appeals to High Court—High Court affirming part of decree and reversing part—Leave, whether can be granted.*

Plaintiff's suit was decreed in part by the trial Court. There were cross-appeals to the High Court and the latter dismissed the plaintiff's appeal and accepted that of the defendant. The plaintiff applied for and obtained leave to appeal to the Privy Council against the decree by which the defendant's appeal had been accepted. He then applied for leave to appeal against the decree by which his own appeal had been dismissed and the trial Court's decree had to that extent been confirmed:

Held, that no substantial question of law being involved in the case and the trial Court's decree having been confirmed, leave to appeal to the Privy Council could not be granted. **A** CHIRANJI LAL v. BEHARI LAL, 16 A. L. J. 864 **124**

S. 115 **129, 499**
S. 115, O. XXI, rr. 91, 92, 93—

Execution of decree—Sale, cancellation of, for want of saleable interest in judgment-debtor—Notice, absence of, to persons entitled to rateable distribution, effect of—Revision—High Court, power of interference of.

Where an execution sale is cancelled under the provisions of Order XXI, rule 91, Civil Procedure Code, without notice to persons having an order in their favour for rateable distribution of the property, the Court, in passing the order, cannot be said to have failed or declined to exercise a jurisdiction vested in it by law and the High Court cannot interfere with the order in revision.

A mere error in the interpretation of a section is not a failure to exercise jurisdiction within the meaning of section 115, Civil Procedure Code.

Semble.—Persons who have an order for rateable distribution in their favour are persons affected by an application to set aside the sale within the

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meaning of Order XXI, rule 92, Civil Procedure Code, and an order made behind their backs cannot bind them for the purposes of Order XXI, rule 93. **M KOMANDUR KRISHNAMACHARLU v. B. DANOGI RAO, (1918) M. W. N. 716; 35 M. L. J. 604; 8 L. W. 592; 24 M. L. T. 482** 38

S. 115—Receiver, appointment of—Court, refusal of, to help Receiver to discharge his duties—Jurisdiction, refusal to exercise—Revision—High Court, power of interference of.

A Court is bound to assist the Receiver appointed in a suit in the execution of his duties by issue of all necessary orders to the parties and by enforcing them, if necessary, by contempt proceedings, and its refusal to take action or postponement of it is a refusal to exercise jurisdiction within the meaning of section 115 of the Civil Procedure Code.

Where, therefore, a Receiver was appointed in a suit to have custody of certain jewels and on his representing to the Court that the jewels were with the respondent, the Court directed him to sue the latter and when the Receiver filed the suit, the Court postponed the trial of the suit:

Held, that the Court failed to exercise a jurisdiction vested in it by law within the meaning of section 115, Civil Procedure Code. **M RAMACHANDRA AYYAR v. RAJU, 8 L. W. 436** 139

S. 115, O. IX, r. 9—Restoration of suit dismissed for default—Sufficient cause, absence of—Order restoring suit, whether without jurisdiction—Revision.

On an appeal against an order of the primary Court refusing to restore a suit dismissed for default the Appellate Court restored the suit, although it found that the plaintiff could not show sufficient cause for his non-appearance within the meaning of Order IX, rule 9, Civil Procedure Code:

Held, that the order of the Appellate Court was not without jurisdiction. **C NALLADAROO v. HARI KISSEN RATHI** 961

S. 115—Revision 433

S. 115—Revision—Erroneous decision of law, whether ground for interference—Remedy, other, open to aggrieved party, effect of.

An erroneous decision of law cannot be regarded as an exercise of jurisdiction, with which the Court was not vested by law and does not, therefore, furnish a ground for interference in revision.

It is not the practice of the High Court to interfere in revision when another remedy is open to the aggrieved party, and when no great injustice or inconvenience would follow from the refusal to interfere. **N GULAM v. SHEODIN RAM** 415

S. 115—Revision—Error of law, whether ground for interference.

An error in a conclusion of law arrived at by the lower Court is no ground for revision under section 115 of the Civil Procedure Code. **N BAFU BALAJEE v. DHANNU** 160

S. 115—Revision—High Court, powers of interference of—Error of law or fact.

The High Court will not interfere, in revision, with the finding or decision of a subordinate Court, under section 115 of the Civil Procedure Code, on the ground that it erred in law or fact in its appreciation of the merits. To justify the High Court's interference, there must be a want of, or a failure to

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exercise, jurisdiction by the subordinate Court. **M KRISHNASWAMI IYER, In re, 35 M. L. J. 251** 128

S. 115, O. III, r. 4, O. XXI, r. 89, O. XXXII, r. 5—Revision—High Court, power of interference of—Execution—Application to set aside sale on behalf of minor.

Under section 115 of the Civil Procedure Code the High Court is competent to revise a conclusion of law or of fact which bears on a question of jurisdiction.

In execution of a simple money decree passed against a minor, a house belonging to the minor was attached and advertised for sale. An application asking for an adjournment of the sale was put in by a Vakil appointed by the guardian of the minor, but the *rakalatnamah* did not state that the guardian was executing it as such. An affidavit was filed by the guardian along with the application. The Court adjourned the sale and on the adjourned date the property was sold to a stranger. Thereupon the same Vakil purporting to act on behalf of the minor filed an application under Order XXI, rule 89, of the Civil Procedure Code to set aside the sale. The Court rejected the application on the ground that it was not filed by the guardian or by a properly appointed Vakil:

Held, (1) that the application was in order inasmuch as it had been filed by a Vakil appointed by the guardian of the minor;

(2) that the refusal of the Court to entertain the application amounted to a refusal to exercise a jurisdiction vested in it and that, therefore, the High Court was entitled to interfere in revision under section 115 of the Civil Procedure Code. **A BEHARI LAL v. BALDEO NARAIN, 16 A. L. J. 717; 40 A. 674** 14

S. 115—Revision—Jurisdiction—Erroneous decision upon point of law, whether ground for interference.

Section 115 of the Code of Civil Procedure does not apply to cases where the law enunciated by the lower Court is wrong with regard to the discretion vested in it or where the evidence adduced was inadmissible or was misunderstood, inasmuch as all those are errors affecting merely the result of the cogitation of the Court upon the facts submitted to it; they are not errors involving any question of jurisdiction. **PAT JANKI KVER v. KOKUR DUSADH, (1918) Pat. 347** 930

S. 115—Revision—Question of law—High Court, power of interference of.

A High Court cannot interfere under the terms of section 115, Code of Civil Procedure, with a decision at the instance of persons who complain of the decision on a point of law. **C BIBHUTI BHUSAN CHAKRAVARTY v. UMESH CHANDRA MUKHERJEE** 614

S. 115, O. XXIII, r. 1 (2)—Withdrawal of suit, leave for, grant of, for reasons not covered by sub-rule (2)—Revision—High Court, whether can interfere—Misapplication of law—Jurisdiction, illegal exercise of.

The High Court has power to interfere in revision in a case where withdrawal of a suit has been allowed without reasons which can properly be regarded as covered by Order XXIII, rule 1, sub-rule 2 of the Civil Procedure Code.

To apply a provision of law to a case to which it has no application is to act without jurisdiction

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or at any rate to act illegally in the exercise of jurisdiction within the meaning of section 115 of the Civil Procedure Code. **N DOMA v. DAYARAM 1005**

s. 144 130

s. 145, applicability of, to surety bonds executed outside Court.

Section 145, Civil Procedure Code, is confined to cases where the liability of the surety has been entered into in the face of the Court or has been recorded by Court in accordance with the provisions of the Code. It does not extend to surety bonds taken by a judgment-creditor outside the Court. **M SUBBARAYA PILLAI v. SATHANATHA PANDARAM, 8 L. W. 507; (1918) N. W. N. 764; 24 M. L. T. 416/ 940**

s. 146, O. XXII, r. 10—"Proceeding" and "claiming under" in s. 146, meanings of—Assignment of party's interest pending suit—Appeal, rights to, by Assignee—Omission to be impleaded in suit, effect of—Plaint, return of, for presentation to proper Court—Devolution of interest during pendency of proceedings in first Court, effect of, on proceedings in second Court.

Order XXII, rule 10, Civil Procedure Code, only governs applications made to continue a suit. Applications presented after the termination of the suit are not within the rule.

The "proceeding" contemplated by section 146, Civil Procedure Code, includes an appeal and the expression "claiming under" in the section is wide enough to cover cases of devolution, etc., mentioned in Order XXI, rule 10, of the Code.

The effect of section 146 of the Civil Procedure Code is to grant an assignee of the interest of a party to a suit a right to prefer an appeal against the decrees passed in the suit which his assignor could have preferred, even though the assignee did not make himself a party to the suit.

Obiter.—Where a plaint is returned for presentation to the proper Court, any devolution of interest which takes place while the proceedings are pending in the first Court must be taken to be a devolution in the course of the suit which is subsequently tried in the second Court. **M SITARAMASWAMY v. DULLA LAKSHMI NARASANNA, 8 L. W. 21; 41 M. 510 840**

s. 151 130

s. 151—Execution of decree of High Court at variance with purport of decree—Inherent power of High Court to interfere.

Where it is brought to the notice of the High Court that a decree passed by it is being executed in a manner manifestly at variance with the purport and intention of that decree, the High Court, under its inherent powers of supervision which are expressly saved by section 151 of the Civil Procedure Code, can take such action for the ends of justice as may be necessary to enforce the proper execution of the decree. **PAT KULADA PRASAD TEWARI v. SADHU CHARAN TEWARI, 3 P. L. J. 485 107**

s. 151, O. XLI, r. 27—Execution of deed—Additional evidence, admission of—Substantial cause—Appellate Court, power of.

In a suit the plaintiffs had some reason to suppose that the execution of the deeds on which the suit was based would not be seriously challenged. But it was seriously challenged. The plaintiffs

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then produced formal evidence of the execution of the deeds, by examining a witness to prove the signature of one of the attesting witnesses to the deeds. The trial Court, however, disbelieved this witness and dismissed the suit.

Held, that under these circumstances there was substantial cause to justify the Appellate Court under section 151 and Order XLI, rule 27, Civil Procedure Code, in permitting the plaintiffs to produce additional evidence as to the execution of the deeds. **O MANGAL v. INDAR KUAR, 5 O. L. J. 745 1007**

s. 151, O. XL, r. 1, O. XLIII, r. 1 (s)—Revision—Inherent power of Court to treat revision as appeal.

The High Court has jurisdiction, in the exercise of its inherent powers under section 151 of the Civil Procedure Code, to condone in special cases the misapplication of the provisions of the Code, if the provisions of the law as regards limitation and Court-fees are complied with.

The High Court has authority to convert an application for revision into a memorandum of appeal. **PAT DULHIN SONA KUER v. JAMIL AHMAD 779**

s. 152, O. XLI, r. 33—Appellate Court, power of, to correct accidental slips in judgment and decree of lower Court.

An Appellate Court has, under Order XLI, rule 33 of the Civil Procedure Code, power to correct accidental slips in the judgment and decree of the lower Court, although no application has been made to it under section 152 of the Code. **N DILESHVAR RAM BRAHMAN v. NOHAR SINGH 193**

O. I, r. 3—Joinder of causes of action—

Suit for rent by co-sharer landlord—Prayer for recovery of share of rent against tenants, whether can be joined with prayer for relief in alternative against co-sharer landlords.

The plaintiff as purchaser of an eight-annas share of an estate brought a suit against the tenants making his co-sharers *pro forma* defendants, with a prayer to recover his share of the rent from the tenant defendants or in the alternative from the *pro forma* defendants, if it was found that the latter had realized the share of the rent due to the plaintiff.

Held, (1) that the prayer for the relief against the *pro forma* defendants could be joined with the prayer for the recovery of rent against the principal defendants inasmuch as Order I, rule 3, of the Civil Procedure Code provides for the joinder of such claims, and it is a well-established practice to join such claims;

(2) that the *pro forma* defendants having recovered the whole rent, asserting only an eight-annas interest in the superior right, they were bound to make over half of the rent collected to the owner of the other half of the proprietary right. **C ISWAR DALIN v. GIRINDRA KUMAR NAG 726**

O. I, r. 9, Sch. II, para. 21—

Arbitration—Reference to arbitration by some members of joint family for partition—Award, validity of
Where the question of the partition of the family properties of a joint Hindu family is referred to arbitration and some of the members of the joint

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family are not party to the reference, the award given in pursuance of such reference partitioning the family property is invalid and cannot be filed under paragraph 21 of Schedule II of the Civil Procedure Code. **Pat. CHOTTEY LAL v. MADHO BIBI 953**

O. I, r. 10—Appeal—Misjoinder of parties—Procedure, proper.

The appellant was the first defendant in a suit brought by the plaintiff. The primary Court decreed the suit with costs against the appellant. On appeal the lower Appellate Court, finding that the appellant was not a necessary party to the suit and was wrongly joined as a defendant, struck off the appellant's name from the record as a defendant and dismissed his appeal, making no order as to costs:

Held, that the proper order, which should have been made by the lower Appellate Court was to set aside the order of the primary Court and to dismiss the suit against the appellant with costs. **C SECRETARY OF STATE v. CHATURBHUI NANDA 963**

O. II, r. 2—Mortgage—Suit claiming that mortgage has been satisfied and for recovery of excess balance realised by mortgagee, dismissal of—Redemption, suit for, maintainability of.

Plaintiff mortgagor brought a suit against the defendant mortgagee, claiming that the latter had realised more than was due to him under the mortgage and asking for a decree for Rs. 100. The Court held that the mortgage had not been paid off and dismissed the suit. Subsequently the plaintiff brought a suit to redeem the mortgage:

Held, that the suit for redemption was barred by Order II, rule 2 of the Civil Procedure Code. **P BARKHURDAR v. CHATTA MAL, 119 P. R. 1918 798**

O. II, r. 2—Specific performance of agreement to lease, decree for—Possession, subsequent, suit for, maintainability of—Abandonment of claim—Cause of action—Lease granted to third person after decree, validity of.

The relief for possession is not a part of the claim which a plaintiff suing for the specific performance of an agreement to lease is entitled to make in respect of the breach of the defendant's agreement to demise the land.

Therefore, where a plaintiff obtained a decree for the specific performance of an agreement to lease and after the execution of the lease by the defendant brought a suit for possession of the land demised:

Held, that the suit for possession was not barred by the provisions of Order II, rule 2 of the Civil Procedure Code. **N PANDU v. SITAL PRASAD, 14 N. L. R. 176 188**

O. III, r. 4 14

O. V, r. 17—Summons, service of, modes of—Copy of summons delivered to defendant—Refusal to sign acknowledgment—Failure to affirm copy to door—Service, whether effected.

The object of serving a summons is that the defendant may be informed of the institution of the suit in sufficient time before the date fixed for the hearing, and the procedure laid down for the service of summonses is intended to guard against fraud and ensure that the proper person has been served.

There are three modes of serving a summons on a defendant: (1) by delivery of a copy of the sum-

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mons to the defendant personally or to an agent or some one on his behalf and by obtaining the signature of the person to whom the said copy is delivered to an acknowledgment of service endorsed on the original summons;

(2) by affixing a copy of the summons on the door of the defendant's residence or place of business;

(3) by effecting substituted service as laid down in rule 20 of Order V of the Civil Procedure Code.

Where a copy of the summons was delivered to the defendant who refused to sign the required acknowledgment, but no copy of the summons was affixed to the door of his house:

Held, that the summons was not duly served. **P DIWAN CHAND v. PARBATI, 99 P. R. 1918; 184 P. W. R. 1918 28**

O. VI, r. 17—Amendment of pleadings—Party, whether can resile from statement of Plead—Discretion of Court.

Where in a case, after the evidence had been recorded and the case had become ripe for judgment, the Court found that the plaintiff's Plead had, in the beginning of the trial and as a result of misinformation, made a wrong statement, and allowed the plaintiff to resile from it:

Held, that the Court was justified in exercising the wide discretion conferred upon it under Order VI, rule 17, of the Civil Procedure Code. **P CHUHAR BAI v. RAMA NAND, 113 P. W. R. 1918 114**

O. VI, r. 17—Amendment of pleadings—Written statement—Plea, new, whether can be allowed to be taken at late stage.

Where more than a year after the settling of issues in a suit, when the case was completely ready for hearing, the defendant sought to be allowed to put in a fresh written statement raising a completely new point about which the defendant had no real information:

Held, that he could not be allowed to do so. **Pat BISHENDAYAL v. JAISERI KUER, (1918) PAT. 323 746**

O. IX, r. 8, O. XIV, r. 1, cl. (5)—Date fixed for settlement of issues, whether date fixed for hearing.

The date fixed for the settlement of issues is a date fixed for the hearing of the suit within the meaning of Order IX, rule 8 of the Civil Procedure Code. **Pat FIRM OF HAR CHAND RAI-ANAND RAM v. RAM BAHADUR SINGH, (1919) PAT. 32 192**

O. IX, r. 9 961

O. IX, r. 13, scope of—Mortgage decree—Final decree passed ex parte, application to set aside, maintainability of.

A final decree passed *ex parte* in a mortgage suit is a 'decree' within the meaning of Order IX, rule 13, Civil Procedure Code, and an application to set it aside is, therefore, maintainable under the rule. **M KANAKASUNDARAM PILLAI v. SOMASUNDARAM PILLAI, 35 M. L. J. 375 71**

O. X, r. 4—Personal attendance of parties, when to be ordered.

Before a legal order can be passed against a party directing him to appear in Court under the provisions of Order X, rule 4 of the Civil Procedure Code, it is necessary that the Court should find, in the first place, that there are material questions relating to the suit which must be answered either by such

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party or by his Plead, and when such party has a Plead, it is only when the Plead is unable or refuses to answer those questions that the Court may direct the party to appear in person. **O NUR-UL-ISLAM v. QADIR BAKHSI**, 21 O. C. 252 **269**

O. XI, r. 21—Discovery of documents, order for—Failure to obey order, effect of.

Where a party fails to comply with an order for discovery, the proper remedy is for the party seeking discovery to apply to have the proceedings stayed or the suit dismissed. **Pat KUNJ LAL v. BANWARI LALL** **711**

O. XIV, r. 1, cl. (5) **192**

O. XX, r. 1, O. XXII, r. 6—Death of party before conclusion of arguments—Judgment, delivery of, after death, effect of.

Where a party to a suit died after arguments were partly heard and judgment was pronounced on a subsequent day when the arguments were closed without the legal representative of the deceased being brought on the record:

Held, that the judgment was a nullity and was not binding on the deceased's representative.

Order XX, rule 1, Civil Procedure Code, contemplates that all arguments should be heard before the case can be regarded as ripe for judgment. **M AMMALANADHUNI PATTABHIRAMAYYA** **859**

O. XX, r. 4—Judgment of Court of Small Causes, contents of.

Where in accordance with the provisions of Order XX, rule 4 of the Civil Procedure Code, the judgment of a Court of Small Causes contains the points for determination and the Judge's decision thereon, but omits to give reasons for the decision, the High Court will not interfere with it. **C PROTAP CHUNDRA DUTT v. ABHIMANINI SURINI** **752**

O. XX, r. 14 **470**

O. XXI, r. 2 **109, 135**

O. XXI, r. 2—Execution of decree—Payment out of Court—Satisfaction not certified—Execution, application for—Suit by judgment-debtor for damages—Cause of action—Damages, measure of—Limitation.

Where a decree-holder does not certify a payment made to him out of Court by the judgment-debtor towards the satisfaction of the decree under the provisions of Order XXI, rule 2, Civil Procedure Code, and takes out execution without giving credit for such payment, the judgment-debtor has a right to sue the decree-holder for any damage he may have suffered by the latter's neglect to certify and by the proceedings in execution.

Such a suit is one for breach of the implied promise to certify payment to the Court and to make it effectual in execution.

In such a case the filing of the execution petition in itself gives a cause of action though no money may have been realized, and successive applications may give rise to successive breaches and fresh causes of action. If money is subsequently realized, that will give a fresh cause of action as a further breach of the covenant and the amount recovered will form the main portion of the damages; but where money is not realized, the damages awarded can only be by way of compensation for any injury

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caused to the judgment-debtor and for any loss he may have been put to by the attempted execution of a satisfied decree.

Such a suit is governed by Article 115 and not by Article 120 of the Limitation Act. **M GOPALASAMI NAICK v. NAMMALWAR NAICK**, (1919) M. W. N. 3; 36 M. L. J. 175 **810**

O. XXI, r. 2, O. XXXIV, rr. 2, 5

—Mortgage decree for sale—Payment out of Court of amount of preliminary decree, plea of, maintainability of—Certificate under O. XXI, r. 2, production of, effect of.

Under Order XXXIV, rules 2 and 5, Civil Procedure Code, a final decree for sale should be passed if the amount specified in the preliminary decree has not been paid into Court within the time specified. The Court will not recognise any plea, at the time of passing the decree for sale, to the effect that the amount has been paid out of Court to the decree-holder. In this respect, the scheme of the Code differs from the provisions laid down in section 89 of the Transfer of Property Act.

If, however, between the passing of the preliminary decree and the passing of the decree for sale the defendant obtains a certificate under the provisions of Order XXI, rule 2, Civil Procedure Code, he can take advantage of it to reduce the amount for which the property is to be sold and the decision will be the same as if, at the time when the decree for sale was being made, he came forward and paid the amount into Court. **M SINGA RAJA v. PETHU RAJA**, 8 L. W. 497; 35 M. L. J. 579; (19'8) M. W. N. 809; 24 M. L. T. 501; 42 M. 61 **196**

O. XXI, r. 2 (3)—Execution of decree

—Payment out of Court not certified, effect of.

Where a judgment-debtor makes a payment out of Court to the decree-holder towards the satisfaction of the decree, he is nevertheless not entitled in execution proceedings under the decree to claim the benefit of the payment unless he has complied with the provisions of Order XXI, rule 2, sub-rule (3) of the Civil Procedure Code. **Pat SUKHEE KUMRI v. MAHAMAYA PRASAD SINGH** **765**

O. XXI, r. 16—Commissioner, examination of witnesses by—Demeanour of witness, note of.

Per Woodroffe, J.—A Commissioner for the examination of witnesses is entitled by law to note his observations as to the demeanour of the witnesses examined by him. **C MARIAM BIBI v. MUHAMMAD IBRAHIM**, 28 O. L. J. 306 **561**

O. XXI, r. 21 **39**

O. XXI, r. 32—Injunction, decree for, mode of execution of—Execution, whether can be effected through Police—Hereditary office, decree passed with regard to, whether binds legal representatives of parties—Civil Court, power of—Procedure.

A decree for a perpetual injunction was passed in favour of the plaintiffs and the defendants third party, restraining the defendants second party from interfering with the right of the plaintiffs and of the defendants third party to perform the "Singas Arti" ceremony in a temple. The legal representatives of the defendants second party caused an obstruction to the performance of the ceremony by the defendants third party, and the latter applied for execution of the decree through the Police:

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Held, (1) that the decree having been passed both in favour of the plaintiffs and of the defendants third party, the latter were entitled to execute it;

(2) that if the defendants second party disobeyed the order of the Court, they were liable to the penalties mentioned in Order XXI, rule 32 of the Civil Procedure Code, which prescribed the manner for the execution of a decree for injunction and that the Court had no power to order the Police to see that the decree-holders performed the ceremony without obstruction by the defendants second party;

(3) that as the suit was brought by the plaintiffs on the basis of a right which they claimed as the descendants of the founder of the temple, the injunction was granted against the defendants not as individuals but as persons claiming a right as descendants of the original founder and that therefore the decree could be enforced against their legal representatives also. **A GORDHANLALJI v. MAKSUDAN BALLABH**, 16 A. L. J. 700; 40 A. 648. **26**

O. XXI, r. 34.

Action taken by the Court under Order XXI, rule 34 of the Civil Procedure Code, in execution of a decree for specific performance of a contract of lease is a proceeding in the suit itself.

Therefore, a transfer of the property in dispute by the judgment-debtor effected after the passing of the decree but before action is taken under Order XXI, rule 34 of the Civil Procedure Code, would be affected by the doctrine of *lis pendens*. **N PANDU v. SITAL PRASAD**, 14 N. L. R. 176. **188**

O. XXI, r. 53—Decree for mesne profits and costs, whether immoveable property—Attachment of decree—Decree, whether can be sold—Procedure.

In a suit by a mortgagee the Court passed a decree in favour of the mortgagee for recovery of possession of the mortgaged property, unless the persons in possession of the property redeemed the mortgage by a certain date. There was also a decree for costs and mesne profits in favour of the plaintiff. The defendants redeemed the mortgage, so that the only decree which remained subsisting was for mesne profits and costs. This decree was attached and sought to be sold by a creditor of the mortgagee in execution of a decree obtained by him against the mortgagee:

Held, that the decree as attached was a decree for money within the meaning of Order XXI of the Civil Procedure Code and that the only procedure which the attaching decree-holder could adopt was to execute the decree under Order XXI, rule 53. **PAT LACHMAN OJHA v. CHARITER OJHA**, (1918) PAT. 257; 5 P. L. W. 191. **183**

O. XXI, r. 53 (6)

O. XXI, rr. 54, 57, O. XXXVIII, rr. 5, 6, 7, 11—Attachment ordered before but effected after judgment, effect of—Execution application, dismissal of, effect of, on attachment.

An attachment which is ordered in a suit before judgment cannot be treated as a nullity merely because, as a matter of fact, the attachment is not actually completed until after judgment.

Order XXI, rule 57, Civil Procedure Code, has no application to attachments ordered under Order XXXVIII, rule 5.

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Per *Phillips, J.*—When a Court makes an order under Order XXXVIII, rule 6, Civil Procedure Code, that order cannot be deprived of all force by the mere failure of the executive officers of the Court to carry it out before the decree is passed.

Per *Kumarasawmi Sastri, J.*—There is nothing in Order XXXVIII, rules 5 to 12, Civil Procedure Code, requiring that the actual attachment in pursuance of the order directing conditional attachment should be made before the passing of the decree. Attachment of the property in the manner prescribed by Order XXI, rule 54, is a purely ministerial act. Any delay of the officers of Court in effecting the attachment should not prejudice the decree-holder and the validity of the order of attachment under Order XXXVIII, rule 5, should not depend on the date when it is actually effected. An attachment ordered before judgment invalidates an alienation made after the property is actually attached in pursuance of the order, even though the actual attachment was made after the passing of the decree. **M RUDRAVARAM VENKATASUBBIAH v. RUDRAVARAM VENKATA SESHAIYA**, (1918) M. W. N. 806; 35 M. L. J. 37; 8 L. W. 36; 24 M. L. T. 343; 43 M. 1. **232**

O. XXI, rr. 54 (2), 57, 63, 90—

Execution of decree—Sale—Proclamation, formalities necessary for—Omission to comply with necessary formalities, effect of.

A copy of the proclamation of sale must, under rule 67 read with rule 54 (2) of Order XXI of the Civil Procedure Code, be affixed upon a conspicuous part of the Court house, and under rule 63 of the Order the sale must take place after the expiration of at least 30 days from the day on which the copy of the proclamation is so affixed. An omission to comply with any of those formalities is a material irregularity in the publication of the sale within the meaning of Order XXI, rule 90, of the Civil Procedure Code and vitiates the sale. **N LAXMINARAYAN v. PURNABAI**. **611**

O. XXI, rr. 55, 58, 60, 63—

Execution of decree—Attachment, withdrawal and revival of—Objection allowed—Declaration, suit for, by decree-holder, decree in, effect of—Decree reversed in appeal but restored in second appeal—Attachment, whether revived.

Where an execution Court allowed an objection under Order XXI, rule 58, Civil Procedure Code, and referred the unsuccessful decree-holder to a regular suit, but did not pass any order under Order XXI, rule 60, of the Code raising the attachment, and the decree-holder thereafter filed a declaratory suit and obtained a decree in his favour:

Held, that in view of the provisions of Order XXI, rule 63, Civil Procedure Code, the result of the decree passed in the declaratory suit was to revive the attachment which had been previously carried out, even if it be assumed that the legal effect of allowing the objection had been to raise the attachment.

Where the decree of a Court of first instance is reversed in first appeal but restored in second appeal, the result of the decision in second appeal is to revive the attachment which, under the provisions of Order XXI, rule 55, Civil Procedure Code, is deemed to have been withdrawn in consequence of

Civil Procedure Code—1908—contd.

the decision in first appeal. **O. PARMESHA DIN v. DEBI PRASAD**, 5 O. L. J. 647 **386**

O. XXI, r. 57 **232**

O. XXI, r. 57—Execution of decree—

Attachment of decree—Execution case dismissed for default, effect of—Attachment, whether raised—Purchaser of attached decree, position of.

A decree-holder applied for the attachment of a decree belonging to his judgment-debtor. The executing Court ordered the decree to be attached, but on the date fixed for orders dismissed the execution case for default. After the order for dismissal the judgment-debtor sold the attached decree to one A:

Held, (1) that until the attached decree had been realised by the decree-holder there was nothing further to be done by him in the execution case, so that the executing Court had no jurisdiction to dismiss the case for default;

(2) that notwithstanding the order for dismissal of the case, the attachment of the decree continued to subsist;

(3) that, therefore, A acquired no title to the decree by his purchase as against the attaching decree-holder, and had no right to execute it.

So long as an attachment of a decree, remains in force, any dealings by the original decree-holder or any transfer or delivery of property comprised in the decree is void as against the claims enforceable under the attachment. **PAT MUHAMMAD AMIRUL HASAN v. WAZIR BIBI**, (1918) PAT. 353 **786**

O. XXI, r. 58 **386**

O. XXI, rr. 53, 63—Limitation Act

(IX of 1908), *Sch. I, Art. 11—Refusal to investigate claim, whether order under r. 63—Order that claim be notified to bidders—Suit by claimant to establish title—Limitation applicable.*

Where a Court purports to make an order under the proviso to Order XXI, rule 54, Civil Procedure Code, i.e., an order refusing to investigate, the order comes within the mischief of Order XXI, rule 63, Civil Procedure Code, and Article 11 of Schedule I of the Limitation Act.

An order on a claim petition which expresses no final judgment upon the right put forward but simply directs the sale after notifying the claim, is an order against the claimant and his suit to establish his title is governed by Article 11 of Schedule I of the Limitation Act.

Per Seshagiri Aiyar, J.—The practice of notifying claims to intending bidders is not warranted by anything contained in the Code of Civil Procedure. It often leads to the depreciation in value of the property to be sold and is not calculated to advance the right of the claimant in any way. **M. MACHI RAJU VENKATARAMAN v. VADREYU RANGANAYAKANNA**, 8 L. W. 292; 35 M. L. J. 315; (1918) M. W. N. 599; **240**

O. XXI, r. 60 **386**

O. XXI, rr. 60, 61—Claim proceedings

Investigation of claims—Court, duty of.

Order XXI, rules 60 and 61, Civil Procedure Code, lay down the lines on which the investigation of claims preferred to properties under attachment should proceed. The Court should consider whether at the time of attachment the property was in the possession of the judgment-debtor as his own

Civil Procedure Code—1903—contd.

property, and not on account of any other person or in trust for him. If this entails a consideration of the *bona fides* of a sale in his favour set up by the objector or the legal effect of the deed of conveyance including the circumstances of its registration, such matters should be gone into. **L. B. CHETTY, E. N. M. K. v. CHARTERED BANK OF INDIA, AUSTRALIA AND CHINA**, 11 BUR. L. T. 118 **182**

O. XXI, r. 63 **270, 386**

O. XXI, r. 66—Execution of decree—

Sale proclamation—Valuation of property to be sold, method of.

Where an executing Court directed that the value of the property to be sold should be reckoned at twenty times the Government Revenue:

Held, that this was only a colourable pretence of exercising the jurisdiction vested in the Court by law to ascertain the actual value of the property and record it in the sale proclamation and that the Court should ascertain the value of the property by a reference to the rent-roll and to the Record of Rights showing the extent of the *zirāits* and *bakāsh* lands of the village. **PAT JAGGARNATH PERSHAD v. CHITRAGUPTA NARAIN SINGH**, 3 P. L. J. 590 **141**

O. XXI, rr. 67, 68 **611**

O. XXI, r. 89 **14**

O. XXI, r. 90 **611, 970**

O. XXI, r. 90.

The language of Order XXI, rule 90 of the Civil Procedure Code, which gives a Court power to set aside sales on the ground of fraud in publishing and conducting the sale, is wide enough to include cases where fraud is committed after the publication of the sale proclamation.

Where a decree-holder agreed not to proceed with an execution sale on a promise by the judgment-debtor to pay up the whole of the decretal money within two months, but nevertheless proceeded to sell the property in contravention of his agreement:

Held, (1) that the conduct of the decree-holder amounted to fraud in the matter of conducting the sale and that the proper provision under which the judgment-debtor could come and impeach the sale was Order XXI, rule 90 of the Civil Procedure Code;

(2) that no second appeal lay against the order setting aside the sale. **PAT MAULA BUX v. RAGHUBAR GANJHU**, 3 P. L. J. 615 **560**

O. XXI, rr. 91, 92, 93 **33**

O. XXI, r. 96 **129**

O. XXII, r. 4, O. XXX, r. 4—Suit

by persons described as proprietors of firm, decree in—Appeal—Respondent, death of—Representative not brought on record, effect of.

Order XXX, rule 4, of the Civil Procedure Code applies only to a case where the suit is brought in the name of the firm.

In a suit where the description of the plaintiffs as given in the plaint was "the proprietors and *maliks*" of a firm and then the names of the plaintiffs were mentioned, the Court below gave a decree to the plaintiffs and in the decree one B. and other persons were described as the plaintiffs without the addition of the words that they were *maliks* of the firm. After an appeal from the decree had been

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filed by the defendant one of the plaintiffs-respondents died, but his legal representatives were not brought on the record within the time allowed by law:

Held, that the decree being in favour of the plaintiffs jointly the appeal could not proceed in the absence of the legal representatives of the deceased plaintiff-respondent. **C MONMOHAN PANDAY v. BIDHU BHUSAN RAY CHOWDHURY**, 28 O' L. J. 268 309

— **O. XXII, r. 6** 859

— **O. XXII, r. 10** 840

— **O. XXIII, r. 1**, applicability of—*Withdrawal of suit—Sufficient ground*.

Under Order XXIII, rule 1 of the Civil Procedure Code, a suit can only be withdrawn with permission to bring a fresh suit when the Court is satisfied that the suit must fail for reason of some formal defect or that there are other sufficient grounds for allowing the plaintiff to bring a fresh suit. The sufficient grounds contemplated in the second clause of the rule must be grounds closely analogous to the grounds given in the first clause.

The provisions of Order XXIII, rule 1 of the Civil Procedure Code, must be strictly applied. **PAT MAHENDRA RAM v. SINGI LAL**, 3 P. L. J. 651 197

— **O. XXIII, r. 1 (2)**.

The main object of sub-rule 2, rule 1, Order XXIII of the Civil Procedure Code, is to prevent a defect of justice on technical grounds. Where no formal defect necessitating failure of the suit is shown to exist, there must still be a defect which has the effect of shutting out a fair trial on the merits and arises out of some error made in good faith by the plaintiff which can only be effectively set right by a trial *de novo*. **N DOMA v. DAYARAM** 1005

— **O. XXV—Security for costs—Insolvent, undischarged, suit by—Cause of action accruing after adjudication—Security, whether can be demanded—Principles applicable.**

An undischarged insolvent suing to recover a sum due to him from the defendant and earned by him subsequent to the adjudication cannot be compelled to give security for costs merely because he is an insolvent, unless he is a nominal plaintiff acting on behalf of the trustee or for the benefit of others.

An application for an order that the plaintiff, who is an undischarged insolvent, be directed to give security for costs of the suit is not covered by any provision of the Civil Procedure Code and should be dealt with under the general law.

It is well settled in English Law that a bankrupt is the proper plaintiff to sue in respect of property acquired by him after adjudication and that anything recovered by him remains in the bankrupt until the trustee intervenes, and the same principles are applicable in this country under the Presidency Towns Insolvency Act. **C MURRAY v. EAST BENGAL MAHAJAN FLOTILLA CO.**, 22 C. W. N. 1018 622

— **O. XXX, r. 4** 309

— **O. XXXII, r. 3—Minor judgment-debtor—Guardian, appointment of—Formal order, absence of, effect of.**

Where in an execution proceeding the Court by its action has given its sanction to the appearance of a person as guardian of a minor judgment-debtor and that person has so appeared and acted on behalf of the minor, the absence of a formal order

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of appointment under Order XXXII, rule 3 of the Civil Procedure Code, is not fatal to the proceedings and the minor is bound by them. **PAT KESHAWESAR-INDRA SAHI v. DEBENDRA BALA DASSI** 245

— **O. XXXII, r. 5** 14

— **O. XXXII, r. 7**, applicability of, to revenue proceedings—*Compromise in mutation proceedings on behalf of minor without leave of Court, validity of.*

The provisions of the Code of Civil Procedure do not apply *en bloc* to proceedings in Courts constituted under the Land Revenue Act.

A minor was represented in certain mutation proceedings by his elder brother, who *bona fide* entered into a compromise with the other party. The leave of the Court as required by Order XXXII, rule 7, of the Civil Procedure Code was, however, not obtained for this settlement:

Held, that the compromise was not bad merely for want of such leave. **O HARPAL SINGH v. SUKHRANI**, 21 O. C. 220 119

— **O. XXXII, r. 7, Sch. II, cl. 20—**

Minor, party to dispute—Reference to arbitration by next friend—Award filed and decree passed without opposition—O. XXXII, r. 7, applicability of—Decree, whether binding on minor.

When a dispute, to which a minor is a party, is submitted to arbitration out of Court by the next friend of the minor and the award made upon such submission is brought into Court by the next friend under clause 20 of the Second Schedule to the Civil Procedure Code, and the Court is asked to file it and thereafter pass a decree upon it, the opposite party not objecting, the Court is not bound to sanction the agreement to have the award filed and a decree passed upon it, as for the benefit of the minor, or to certify the decree, nor is the minor entitled to the protection of Order XXXII, rule 7 of the Civil Procedure Code.

Where a minor through his next friend applies that an award be filed and a decree passed upon it, and the other party to the reference raises no objection to the application, and the award is filed and a decree passed in accordance with it, it cannot be said that there has been any agreement on behalf of the minor with reference to the suit in which the next friend is acting, although were the minor the defendant in such a suit as is numbered under clause 20 of the Second Schedule, it might be that a promise given on behalf of the minor to allow the award to be filed without opposition and a decree passed in accordance with it would be an agreement on behalf of the minor with reference to the suit within the meaning of Order XXXII, rule 7 of the Civil Procedure Code. **B HANMANTRAM RADHAKISAN v. SRIVINARAYAN ASURAM**, 20 BOM. L. R. 970 238

— **O. XXXIV, r. 2** 196

— **O. XXXIV, rr. 4, 5, 10—Mortgage suit—Costs in appeal, whether part of decretal amount—Practice.**

Costs awarded in mortgage suits, including costs of appeal, form part of the decretal amount and are realisable in the first instance by sale of the mortgaged property and not otherwise. **O SADIQ HUSSAIN KHAN v. UMMAT UL FATIMA BEGUM** 329

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O. XXXIV, r. 5 196, 245

O. XXXIV, r. 5—*Transfer of Property Act (IV of 1882), s. 93—General Clauses Act (X of 1897), s. 6 (c)—Limitation Act (IX of 1903), Sch. I, Arts. 18, 18¹, 18²—Mortgage suit—Decree under Transfer of Property Act—Final decree under Civil Procedure Code, application for, maintainability of—Order absolute—Limitation.*

A preliminary decree for sale was passed in a mortgage suit under the provisions of the Transfer of Property Act. The new Civil Procedure Code, Act V of 1908, having come into force before the expiry of the time fixed in the preliminary decree for payment of the mortgage amount, the mortgagee applied for a final decree under Order XXXIV, rule 5, Civil Procedure Code:

Held, (1) that a final and executable decree was passed in the case under the Transfer of Property Act, notwithstanding that the direction in the decree for the sale of the property was made conditional on default of payment of the amount found due to the plaintiff by a certain date;

(2) that the decree-holder's remedy was to apply for an order absolute;

(3) that the matter was governed by Article 182 and not by Article 181 of the Limitation Act.

Per Sadasiva Aiyar, J.—The repeal of the provisions of the Transfer of Property Act regarding mortgage decrees could not, having regard to section 6, clause (c) of the General Clauses Act, deprive the holder of a mortgage decree passed under it of his remedy by way of getting an order absolute in respect of his right under the decree so as to make it executable in the strict sense. **M RAMASAMI REDDI v. SOKKAPPA REDDI**, 35 M. L. J. 194 **732**

O. XXXIV, r. 5 (2) 185, 934

O. XXXIV, r. 6—*Mortgage decree—Compromise providing for sale of properties not subject to mortgage—Order of Court, whether necessary—Procedure.*

A compromise in a mortgage suit provided that if the amount due under the mortgage was not realised by sale of the mortgaged properties, the other properties of the judgment-debtor should be pursued in due course. A decree was passed in accordance with the compromise and the mortgaged properties having been sold, the decree-holders sought to proceed against the other properties of the judgment-debtor:

Held, that a formal order under Order XXXIV, rule 6, of the Civil Procedure Code was a necessary preliminary before proceeding against the properties not covered by the mortgage. **PAT KARIMULLA SHAH v. MUHAMMAD RAZA**, 3 P. L. J. 149 **608**

O. XXXIV, r. 6—*Mortgage decree—Mortgaged properties not exhausted—Mortgagee, whether entitled to personal decree.*

Order XXXIV, rule 6, of the Civil Procedure Code does not mean that a personal decree against the mortgagor cannot be obtained in any case where the whole of the mortgaged properties directed to be sold have not been sold for whatever cause it may be.

Where there is a deficiency after the sale of all the mortgaged properties which were available for

sale at the date of sale under the mortgage decree, the mortgagee-decree-holder is entitled to enforce the liability of the mortgagor under Order XXXIV, rule 6, Civil Procedure Code.

If it can be shown that the properties which were included in the mortgage and which could be sold in pursuance of the mortgage decree were in fact not sold owing to some action or default of the mortgagee, then the mortgagee would be debarred from obtaining a decree for personal liability under Order XXXIV, rule 6, Civil Procedure Code.

But the fact that some of the properties included in the mortgage decree have, since the date of the decree and by reason of the prosecution of his rights by a prior mortgagee and through no act or default of the decree-holder-mortgagee, ceased to be available for sale, is not sufficient to debar the claim of the mortgagee-decree-holder for a personal decree under Order XXXIV, rule 6, Civil Procedure Code.

After the plaintiff, a second mortgagee, had obtained a mortgage decree, the mortgagor was adjudicated an insolvent. On an application made by a prior mortgagee to the Insolvency Court most of the mortgaged properties were sold by the Official Assignee free from all incumbrances. This sale, which was not objected to by the plaintiff, was not sufficient to pay off even the claim of the prior mortgagee. The remaining items of the mortgaged properties were then sold by the plaintiff under his mortgage decree but the price realised by the sale was very small. The plaintiff thereupon applied for a personal decree against the mortgagor and his sureties:

Held, that the plaintiff was entitled to a personal decree under Order XXXIV, rule 6, Civil Procedure Code, although all the properties included in the mortgage decree obtained by him had not been sold under that decree. **C SATISH RANJAN DAS v. MERCANTILE BANK OF INDIA, LTD.**, 45 C. 702 **322**

O. XXXIV, r. 6 (2) 298

O. XXXIV, r. 10 329

O. XXXIV, r. 14 794

O. XXXVIII, r. 11 232

O. XL, r. 1—*Administrator, insolvency*

of—Receiver, appointment of

Where a person, who holds certain property partly in his personal and partly in a representative capacity as an administrator, becomes an insolvent, his personal share in the property vests in the Official Assignee and the latter, as trustee for the creditors of the insolvent, is entitled to have a Receiver appointed of the whole of the property till the share of the creditors is determined. It is immaterial that the bodies for whom the insolvent holds the property as administrator are content to leave their shares in his hands. **L B OFFICIAL ASSIGNEE v. MAHOMED HADI**, 11 BUR. L. T. 127 **152**

O. XL, r. 1, O. XLIII, r. 1 (s)—*Receiver, appointment of—Objection by person in possession, dismissal of—Appeal, whether lies.*

The applicant advanced money to one T, and in consideration of that was appointed manager of T's estate and was put in possession of it. Subsequently certain creditors of T obtained a decree against him and in execution of that decree a Receiver was appointed and put in possession of T's estate. Thereupon the applicant preferred an

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objection to the appointment of the Receiver and to the delivery of possession of the estate, which was dismissed:

Held, that the order dismissing the applicant's objection came within Order XL, rule 1 of the Civil Procedure Code, and was appealable under Order XLIII, rule 1 (s), of the Code. **PAT AGABEG v. SUNDARI**, 3 P. L. J. 573 **133**

O. XLI, r. 1, O. XLIII, r. 1 (s)—

Receiver, appointment of—Possession, resistance to—Court, order by—Appeal, whether lies

The powers of a Receiver are regulated by Order XL of the Civil Procedure Code and the only ground upon which his possession can be resisted is sub-clause (2) of rule 1 of Order XL of the Code.

Where a person who refuses to deliver possession to a Receiver is ordered by the Court to do so, his remedy is by appeal under Order XLIII, rule 1 (s), of the Civil Procedure Code. **PAT DULHIN SONA KUER v. JAMIL AHMAD** **779**

O. XLI, r. 1—Appeal, presentation of—

Decree of lower Appellate Court, copy of, not containing grounds of appeal to that Court, whether proper copy.

Along with his memorandum of appeal to the Chief Court appellant filed a copy of the lower Appellate Court's decree which did not contain the grounds of appeal to that Court:

Held, that the copy filed by the appellant was a proper copy of the decree within the meaning of Order XLI, rule 1, of the Civil Procedure Code and that the appeal to the Chief Court had been properly presented. **P. RAM PEARA v. RUP LAL**, 80 P. R. 1948; 181 P. W. R. 198 **102**

O. XLI, r. 10—Appeal in forma pauperis

—Security for costs, whether can be demanded.

A plaintiff preferring an appeal in forma pauperis cannot be required to give security for costs of the original suit or of the appeal. **C KANCHANI BEWA v. JADUB PRAMANIK** **971**

O. XLI, r. 22 203, 1003**O. XLI, rr. 22, 33, scope of—Cross-**

objection by respondent against co-respondent, whether entertainable—Hindu Law—Reversionary heirs joining in mortgage by female, whether bound by mortgage.

Order XLI, rule 22, of the Civil Procedure Code is wide enough to cover a cross-objection by one respondent against another. But a cross-objection by a respondent as against his co-respondent should not be allowed under this rule where the matters sought to be raised by the cross-objection have no relation to or connection with the question raised by the appeal.

A Hindu female in possession of property inherited from her deceased father or mother mortgaged it by a deed which recited legal necessity. Some of her sons joined in the mortgage:

Held, that the sons who joined in the mortgage were estopped from denying that there was legal necessity for the mortgage and that the mortgage and the execution sale consequent thereon were binding on the property in their hands after the death of their mother.

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Per *Sanderson, C. J.*—Order XLI, rule 33, Civil Procedure Code, gives important and useful powers to a Court of Appeal, which a Court of Appeal would not hesitate to make use of on a proper occasion.

Per *Mookerjee, J.*—Order XLI, rule 33, Civil Procedure Code, must be cautiously applied, for instance, applied generally in cases where but for recourse to it the ends of justice would be defeated. Thus the rule should not be allowed to be invoked in favour of a litigant so as to enable him to evade the provisions of other Statutes such as the Limitation Act or the Court Fees Act. **C SHIB CHANDRA KAR v. DULCKEN**, 28 C. L. J. 123 **78**

O. XLI, r. 23, O. XLIII, r. 1 (u)

—Remand, order of—Appeal—Finding of fact, whether can be disturbed.

In an appeal from an order remanding a case under Order XLI, rule 23 of the Civil Procedure Code, the Chief Court can no more go into questions of fact than it can in the case of second appeals. **P WARYAM SINGH v. HARNAM SINGH**, 109 P. R. 1918 **379**

O. XLI, rr. 25, 27—Appeal—Appellate

Court, whether can order retrial of issues tried by trial Court.

Order XLI, rule 25, of the Civil Procedure Code does not contemplate an order by the Appellate Court directing a retrial by the primary Court of the issues tried and determined by that Court.

If an Appellate Court considers that any question of fact essential to the right decision of the suit has not been tried and determined by the trial Court, it may frame issues and direct the trial of such issues in the manner provided by Order XLI, rule 25, or it may proceed in the manner provided in Order XLI, rule 27. **C CHANDRA KUMAR BISWAS v. NABI BUX** **959**

O. XLI, r. 27 959, 1007**O. XLI, r. 27 cl. (2), O. XLVII,**

r. 1—Appeal—Additional evidence, admission of—Review—Decree, whether can be set aside on happening of subsequent event—Procedure.

A mere omission to comply with Order XLI, rule 27, clause 2 of the Civil Procedure Code, does not render the additional evidence taken in second appeal inadmissible especially when no objection is taken by the opposite party.

Section 628, Civil Procedure Code of 1882, does not authorize a review of a decree which was right when it was made on the ground of the happening of some subsequent event. The proper course in such cases is to request the Court to accept additional evidence regarding the subsequent event and the Court is justified in taking such evidence into consideration. **P NEKI v. CHAJJU RAM**, 111 P. W. R. 1918 **137**

O. XLI, r. 33 78, 193, 1000,

1003

O. XLIII, r. 1 (s) 133, 779**O. XLIII, r. 1 (u) 379****O. XLVII, r. 1 129, 137**

O. XLVII, r. 1—Oudh Rent Act (XXII of 1886), ss. 120 A, 125—Review—Rent appeal—Judicial Commissioner, whether can review decision.

The Court of the Judicial Commissioner of Oudh has power under the Code of Civil Procedure to

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review its own decision given in a rent appeal. This power is not affected by the provisions of section 110A of Act XXII of 1886 which gives authority to the Board of Revenue to review its decisions. **O PARTAB BHADUR (SINGH v BADLU, 21 O. C. 254 276**

Sch. II, paras. 2, 5—Arbitrator refusing to act—Appointment of new arbitrator—Procedure—Arbitration Act (IX of 1899), s. 8.

The provisions of paragraph 5 of the Second Schedule to the Civil Procedure Code relating to the appointment of an arbitrator by a party in the event of the arbitrator previously appointed refusing to act must be read with the provisions embodied in paragraph 2 of the same Schedule, so that both parties must concur in appointing an arbitrator in place of the one who has refused to act, and the appointment does not rest solely with the party who has been served with a written notice by his opponent. **P CHARTA RAM v. SAJAN MAL, 112 P. R. 1918 395**

Sch. II, para. 5 395
Sch. II, paras. 14, 21—Arbitration out of Court—Revocation of submission, grounds for—Delay caused by voluntary absence of party, effect of—Award failing to determine question submitted, effect of—Procedure.

Where parties submit their differences to arbitration, they cannot be allowed to revoke or withdraw from the submission except for very good cause.

Where delay in making an award by the arbitrators was caused by the voluntary absence of one of the parties, that party cannot impugn the award on the ground of delay. Nor is such delay a sufficient ground for revocation of the submission by the party in default.

In cases where a reference to arbitration is made by the order of the Court, the Court may remit the award for the determination of matters left undetermined under paragraph 14 of Schedule II of the Civil Procedure Code, but in the case of arbitration without the intervention of the Court paragraph 21 of the Schedule confers no such power on the Court and if any of the matters referred to in paragraph 14 of the Schedule is proved, the Court has no option but to refuse to file the award. **PAT KUNJ LAL v. BANWARI LALL 711**

Sch. II, para. 20 238
Sch. II, para. 21 711, 953

Companies Act (VI of 1882), s. 169
—Appeal—Service of notice after expiry of 3 months—Delay beyond appellant's control—Extension of time—Reasonable cause.

Where a notice of appeal in the matter of the liquidation of a company was served upon the respondents after the expiry of the period of 3 weeks prescribed by Statute and it appeared that the delay was due to a blunder on the part of the copying department and beyond the control of the appellant:

Held, that the time for the service of notice of appeal was rightly extended. **P KUNDAN LAL v. OFFICIAL LIQUIDATOR, DIAMOND JUBILEE FLOUR MILLS COMPANY, LTD 919**

Confession, extra-judicial, value of.

Evidence as to extra-judicial confessions of his guilt by an accused person is by itself of very little importance, as such evidence is easy to adduce and

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difficult to rebut. **M MELLOR v. MUTHIAH CHETTY, 35 M. L. J. 518; 9 L. W. 113; 20 Cr. L. J. 101 981**

Construction of document 18, 39, 76, 396

—Bond—Time fixed for payment—Limitation, commencement of.

A registered bond provided that the money lent thereunder would be repaid at the end of Jeth 1317 Fasli corresponding to the end of June 1910. The bond was sued upon on the 29th of June 1916:

Held, that for the purpose of this agreement the parties must be taken to have settled between themselves that the last day of Jeth 1317 Fasli was to be the same as the last day of June 1910, and that, therefore, the suit was within time. **O BADSHAH KHANUM v. BISHUNATH SINGH 332**

—Mortgage or sale—Intention of parties.

Where the parties to a document use words that indicate a mortgage by way of conditional sale and all the terms contained in the document are consistent with the terms of a mortgage by way of conditional sale, the proper construction is that the document is a mortgage by way of conditional sale, and it cannot be contended that the intention of the parties as gathered from the instrument was to make an out-and-out sale subject to the right of re-purchase on re-payment of the money within the stipulated time. **C CHANDRA MOYI OHOWDHURANI v. GREGSON 465**

—Taluka, succession to, settled by agreement—Agreement, deed of, interpretation of—Transferable interest, whether acquired.

A dispute regarding succession to a taluka belonging to a Muhammadan gentleman A in respect of which proceedings under section 145, Criminal Procedure Code, had been taken against its three claimants, B, C and D, was settled by mutual agreement, the relevant terms of which were as follows:—

1. The taluka will not for the present be divided.
2. The taluka will be released in favour of all the three claimants and the evidence adduced in the proceedings under section 145, Criminal Procedure Code, will be regarded as proof of possession of all of them.
3. Mutation of names in respect of the taluka will be made in favour of all the three claimants subject to the conditions laid down in the agreement.
4. Each of the three claimants will take a few villages for his personal expenses.
5. Each of the three claimants will in succession hold the office of the taluqdar of the entire taluka without the power of alienation.
6. All the debts due from A will be a charge on the taluka and the taluqdar for the time being will utilize the net income of the taluka in payment of those debts.

7. After payment of the entire debts the net profits will be divided equally between the three claimants.

8. If the taluqdar for the time being neglects the payment of debts or commits any breach of trust, the man next after him may get him ousted and may himself assume that office.

9. In case of urgent necessity, prior to the payment of the debts due by A, if the writing of a

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deed of alienation or hypothecation becomes necessary, then the deed will be valid only when it is signed and executed by all the three claimants.

10. The male children of B by non-biradari wife will get maintenance, and if J and D happen to have no male children by biradari wives, the former will have such heritable interest as may be permitted to them under the Muhammadan Law:

Held, that under the above agreement C and D took a transferable interest in the villages assigned to them as well as in their shares in the *taluqa*, which they were competent to transfer even during the time when B was the *taluqdar*. **O BISHESHWAR NATH v. HAMID MIRZA Brg, 5 O. L. J. 583** 20

— *Transaction evidenced by deed, nature of—Lease or mortgage.*

Where a document, which was described as a "patta gaul qarar birt rahni", recited that the *taluqdar* had received a certain sum from the grantee and that the latter had been put in possession of the lands described in the document, for which he had to pay a certain annual rent:

Held, that the document was nothing more than a lease and did not create any relationship of mortgagor and mortgagee between the parties. **O INDER BAHADUR SINGH v. BECHAN SINGH, 5 O. L. J. 544** 151

— *Will, interpretation of—Legatees, several, named in succession—Estate bequeathed, nature of.*

Where a Will, after stating that the testator would remain in proprietary possession of his property till his death, provided that if he left a son that son would be "the owner and possessor" of the said property, that if he left no son his widow and the widow of his predeceased son would be "the owners and possessors" thereof, and that in the event of none of them existing his daughter would be "the owner and possessor" of the same:

Held, that the Will did not confer life-estates on any of the legatees or even successive estates on the several legatees, but conferred an absolute estate on the eventual legatee, whoever such legatee might be at the time of the testator's death. **O SHEO SHANKAR BAKSHI v. MITHANA KUMAR, 5 O. L. J. 604** 177

Contract—Person not privy to contract, whether can take advantage of it.

A person who is not a party to a contract and with whom there is no privity, cannot gain any advantage by it whether as a plaintiff or as a defendant unless he is in the position of a *cestui que trust*. **N SOGAI v. WARLOO** 549

— *to supply labour, construction of—Covenant, implied—Maps and specifications.*

Plaintiffs agreed to supply labour to the defendants by loading and unloading waggons of sand for purposes of reclamation on the foreshore. The agreement was accompanied by maps and specifications. The plan showed a low rubble construction shown in section which was designated "temporary rubble toe to protect filling during reclamation." Plaintiffs sought to import into the contract an implied term that the defendants were to provide adequate protection to the filling up by sand by a temporary rubble during reclamation:

Held, that assuming that the contract had an implied condition, the condition was only to execute

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the protection as shown in the plan and that it was impossible to spell out of the plans and sections an obligation to do more than what was there shown.

P C KARACHI PORT TRUST v. DAVIDSON, 22 C. W. N. 961; 8 L. W. 324; (1918) M. W. N. 61 319

Contract Act (IX of 1872), s. 16—

Mortgage—Interest, high rate of—Transaction improvident—Hardship—Relief, whether can be given

Even where a transaction appears to be undoubtedly improvident, in the absence of any evidence to show that the mortgagee has taken undue advantage of his position, a Court of Justice cannot give relief to the mortgagor on grounds of simple hardship.

P C AZIZ KHAN v. DUNI CHAND, 101 P. R. 1918; 23 C. W. N. 130; 165 P. W. R. 1918 933

s. 16—Undue influence—Borrower in need of money—Lender, whether dominates his will.

Urgent need of money on the part of a borrower does not of itself place the lender in a position to dominate his will. **O MUHAMMAD SHER KHAN v. SWAMI DAYAL, 5 O. L. J. 572** 32

s. 16—Undue influence—Interest, high rate of—Court, power of, to reduce rate.

Apart from the Usurious Loans Act the mere fact that a bargain is unconscionable in the sense that the rate of interest charged is excessive, is not in itself a sufficient ground for interference by the Court. **O DALPAT SINGH v. AHMAD SHAH, 5 O. L. J. 579** 17

s. 16—Undue influence—Unconscionable bargain—Expectant heir, bargain with, validity of—English equitable rules, applicability of, to India—Interest, compounding of, whether oppressive.

Questions as to undue influence, unconscionable bargains and dealings with expectant heirs must be decided on the provisions of the Indian Contract Act, 1872, as amended by the Indian Contract Amendment Act, 1899, and these alone. The principles on which English Courts of Equity deal with similar questions are entirely inapplicable to India.

In money-lending transactions the mere fact that the sum ultimately claimed exceeds enormously the amount originally advanced is no ground for holding the transaction to be unconscionable. It must also appear that there is something unconscionable either in the original dealings or in the subsequent stages of the transaction.

By making short term loans and insisting on capitalising the interest immediately it falls due, a money-lender may pile up compound interest at an oppressive and unconscionable rate. But there is nothing inherently wrong or oppressive in his securing interest upon interest after the interest has been due and unpaid for a considerable time.

The Indian Contract Act throws upon the person dealing with an expectant heir and in a position to dominate the latter's will the burden of showing that he has not used his position to obtain an unfair advantage. **P C BALLA MAL v. AHAD SHAH, 35 M. L. J. 614; 16 A. L. J. 905; 121 P. R. 1918; 23 C. W. N. 233; 5 M. L. T. 55; 183 P. W. R. 1918** 1

s. 25—Pro-note, suit on—Consideration, release from supposed obligation, whether amounts to.

Where the Manager of an indigo factory on the one hand and the tenants of the factory on the other

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believed in good faith in the existence of an obligation on the part of the tenants to grow indigo on a certain proportion of their holdings and the latter, in order to obtain a release from the obligation, executed pro-notes in favour of the Manager:

Held, that the pro-notes were supported by valid consideration. **Pat AJODHYA JHA v. E. COX** 701

ss. 46, 55 550

S. 64—Guardian and ward—Sale of minor's property by guardian—Consideration, application of, in purchase of other properties for minor—Sale declared not binding on minor—Right of vendee to properties purchased—'Benefit', return of, scope of, doctrine of.

Where a sale of a minor's properties by his guardian is declared to be not binding on the minor, the vendee is not entitled to claim other properties which were purchased for the minor with the sale consideration, as a 'benefit' which the minor is bound to restore under section 64 of the Contract Act when he elects to avoid the sale, if the latter purchase was not contemplated at the time of the original sale.

Per *Kumaraswami Sastri, J.*—Ordinarily, the benefit which a party receives when he sells the property is the price which the vendee pays. Any profits which the vendor might make with the moneys would be too remote in estimating what he has to return, in case he is entitled to avoid the sale and elects to do so. Where, however, for the protection of a purchaser contracting with a guardian or a qualified owner, a particular dealing with the money was in the direct contemplation of the parties, such as the purchase of other lands with the consideration, and the money is so applied, the benefit which the other party obtains will be the land or other property acquired with the consideration. There must be something more than a mere application of the consideration in a particular way in order to entitle the purchaser to claim restoration of the properties acquired with the consideration paid by him. **M CHINNASWAMI REDDI v. KRISHNASWAMI REDDI**, 35 M. L. J. 652; 42 M. 36 856

S. 65—Contract by minor—Mortgage—Fraudulent representation, absence of—Minor, whether liable to repay money borrowed.

A minor cannot be made to repay money which he has spent merely because he received it under a contract induced by his fraud.

In a suit for sale on a mortgage bond, the defendant pleaded that at the time of the execution of the bond he was a minor and no fraudulent representation on the part of the defendant inducing the plaintiff to enter into a contract was either alleged or found:

Held, that the defendant was not liable to repay the money borrowed by him. **A RADHEY SHIAM v. BHARI LAL**, 16 A. L. J. 592; 40 A. 558 478

S. 69 69

ss. 108, Excep. (1), 109—"Goods," meaning of—Transfer; fraudulent—Transferee, whether gets good title—Share certificates accompanied by blank transfer deeds, whether negotiable—Negotiability, conditions of—Usage, effect of.

One S. was the owner of certain jute shares. One U. obtained the shares from S. by fraudulent representations and sold them to L. who sold them to the plaintiff firm, the latter being *bona fide* pur-

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chasers. At the time of sale L., made over to the plaintiffs the share certificates and a blank transfer deed signed by J., the person then registered as owner of the shares:

Held, (1) that the transaction was covered by section 108 of the Contract Act and L., who bought the shares from U., did not acquire a good title to them and, therefore, could not pass a good title to the plaintiffs;

(2) that although U. was in possession of the shares, he could not give a good title under section 108, exception (1) of the Contract Act, which requires possession with the consent of the owner and which does not apply where that consent is obtained by deceit;

(3) that the plaintiffs were entitled to recover from L. the price they had paid for the shares with interest.

The expression "goods" in section 108 of the Contract Act includes all moveable property.

Share certificates with blank transfer deeds endorsed by the last registered owner are not negotiable instruments.

Mere proof of usage that sales of shares are effected by delivery of the certificate accompanied by transfer deeds endorsed in blank by the last registered owner is not sufficient to make the share certificates negotiable.

Certain requirements have to be fulfilled before a document can be considered negotiable. It must be in a form which renders it capable of being sued on by the holder of it *pro tempore* in his own name and it must be by the custom of trade transferable like cash by delivery. Failure of these requirements prevents a document from being considered negotiable. **C HAZARIMUL-SHOHANLAL v. SATISH CHANDRA GHOSH**, 22 C. W. N. 1036 966

ss. 108, Exception (1), 178

—"Possession," meaning of—Juridical possession—Transfer, fraudulent, of shares by person in possession, whether confers good title on bona fide transferee—Share certificate accompanied by transfer deed, whether negotiable.

The word "possession" in Exception (1) to section 108 of the Contract Act does not apply in the case of qualified possession, such as that of a hirer of goods or where the possession is for a specific purpose. Juridical possession is different from mere possession.

A pledgee's possession is not such possession as entitles him to deal with the goods in fraud of the rights of the owner.

Share certificates accompanied by transfer deeds endorsed in blank by the last registered owner cannot be considered as negotiable instruments.

Defendant Bank purchased certain jute shares for one of their constituents and deposited them with the officer in charge of their safe custody department. The latter handed over the shares to A., the head clerk of the department, for the purpose of getting them registered in the name of the constituent for whom they had been purchased. A. fraudulently disposed of the shares to S., who sold them to M., who sold them to B., from whom the plaintiff purchased them in good faith:

Held, that inasmuch as the possession of A. did not come within the purview of section 108, Exception (1)

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of the Contract Act, he could not transfer a good title to S. and that the subsequent sellers did not pass a good title to their respective purchasers. **C ROOPCHAND JANKIDAS v. NATIONAL BANK OF INDIA, LTD., 22 G. W. N. 1042** 975

s. 176—Bailment—Pledge—Notice, whether necessary before suit.

Section 176 of the Contract Act requires a notice only when the pawnee wishes to exercise his option of selling the pledged goods. If he chooses to bring a suit upon the debt, no notice is required by that section. **N JWALA PRASAD v. PUNDLIK PANDURANG** 970

s. 178

s. 197—Ratification, proof of.

Section 197 of the Contract Act lays down that a ratification may be express or implied from the conduct of the person on whose behalf the act is done. The acts relied upon as proving ratification, however, must be clearly inconsistent with a denial of liability.

N NARAYAN DAS v. CHANDRABHAN 959

Co-sharers—Joint property, rule of enjoyment of, by co-sharers—Exclusive possession by one co-sharer for long time, effect of.

The general rule as regards the enjoyment of joint property by co-sharers is that one co-sharer has no right to appropriate to himself a specific portion of the common land and to exclude his co-sharers from all use and enjoyment of the same without a lawful partition. But where a person has been in possession of a piece of joint land for a long time without any let or hindrance by the other co-sharers, the latter have no right to eject him or his transferee or to disturb his possession or enjoyment otherwise than by seeking partition, and he is entitled to continue in such possession so long as such user does not interfere with the use by other co-sharers of what is in their possession. **O RAM PIYARE LAL v. NAGESHWAR, 21 O. C. 214; 5 O. L. J. 618** 91

Costs, award of—Successful party, whether can be deprived of costs—Discretion of Court—Appeal—Appellate Court, interference by.

Where a trial Judge has given his reasons for depriving a successful party of costs and all the circumstances are before the Court of Appeal, the latter can, if satisfied that the trial Judge has not exercised his discretion judicially, interfere with it and make the order which the lower Court ought to have made.

The mere fact that a defendant relies upon a right which a Statute gives him is not a sufficient ground for depriving him of his costs. **A RADHEY SHIAM v. BIHARI LAL, 13 A. L. J. 592; 40 A. 558** 478

Court-fee—Appeals, separate, by several defendants—Court-fee payable—Principal and surety—Suit against surety, whether maintainable without principal being sued.

Plaintiff Bank sued to recover the sum of Rs. 18,852-12-0 from the defendants, alleging that defendant No. 3, a Company, opened a current account with the plaintiff on the 6th July 1908, agreeing to pay interest at the rate of Rs. 7-8-0 per cent per annum from the date of the account up to the 14th October 1909 and thereafter at the rate of Rs. 8-4-0 per cent per annum, that defendant No. 2 executed two promissory notes for Rs. 30,000 and

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Rs. 20,000 respectively in favour of the plaintiff by way of security for the overdraft allowed to defendant No. 3, and that defendants Nos. 1 and 2 in conjunction with one G. executed a surety bond in favour of the plaintiff by which they agreed to act as sureties for the amount found due to the plaintiff from defendant No. 3 from time to time. The suit having been decreed, defendants Nos. 1 and 2 filed separate appeals in the Chief Court. Defendant No. 2 paid full *ad valorem* Court-fee and presented his appeal first, while defendant No. 1 stamped his memorandum of appeal with a Court-fee of Rs. 2 only on the ground that the full Court-fee had already been paid by defendant No. 2. It was contended, *inter alia*, that defendants Nos. 1 and 2 had executed the pro notes as officers of defendant No. 3 and were not, therefore, personally liable on these documents and that in any event the pro-note jointly executed by defendants Nos. 1 and 2 was merely a contract of indemnity and that consequently until plaintiff had exhausted his remedies against the principal debtor, defendant No. 3, the suit against defendants Nos. 1 and 2 was premature:

Held, (1) that the defendants were entitled to file a joint appeal but as they had elected to present two entirely distinct and separate appeals, each must pay the full amount of Court-fee;

(2) that the creditor was not bound to exhaust his remedies against the principal before suing the surety.

A suit may be maintained against the surety though the principal has not been sued. **P PANNA LAL v. MARWAR BANK, LTD., 91 P. R. 1918** 424

Court Fees Act (VII of 1870), s. 7 (iv)

(c)—Mortgage suit—Exemption of property from liability—Appeal—Court-fee payable.

The plea raised by one of the defendants to a mortgage suit was that certain property, which was alleged to be covered by the mortgage-deed, was not liable to be sold in execution of the mortgage decree by reason of certain transfers which had been made in his favour before the mortgage-deed in suit was executed. The trial Court held a part of this property to be liable for the mortgage debt. The defendant appealed:

Held, that the appellant was bound to pay *ad valorem* Court-fee on the memorandum of appeal. **O SHEORAJA v. DEBI DIN, 5 O. L. J. 663** 535

Sch. II, Art. 17, cl. 3 552
Criminal Procedure Code (Act V of 1898), ss. 15, 16, 350—Rules framed by U.

P. Government under s. 16, validity of—Trial before Bench of Magistrates—Judgment by Bench other than Bench which heard evidence, legality of. The rules framed by the United Provinces Government under section 16 of the Criminal Procedure Code provided that in the case of Benches consisting of not more than three members, any two of the members shall form a *quorum*. It was also provided that if a Bench held an adjourned sitting for the disposal of a part-heard case, and the members at the adjourned sessions were not the same as sat at the first hearing of the case, the provisions of section 350 of the Code of Criminal Procedure would be held to apply to the case:

Held, (1) that the rules were *intra vires* the Government;

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(2) that the effect of the rules was that any trial commenced before any two members of a Bench could lawfully be continued before any other two members, provided that if exception was taken by the accused to the proceeding before a differently constituted Bench, the trial must either be recommenced *de novo* or adjourned to a subsequent date on which the same Magistrates who commenced the trial might find it convenient to sit together.

At the first hearing of a case before a Bench of Magistrates the evidence for the prosecution was recorded. At the second hearing one of the Magistrates was replaced by another, who was not present at the first hearing, but the accused having stated that they had no objection to the trial being proceeded with, the trial was concluded and on a subsequent date judgment was pronounced by the Bench before which the trial had commenced:

Held, that one of the Magistrates who delivered the judgment being absent on the date of the second hearing it could not be said that the accused were not prejudiced, and that, therefore, the proceedings at the last hearing, when judgment was pronounced, were illegal and must be set aside. **A MATHURA v. EMPEROR**, 16 A. L. J. 884; 19 Cr. L. J. 1004 **344**

ss. 30, 207, 254, 347—*Offence exclusively triable by Sessions Court, committal for, by Magistrate empowered under s. 30—Commitment, legality of.*

The committal of a case triable exclusively by the Court of Session is not illegal merely, because the Committing Magistrate is himself empowered under section 30 of the Criminal Procedure Code to try the case.

The words "ought to be tried" in sections 207 and 347 of the Criminal Procedure Code must be read with section 254 of the Code. **N EMPEROR v. HANUMAN**, 20 Cr. L. J. 97 **977**

ss. 96, 100—*Warrant under s. 100—*

Using form of warrant under s. 96, legality of.

If the substance of a warrant issued under section 100, Criminal Procedure Code, complies with the requirements of that section, the warrant is perfectly legal, no matter what prescribed form is used for the warrant.

There being no prescribed form of warrant under section 100, Criminal Procedure Code, a Magistrate issuing such a warrant adapted a form under section 96, Criminal Procedure Code, to the provisions of section 100 by altering the figures and also by drawing up the warrant in terms required by section 100:

Held, that the warrant was perfectly legal. **C SUPERINTENDENT AND REMEMBRANCE OF LEGAL AFFAIRS, BENGAL v. MOZAM MOLLA**, 23 C. L. J. 304; 45 C. 905; 20 Cr. L. J. 47 **687**

s. 100 **687**

ss. 107, 112, 537—*Security for breach of peace—Accused agreeing to give security—Breach of peace, proof of, absence of—Order, legality of.*

A Magistrate called upon the accused under section 112 of the Criminal Procedure Code to show cause why they should not furnish security to keep the peace under section 107, Criminal Procedure Code, on the ground that they were members of an unlawful assembly which passed a mosque with loud

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music and which intended to cause a breach of the peace by repeating this procedure. The accused denied these allegations but expressed their willingness to execute bonds to keep the peace. Thereupon the Magistrate directed them to execute bonds for Rs. 100 to keep the peace for one year:

Held, that the order was illegal, inasmuch as the accused denied every allegation on the basis of which they were considered liable to furnish security and no evidence was taken to prove those allegations. **N EMPEROR v. RAI SINGH**, 20 Cr. L. J. 105 **985**

s. 110—*Criminal Tribes Act (III of 1911), s. 4—Security for good behaviour—Proceedings against person registered under Criminal Tribes Act, legality of—Magistrate, discretion of, exercise of—Proceeding, pending—High Court, power of interference of.*

Proceedings under section 110, Criminal Procedure Code, against persons who have been registered under section 4 and the following sections of the Criminal Tribes Act, are not illegal.

Per *Huda, J*—Such proceedings, though not illegal, are inexpedient.

Per *Richardson, J.*—In every case under section 110, Criminal Procedure Code, there is a question of discretion whether the person proceeded against should or should not be bound down to be of good behaviour. The fact that the persons proceeded against are already registered under the Criminal Tribes Act, may be a factor and an important factor which the Magistrate should take into consideration before he makes any order against them under section 110, Criminal Procedure Code.

The High Court does not, as a rule, interfere in any pending proceeding unless there is some strong ground for intervening. **C GHULAM RASUL v. EMPEROR**, 20 Cr. L. J. 30 **510**

s. 112 **510**
ss. 144, 195—*Disobedience of order under s. 144—Sanction for prosecution granted by District Magistrate—Order, whether administrative or judicial—Appeal, whether lies.*

An order passed by a Magistrate under section 144, Criminal Procedure Code is a judicial order and the authority issuing the order cannot be separated from the authority-granting sanction for prosecution for disobedience of it.

Where, therefore, a Magistrate grants sanction for prosecution for disobedience of an order issued by him under section 144 of the Criminal Procedure Code, he acts as a "Court" within the meaning of section 195, sub-section 7 of the Code.

A public servant *qua* public servant is not subordinate to the authority of the High Court as required by section 195 (6) of the Criminal Procedure Code.

A Sub-Magistrate having refused to accord sanction for prosecution of the petitioner for disobedience of his order passed under section 144, Criminal Procedure Code, the opposite party appealed to the District Magistrate, who granted the sanction applied for. Against this latter order the petitioner appealed to the Sessions Judge, who refused to interfere with the District Magistrate's order on the ground that it was passed administratively:

Held, that the order of the District Magistrate was a judicial order, against which an appeal lay to

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the Sessions Judge. **M** ARUNACHALAM PILLAI v. PONNUSWAMI PILLAI, 35 M. L. J. 454; 8 L. W. 422; 24 M. L. T. 396; (1918) M. W. N. 824; 42 M. 64; 20 Cr. L. J. 78 **878**

ss. 144, 145—Dispute as to land—Section applicable.

Section 144, Criminal Procedure Code, is applicable only to temporary orders in urgent cases of nuisance or apprehended danger. It is not applicable in cases where there is a dispute as to land for the settlement of which section 145 provides the appropriate remedy. **Pat** LACHMAN RAM v. DHIRU DUSADH, 19 Cr. L. J. 1002 **342**

ss. 145, 147—Enquiry under s. 147—Procedure—Order passed without giving parties opportunity to produce evidence, legality of—Jurisdiction—Order affecting persons not parties to proceedings.

An enquiry under section 147, Criminal Procedure Code, has to be made in the manner provided by section 145 of the Code and the Magistrate conducting such enquiry must receive the evidence of the parties. Failure to give an opportunity to the parties of calling evidence affects the jurisdiction of the Magistrate.

Section 147, Criminal Procedure Code, contemplates an order to be passed between parties to the proceedings only. An order affecting persons who are not parties to the proceedings is not within the purview of the section and is, therefore, liable to be set aside as affecting jurisdiction. **N** PILLAI v. DARTA, 20 Cr. L. J. 110 **990**

ss. 145, 146—Possession of fishery extending over several miles, dispute as to—Magistrate unable to satisfy himself as to possession of whole fishery—Procedure—Local investigation, whether necessary in every case.

In a proceeding under section 145, Criminal Procedure Code, regarding the possession of a fishery extending over several miles in length, if on the evidence the Magistrate is unable to satisfy himself as to the possession of the whole length in question, he should ascertain, so far as he can, the possession of some portion or portions thereof. As to the portion of which he is able to say "so and so is in possession" he should proceed under section 145, Criminal Procedure Code, and only as to the remainder should he proceed under section 146, Criminal Procedure Code.

There is no hard and fast rule of law that in every case under section 145, Criminal Procedure Code, a local investigation must be held, whether the parties desire it or not.

A Magistrate who attaches the property in dispute under section 146, Criminal Procedure Code, without holding a local investigation, cannot be said to have exercised his jurisdiction erroneously.

In a proceeding under section 145, Criminal Procedure Code, the Magistrate attached the property in dispute under section 146, Criminal Procedure Code, on a finding arrived at by him which was expressed in these terms: "It is very difficult to come to a decision about the possession of the whole jaltar in dispute from the evidence adduced".

Held, that although "difficulty" was not synonymous with "impossibility" as contemplated by the second part of section 146 (1), Criminal Procedure Code, yet the judgment of the Magistrate might

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be read as meaning that on the evidence adduced, he was unable to satisfy himself as to which of the contending parties was in possession of the property in question. **C** UPENDRA NATH BHATTACHARJEE v. PRASANNA KUMAR GHOSH, 20 Cr. L. J. 17 **497**

s. 145 (4).

Where in a proceeding under section 145 of the Criminal Procedure Code, a local enquiry is directed to be made, the result of the local enquiry becomes a part of the proceeding and the party affected by it is entitled to be made acquainted with the result thereof and should be given an opportunity of rebutting the report. **N** JAIWANTI v. RAMRAO, 20 Cr. L. J. 107 **987**

s. 147

s. 148.

A Magistrate deputed to hold a local enquiry under the provisions of section 148 (1), Criminal Procedure Code, should hold the enquiry himself and should not delegate it to somebody else. **N** JAIWANTI v. RAMRAO, 20 Cr. L. J. 107 **987**

s. 160

s. 190 (1) (c)—Magistrate taking cognizance of offence, whether can hold inquiry preliminary to commitment.

The fact that a Magistrate took cognizance of an offence under section 190 (1) (c), Criminal Procedure Code, is no bar to his holding an inquiry preliminary to commitment. **C** AZAM ALI v. EMPEROR, 20 Cr. L. J. 47 **687**

s. 191

s. 195

s. 195—"Court" in s. 195 (7), meaning of—Public servant passing orders under s. 195 (1), whether acts judicially.

The summonses and orders referred to in the group of offences mentioned in clause (a) of sub-section 1 of section 195, when issued by a Magistrate or Judge, are issued judicially and where sanction is given to prosecute for disobedience of such summonses or orders, such sanction is issued by the same authority, namely, the Court.

The word 'Court' in sub-section 7 of section 195, Criminal Procedure Code, is not confined to clauses (b) and (c) of sub-section 1 of the section. Sub-section 7 is enacted for the purpose of explaining what is subordination within the meaning of sub-section 6, where the authority giving or refusing is a Court, and does not purport to confine its operation to clauses (b) and (c) of sub-section 1.

Where, therefore, sanction is given with reference to an offence against a Court, the appeal is governed by sub-section 7. **M** ARUNACHALAM PILLAI v. PONNUSWAMI PILLAI, 35 M. L. J. 454; 8 L. W. 422; 24 M. L. T. 396; (1918) M. W. N. 824; 42 M. 64; 20 Cr. L. J. 78 **878**

ss. 195, 476—Order under s. 476 made without taking evidence, legality of—Jurisdiction—Court, power of, to order prosecution of person not party to proceedings—S. 476, scope of.

A Court, while proceeding under section 476 of the Criminal Procedure Code, is required to arrive at findings upon some evidence before it. If there is no evidence on the record and the Court proceeds to order the prosecution of a person for forgery in relation to a proceeding before it, the discretion vested in the Court under the section is illegally exercised and the order is liable to be set aside.

Criminal Procedure Code—contd.

Section 476 of the Criminal Procedure Code is a self-contained section and the reference to section 195 in that section is only made for the sake of brevity and refers not to the conditions enumerated in section 195 but merely to the offences enumerated in that section.

Section 476 of the Criminal Procedure Code confers jurisdiction upon an executing Court to order the prosecution of a person for forgery, even though not a party to the execution proceedings, if the offence is brought to the notice of the Court in the course of the proceedings. **PAT ABUL SATTAR v. EMPEROR**, (1918) PAT. 352; 20 CR. L. J. 94 **894**

s. 195—Penal Code (Act XLV of 1860), s. 211—Making false charges against several persons—Separate offences—Sanction to prosecute in respect of each offence, whether should be granted.

A person who falsely charges several persons, with having committed an offence is guilty of as many separate offences and there is no impropriety in his being called to account under section 211 of the Penal Code in respect of each of such false charges. **L B GNANAKANNU v. VEERAVAGU**, 11 BUR. L. T. 136; 19 CR. L. J. 1002 **342**

ss. 195, 476—Perjury committed in summary trial—Sanction, whether ought to be granted.

Where during the course of a summary trial the Court is of opinion that perjury has been committed, it should take action itself instead of placing in the hands of a private person the right of vindicating the law. **A THAKUR DAS v. ABDULLA**, 16 A. L. J. 992; 20 CR. L. J. 48 **686**

s. 195—Sanction for prosecution—Petty theft committed thirty-eight years previously, denial of—Sanction, whether should be granted.

Sanction was granted for the prosecution of the accused for perjury in respect of a statement made by him in which he had denied the fact of his having been convicted of petty theft thirty-eight years previously at the age of fourteen:

Held, that the fact which the accused had denied was not relevant to the trial before the Magistrate, and that, therefore, this was not a fit case in which sanction should have been granted. **A GAJADHAR v. EMPEROR**, 16 A. L. J. 923; 20 CR. L. J. 2 **493**

s. 195 (1) (a), (6), (7)—Arms Act (XI of 1878), s. 25—Penal Code (Act XLV of 1860), s. 182—Information given to District Magistrate of person being in possession of fire-arms without license—Issue of search-warrant by Magistrate—Act, whether judicial or executive—Information found to be false—Sanction for prosecution for giving false information to public servant—Appeal to Sessions Judge, whether maintainable.

A Magistrate directing the issue of a warrant to search premises, on information received that the owner or occupant thereof is in possession of fire-arms without a license, acts as a Court and not merely as a public servant, whether he purports to act under the Criminal Procedure Code or under section 25 of the Arms Act.

Where a District Magistrate accords sanction for the prosecution of an informant on the ground that his information proved to be false, he acts judicially and his order is appealable to the Sessions Judge under section 195 (7).

Criminal Procedure Code—contd.

Per Sadasiva Aiyar, J.—Every Magistrate acting judicially is a Criminal Court. A Magistrate to whom, as a Criminal Court, a report is made in order that he might take action as a Criminal Court, receives that report as a Court. The terms 'Court' and 'Magistrate,' wherever used in the Criminal Procedure Code, are generally used as convertible terms. **M GADDAM PENCHULU REDDI, In re**, 35 M. L. J. 686; (1918) M. W. N. 908; 42 M. 96; 20 CR. L. J. 90 **890**

s. 197—Sanction to prosecute public servant—Offence, designation of, whether necessary. Where a Collector sanctioned the prosecution of a Kulkarni and a Patil "for cheating or for such other offence with which it may be necessary to prosecute them in connection with obtaining money from ryots:"

Held, that the offence or offences which might be established in connection with obtaining money from ryots were sufficiently designated in the sanction, and that the sanction was not invalid on account of vagueness. **B EMPEROR v. MADHAV LAXMAN**, 20 BOM. L. R. 607; 20 CR. L. J. 71 **871**

ss. 198, 204—Complaint at suggestion of Police—Issue of process to accused, whether necessary.

The fact that the complaint in respect of an offence under section 494, Indian Penal Code, is written at the suggestion of the Police does not contravene the provisions of section 198 of the Criminal Procedure Code.

Where on a case being called the accused present themselves before the Magistrate, there is no necessity of issuing process to them under section 204 of the Criminal Procedure Code and the mere omission to issue process in such a case does not render the commitment of the accused to the Court of Session illegal. **P EMPEROR v. RURI**, 5 P. R. 1919 CR.; 20 CR. L. J. 3 **493**

s. 200 **483**

ss. 200, 537 (a)—Complaint by District Judge to District Magistrate—Failure to examine complainant—Irregularity.

A District Judge, believing that a certain Will which had come before him in probate proceedings was a forgery, wrote a letter to the District Magistrate suggesting that in the interests of justice there should be a prompt investigation. On receipt of the letter the District Magistrate, without sending for the District Judge and examining him on oath, ordered a Police investigation and thereafter sent the case for inquiry and trial before a competent Magistrate:

Held, (1) that the letter amounted to a "complaint" within the meaning of the definition contained in section 4 of the Criminal Procedure Code;

(2) that the failure to examine the District Judge on oath was an irregularity of a kind which came within those enumerated in clause (c) of section 537 of the Criminal Procedure Code, and that there having been no failure of justice the trial was not vitiated by the irregularity. **B APARAO JHAVERILAL, In re**, 20 BOM. L. R. 114; 20 CR. L. J. 42 **682**

s. 204 **493**

ss. 207, 254, 346, 347—Commitment to Sessions, by Magistrate having power to sentence adequately, legality of—Grounds of commitment—Warrant cases, powers of Magistrates in trial of.

Criminal Procedure Code—contd.

Section 254 of the Criminal Procedure Code makes it imperative on a Magistrate only to frame a charge and not to complete the trial to conviction or acquittal. That section simply lays down the procedure for the trial of warrant cases where the Magistrate considers it right and proper for himself to go on with the trial and is in no way a limitation of the right of a Magistrate given to him under section 347 to commit a case for trial if he thinks that he should do so.

Section 347 of the Criminal Procedure Code does not restrict the grounds on which a Magistrate should arrive at his opinion to commit a case to want of jurisdiction in himself or to his inability, in his own opinion, to sentence the accused adequately. Even where he can inflict the maximum sentence for the offence, he may still commit the accused for trial to the Court of Session or the High Court on such grounds as complicated questions of law arising or the case being a fit one to be tried by a Jury or with the aid of Assessors.

Per *Napier, J.*—The powers of a Magistrate, who has taken a warrant case on his file for trial, are as follows:—He may try it through himself if he has jurisdiction; he may, if he thinks he cannot inflict a proper sentence, act under section 364 or 349 and send it to a higher Magistrate, or he may, if he thinks that it is a proper case for Sessions, commit the accused under section 347 or if he has not power to commit, send it to another Magistrate to commit under section 346. **M CROWN PROSECUTOR v. BHAGAVATHI**, 35 M. L. J. 559; (1918) M. W. N. 870; 9 L. W. 14; 42 M. 83; 19 Cr. L. J. 997 **337**

s. 207.

Under section 207 of the Criminal Procedure Code a Magistrate who is competent to commit to the Court of Session can commit to that Court cases triable exclusively by that Court and cases which in his opinion ought to be tried by that Court.

A commitment, however, made on the sole ground that the accused has been committed in another case is bad in law. **N EMPEROR v. HANUMAN**, 20 Cr. L. J. 97 **977**

s. 215—Commitment to Sessions, whether can be quashed by Sessions Court.

A commitment once made can only be quashed by the High Court under section 215 of the Criminal Procedure Code. **P EMPEROR v. RURI**, 5 P. R. 1919 Cr.; 20 Cr. L. J. 3 **493**

ss. 215, 532—Commitment, whether can be quashed by Sessions Judge.

Under section 215 of the Criminal Procedure Code a commitment can be quashed by the High Court only and only on a point of law. Section 532 of the Code applies only to a case where a Magistrate or other authority purporting to exercise powers duly conferred, which are not so conferred, commits an accused person to a Court of Session. It has no application to a case where the Court of Session considers that a commitment made by a competent Court is illegal. **B EMPEROR v. MADHAV LAXMAN**, 20 Bom. L. R. 607; 20 Cr. L. J. 71 **871**

ss. 222, 234, 235—Joint trial for criminal breach of trust and falsification of accounts, when permissible—Trial for criminal breach of trust during period exceeding one year, legality of—Court, duty of—Procedure—Appeal from acquittal

Criminal Procedure Code—contd.

—*Retrial, whether can be ordered on technical ground.*

A charge of criminal breach of trust of a sum of money can be tried under section 235 (1), Criminal Procedure Code, at the same time with one of falsification of accounts made to conceal the act of misappropriation as part of the same transaction, but a charge of criminal breach of trust cannot be legally tried together with one of falsification relating to a distinct act of misappropriation committed in a separate transaction.

The accused was jointly tried of offences falling under six different charges, viz:—

(1) Criminal breach of trust of a sum during the period 17th September 1914 to 25th March 1915.

(2) Criminal breach of trust of a sum during the period 6th March 1915 to 31st March 1916.

(3) Criminal breach of trust of a sum during the period 1st April to 31st May 1916.

(4) Criminal breach of trust of a sum during the period 1st June 1916 to 9th October 1916.

(5) Preparation of a false balance sheet of the Lahore Electric Supply Company for the year ending 31st March 1915.

(6) Preparation of a false balance sheet for the year ending 31st March 1916;

and was acquitted. Government preferred an appeal to the Chief Court against the acquittal:

Held, (1) that charges (1) and (5) could have been tried together, because the preparation of the false balance sheet for the year ending 31st March 1915 was effected to conceal the criminal breach of trust which had been committed during the period ending 25th March 1915;

(2) that similarly charges (2) and (6) could have been tried together and charges (4) and (5) could also have been tried together in one trial, as they related to two offences of the same kind committed within the space of 12 months;

(3) but that the trial of all six charges in one trial was contrary to section 234 of the Criminal Procedure Code and was quite illegal;

(4) that charge (2) contravened section 222, Criminal Procedure Code, and the trial of that charge was in itself quite illegal;

(5) that the Court before the commencement of the trial should have recorded an order to the effect that it was trying such and such charge or charges and should have proceeded to take all the evidence relating thereto, the trials should have been quite distinct and the accused should have been apprised as to which charges were being tried in each trial and the opinions of the Assessors should have been recorded separately in each;

(6) that it would not be fair to the accused, who had been acquitted, to order a retrial simply because the trial was illegal on account of misjoinder of charges, unless the Court was satisfied that the order of acquittal was obviously erroneous or was not one which should be maintained owing to the trial Court having omitted to consider material evidence for some other sufficient reason;

(7) that the onus was on the prosecution to prove affirmatively that the accused received any sums beyond those entered by him as having been received;

Criminal Procedure Code—contd.

(8) that it could not on the evidence be said for certain that the accused was in charge of all the money received by the Company;

(9) that in view of all these facts it was not one of those exceptional cases where, supposing the trial had been legal, the Chief Court would reverse the order and convict the accused and that, therefore, a retrial should not be ordered. **P** **EMPEROR v. JAGAT-
RAM**, 19 Cr. L. J. 987

s. 234,

s. 234—Joinder of charges—Offences against different individuals committed by one person, whether can be tried together—Procedure.

The conviction of an accused person at one trial for three acts of misappropriation committed against three different persons is not illegal.

Section 234 of the Criminal Procedure Code is not limited to cases where the offences have been committed against the same person. **N** **KRISHNAYYA v. EMPEROR**, 20 Cr. L. J. 71

ss. 234, 239—Joint trial of several persons for separate offences, legality of—S. 239, applicability of.

The joint trial of several accused persons for two or more separate offences is illegal.

Section 234 of the Criminal Procedure Code applies only to offences committed by a single person. It is not applicable when several persons are tried jointly under section 239 of the Code. **N** **SAYAD LAL v. EMPEROR**, 20 Cr. L. J. 7

ss. 234, 239—Joint trial of two accused for cheating—Conspiracy—One transaction.

In each case it is a question of fact whether the offences in respect of which more persons than one are charged at the same trial were committed in the same transaction, within the meaning of section 239 of the Criminal Procedure Code, and that question must be determined with reference to the facts of each case.

Where it was alleged that the accused, the Kulkarni and the Patil of a village, conspired together and cheated certain persons on the same day, by asking them to pay certain sums in excess of what was properly payable by them as assessment:

Held, that there being clear proximity of time and space, clear continuity of action and sufficiently specific community of purpose, the offences committed by the accused must be held to be committed in the same transaction within the meaning of section 239 of the Code of Criminal Procedure, so that the joint trial of the accused under that section was not illegal. **B** **EMPEROR v. MADHAV LAXMAN**, 20 Bom. L. R. 607; 20 Cr. L. J. 71

s. 235

s. 239

s. 239

Section 239 of the Criminal Procedure Code is the only section of the Code which refers to a trial of more persons than one jointly, but it does not authorise such trial for two or more distinct offences unless they form part of the same transaction or unless one is the actual offence and the other or others are offences of abetting or attempting that offence. **N** **SAYAD LAL v. EMPEROR**, 20 Cr. L. J. 7

s. 250—Compensation, order to pay,

Criminal Procedure Code—contd.

against person instigating the giving of false information, validity of.

Section 250 of the Criminal Procedure Code does not warrant an order to pay compensation against a person who only instigates the giving of false information but who does not himself make the complaint or give the information to the Police. **S** **EMPEROR v. SUMER**, 12 S. L. R. 76; 20 Cr. L. J. 100

s. 250—Compensation, order to pay, where complaint vexatious in one particular, validity of.

An order for compensation under section 250, Criminal Procedure Code, cannot be justified merely because the complaint filed was vexatious in one particular. An award of compensation can only be made where there has been a complete discharge or acquittal of the accused on all the heads of the charges against him. **S** **EMPEROR v. NADAR**, 12 S. L. R. 87; 20 Cr. L. J. 106

s. 253

s. 254

s. 260 (1), cls. (d), (1)—House-breaking by night and theft—Value of property stolen over Rs. 50—Summary trial, legality of.

A Magistrate is not authorized to split up an offence so as to give himself jurisdiction over the parts which he would not have over the whole, thereby depriving the accused of his right to appeal.

Clause (i) of section 260 (1) of the Criminal Procedure Code must be read with clause (d), which only permits a summary trial for theft under section 380 of the Penal Code where the value of the property stolen does not exceed Rs. 50.

The offence of house-breaking by night under section 457 of the Penal Code, accompanied by a theft of property worth more than fifty rupees, cannot legally be tried summarily under section 260 of the Criminal Procedure Code.

Summary procedure in cases of serious offences even though legal is inappropriate. **N** **DIPCHAND v. EMPEROR**, 14 N. L. R. 190; 19 Cr. L. J. 1003

s. 307—Sessions trial—Judge disagreeing with verdict of Jury—Reference to High Court—Verdict supported by evidence, effect of.

Where in a trial before the Court of Session the Judge, disagreeing with the verdict of "not guilty" returned by the Jury, referred the case to the High Court under section 307, Criminal Procedure Code:

Held, that as there was evidence on the record which would support the conclusion arrived at by the Jury, though there was evidence also the other way, the verdict of the Jury could not be said to be perverse or erroneous; that on the contrary it, may have been correct, so that the accused must be acquitted. **C** **EMPEROR v. ASGAR MANDAL**, 22 C. W. N. 811; 20 Cr. L. J. 20

s. 309—Assessors, opinion of, mode of taking of—Sessions Judge, duty of—Procedure.

In a case of rioting where the dispute arises over the possession of a piece of land and the Crown admits the possession of the accused and the accused themselves urge the plea of private defence, it is the duty of the Sessions Judge to explain to the Assessors the legal aspect of the plea put forward by the accused, and to direct their attention to it by putting specific questions to them on the point.

Criminal Procedure Code—contd.

In such a case general questions such as "Has the offence of rioting been proved against any of the accused?" are utterly insufficient. **PAT SUNDAR BUKSH SINGH v. EMPEROR**, 3 P. L. J. 653; (1918) 1 A.T. 359; 19 Cr. L. J. 983 **163**

s. 342, object of—Accused, examination of—Accused, duty of—Procedure

The provisions of section 342 of the Criminal Procedure Code are mandatory and non-compliance with them vitiates the trial.

The object of section 342, Criminal Procedure Code, is (1), to communicate to the accused, to the full extent that may be found necessary in each particular case, what is alleged against him in the evidence for the prosecution;

(2) to ascertain from him what explanation or defence, in law or in fact, he wishes to put forward in respect thereof.

Where the accused is an ignorant person who cannot be expected to know or understand what particular parts of the evidence are, or are likely to be considered by the Court to be, against him, it is necessary that his attention should be directed to all the vital parts of the evidence against him.

It is not a sufficient compliance with the provisions of section 342 of the Criminal Procedure Code to ask an accused the general question: "Have you anything more to say in this case or?" "you have heard the prosecution witnesses against you, what have you to say?" **N TANI v. EMPEROR**, 20 Cr. L. J. 12 **487**

ss. 345, 439—Revision—Composition of offence—High Court, power of, to allow composition.

The High Court sitting as a Court of Revision under section 439 of the Criminal Procedure Code has no power to allow the composition of an offence under section 345 of the Code. **P EMPEROR v. HARNAM SINGH**, 35 P. R. 1918 Cr.; 20 Cr. L. J. 87 **887**

ss. 346, 347 **337**

s. 347 **977**

s. 350 **344**

s. 350, scope of—Case transferred from one Magistrate to another—Witnesses, whether should be re-examined.

Section 350 of the Criminal Procedure Code is applicable to a case which has been transferred from the Court of one Magistrate to that of another. It is not restricted to cases in which Magistrates succeed each other in their offices. **N AKBAR ALI v. EMPEROR**, 20 Cr. L. J. 41 **681**

s. 362—Magistrate, duty of.

It is the duty of the Magistrate in a case which comes within section 362, Criminal Procedure Code, to take a note of all the material facts stated by a witness, whether they appear in the course of the examination-in-chief or in the course of the cross-examination. **C AH FOONG CHINAMAN v. EMPEROR**, 22 C. W. N. 834; 24 C. L. J. 105; 20 Cr. L. J. 24 **504**

s. 403 (2)—Complaint of offences under ss. 352, 504, Penal Code—Process under s. 352—Trial and acquittal of offence under s. 352—Fresh trial for offence under s. 504, legality of.

A petition of complaint alleged that the accused had committed offences punishable under sections 352 and 504, Indian Penal Code. Process was issued upon the accused directing him to appear and take his trial under section 352 only. Having heard the complainant and his witnesses, the

Criminal Procedure Code—contd.

Magistrate acquitted the petitioner of the offence under section 352, but being of opinion that on the evidence adduced a *prima facie* case of an offence punishable under section 504 had been made out, ordered process to issue directing the accused to appear and stand his trial under section 504:

Held, that section 403 (2), Criminal Procedure Code, was applicable to the case, so that the accused could be legally tried again for the offence punishable under section 504, Penal Code. **C BEJOY KRISHNA PAL v. BALAI CHAND BHANDARI**, 20 Cr. L. J. 43 **683**

ss. 403 (4), 530 (k)—Acquittal by

Magistrate not empowered to try case, whether bars subsequent trial—Procedure—Jurisdiction.

A complaint was made against the accused disclosing offences punishable under sections 409 and 477A of the Penal Code. The case was by some mistake made over for trial to an Honorary Magistrate exercising the powers of a Magistrate of the Second Class. He proceeded to deal with the case as one under section 408, Indian Penal Code, and finally acquitted the accused. Subsequently the complainant presented a further complaint to the District Magistrate praying for the trial of the accused under sections 409 and 477A of the Penal Code. The District Magistrate thereupon took cognisance of the case and referred the complaint to a First Class Magistrate for disposal:

Held, that inasmuch as the Second Class Magistrate who had dealt with the case was not empowered to commit accused persons for trial to the Court of Session, the District Magistrate had jurisdiction to take cognisance of the second complaint having regard to the provisions of section 350 (k) and section 403 (4) of the Criminal Procedure Code. **C KRISHNADHON GHOSE v. MAHENDRA NATH DUTT**, 20 Cr. L. J. 112 **992**

ss. 423, 439—Acquittal of accused—

Revision—High Court, power of interference of—Appeal by accused—Appellate Court, power of.

Where a trial has ended in the complete acquittal of the accused person, it is not open to the High Court in the exercise of its revisional jurisdiction to convict him of any offence. The utmost that it can do, in the absence of an appeal against the acquittal by the properly constituted authorities, is to order a new trial.

An appeal against a conviction, however, opens out the entire case, and the Appellate Court, being empowered to alter the finding by section 423 (1) (b) of the Criminal Procedure Code, may record a conviction in respect of an offence of which the trial Court has found the accused not guilty. **A DULLI v. EMPEROR**, 16 A. L. J. 918; 20 Cr. L. J. 22 **502**

s. 423 (1), (4) **510**

ss. 435, 439, 562—Accused released under s. 562—Revision—Sentence of imprisonment, whether can be passed.

Section 439 of the Criminal Procedure Code presupposes that a sentence has been imposed. Therefore where an accused is released on good probation under section 562 of the Code, the High Court cannot substitute a sentence of imprisonment or of whipping in revision. **N EMPEROR v. NURKHAN**, 20 Cr. L. J. 93 **979**

ss. 435, 439—Proceedings under Chap-

ter XII—Local enquiry—Procedure—Order passed without taking evidence—Jurisdiction—Revision—High Court power of interference of.

Criminal Procedure Code—contd.

A High Court cannot ordinarily interfere in revision under sections 435 and 439 of the Criminal Procedure Code with proceedings under Chapter XII of the Code, but it has power to interfere where the subordinate Court has passed an order without giving the parties an opportunity of calling evidence, and has thus acted without jurisdiction. **N JAIWANTI v. RAMRAO**, 20 Cr. L. J. 107 **987**

ss. 435, 439—*Revision against order of discharge—High Court, jurisdiction of—Interference, limits of—Alien enemy trading under license, whether competent to file complaint or move High Court in revision—Internment after filing of revision petition under Enemy Ordinance, effect of.*

In dealing with revision petitions against orders of discharge of accused persons by Magistrates, the High Court will apply the same principles as are applicable to cases of petitions to revise orders of acquittal. In either case the High Court will not interfere where there is no clear error or defect in the proceedings of the lower Courts which has resulted in grave injustice but the question is merely one as to the appreciation of doubtful evidence.

It is competent to an alien enemy residing in British India by license of the King to complain against crimes directed against his person or property and to apply in revision to the High Court against any order of a Magistrate discharging the accused on the materials placed before him.

The internment of an alien subject, after he has filed a revision petition, does not necessarily stay the hands of the High Court. **M MELLOR v. MUTHIAH CHETTY**, 35 M. L. J. 513; 9 L. W. 113; 20 Cr. L. J. 101 **931**

s. 439 502, 887, 979, 981, 987

ss. 439, 476—*Civil Procedure Code (Act V of 1908), s. 115—Sanction for prosecution granted by Civil Court—Revision—High Court, power of interference of.*

The High Court has no power under section 439 of the Criminal Procedure Code to set aside an order made by a Court of Small Causes directing the prosecution of a decree-holder for perjury in respect of a statement made by him before that Court, nor can such an order be interfered with under section 115 of the Civil Procedure Code. **A RAM PRASAD v. EMPEROR**, 16 A. L. J. 921; 20 Cr. L. J. 19 **499**

s. 439—*Revision—Acquittal, order of, interference with—Jurisdiction.*

The High Court has jurisdiction to interfere in revision even in the case of an order of acquittal, but such interference will only be where serious injustice has been caused by an error of law. **M MOGAL BEG, In re**, 35 M. L. J. 665; 25 M. L. T. 24; 20 Cr. L. J. 49 **817**

s. 476. 499, 683, 894

s. 476—*Offence brought to notice of Court in subsequent judicial proceeding, effect of—Court, power of, to enquire into commission of offence, exercise of, time of.*

The powers conferred by section 478, Criminal Procedure Code, can be exercised at any time when an offence is committed before a Court in a judicial proceeding, or when the commission of it is brought to its notice in the course of that judicial proceeding or in any other. **O RAM ANUJ v. EMPEROR**, 5 O. L. J. 622; 19 Cr. L. J. 981 **161**

Criminal Procedure Code—contd.

s. 477, *scope of—Sessions Judge, power of, to try witness for perjury, exercise of—Summary trial, legality of—Court, duty of—Procedure.*

Section 477 of the Criminal Procedure Code gives the power to a Court of Session to charge a person for any offence referred to in section 195 of the Code and committed before it. It further gives the Court of Session the power to commit for trial or to admit to bail and to try the person for the charge it has framed, but the section nowhere lays it down that the trial is to be a summary one, nor does it anywhere demand a decision which should be more prompt and speedy than that of any ordinary trial. The very powers granted in that section to a Court of Session are so unusual that it is the bounden duty of any Court exercising them to be at pains to give the accused a fair and impartial trial, in view of the fact that the Court has already had before it certain evidence upon which it may have already formed an opinion.

At the conclusion of a trial in a Sessions Court, the Sessions Judge charged one of the defence witnesses with the offence of perjury and proceeded there and then to try him under the powers conferred upon the Court by section 477 of the Criminal Procedure Code. The accused repeatedly asked for time to enable him to obtain legal advice and to put in his defence, but the Court refused his prayer and convicted and sentenced him.

Held, that the Sessions Judge had, in the exercise of his jurisdiction, acted hastily and irregularly and had not given the accused a fair trial and that, therefore, the case must be re-tried. **A HADAR KHAN v. EMPEROR**, 16 A. L. J. 924; 20 Cr. L. J. 34 **673**

s. 488—*Hindu wife leaving husband's house without cause—Maintenance, right to, on return to husband's house.*

The duty of a husband to maintain his wife under the Hindu Law is absolute and under the Criminal Procedure Code it is subject only to the wife's chastity. When a Hindu wife, therefore, leaves her husband's house without good cause, her right of maintenance is only suspended and she has the right to return to her husband's house at any time and claim to be maintained by him. **S JANKIBAI v. SHIVRAM BABJI**, 12 S. L. B. 90; 20 Cr. L. J. 98 **978**

s. 496 674

s. 512—*Evidence taken against absconding accused—Procedure.*

Where a Magistrate had clear evidence that the accused were absconding and evidence from which he might reasonably infer that there was no immediate prospect of their arrest, and he expressly stated in his order that he was taking evidence under section 512 of the Criminal Procedure Code, the presumption is that he did his duty and did not record the evidence under the section unlawfully. The mere fact that the Magistrate did not recite a finding that there was no immediate prospect of the arrest of the accused does not render the evidence inadmissible. **A BHAGWATI v. EMPEROR**, 16 A. L. J. 907; 20 Cr. L. J. 6 **481**

ss. 517, 520, 523—*Restitution of property—Revision—Power of Court in revision—Restitution, enforcement of.*

Section 520 of the Criminal Procedure Code of 1898 differs from the corresponding provision in the Code

Criminal Procedure Code—concl.

of 1882 and contemplates that the Court of reference or revision shall order restitution if justice so requires.

Where a remedy is allowed by law, it must be assumed that the Legislature intends that the tribunal invested with jurisdiction shall enforce its order in the manner it considers most suitable, even though there is no express provision for doing the same. **Pat** BADRUL HASAN *v* CHAMELA, 19 Cr. L. J. 995

s. 520

s. 522—Order restoring property to person entitled thereto, nature of—Appellate Court, whether can pass order.

An order under section 522, Criminal Procedure Code, directing the restoration of immoveable property to the person entitled thereto, cannot be regarded as a consequential or incidental order within the purview of section 423 (1), clause (4) of the Code.

An Appellate Court is not competent to make an order under section 522, Criminal Procedure Code, directing the restoration of immoveable property to the person entitled thereto, where the trial Court has for some reason or other refrained from taking action under the aforesaid section. **P** MUHAMMAD DIN *v* EMPEROR, 20 Cr. L. J. 30

s. 523**s. 530 (k)****s. 532****s. 537****s. 537 (a)**

s. 556—Criminal trial—Judge importing his own knowledge into case, effect of—Irregularity.

Where a Judge is the sole judge of law and fact in a case tried before himself, he cannot give evidence before himself or import matters in his judgment not stated on oath before the Court in the presence of the accused. If he does so, he makes himself a witness in the case and renders himself incompetent to try it. **Pat** MANGNI LAL MARWARI *v* EMPEROR, 20 Cr. L. J. 45

s. 562**Criminal Tribes Act (III of 1911), s. 4**

Crookes' Work on Castes and Tribes of N. W. P. and Oudh, admissibility of

Crown Grants Act (XV of 1895)—

Crown, grant of land by—Limitation of descent, power of Crown to impose—Talugdari property, accretion to

The Crown has in British India power to grant or to transfer lands, and by its grant or transfer to limit in any way it pleases the descent of such lands. But a subject has no right to impose upon lands or other property any limitation of descent which is at variance with the ordinary law of descent applicable to his case.

Villages transferred by the Government in exchange for villages included in a talugdari sanad must be treated as talugdari villages.

Where a house in Kaiser Bagh at Lucknow had been allotted to a talugdari for his use as such:

Held, that the talugdari's right of possession would on his death pass to his successor in the talugdari

Crown Grants Act—concl.

estate and not to his heirs under the personal law. **P** C RAJINDRA BAHADUR SINGH *v* RAGHUBANS KUNWAR, 21 O. C. 108; 5 O. L. J. 401; 24 M. L. T. 282; 8 L. W. 570; 40 A. 470; (1918) M. W. N. 831; 28 O. L. J. 456; 23 C. W. N. 101; 20 Bom. L. R. 1075

Custom—Abadi, house in, occupied by kamin—Collateral, whether entitled to succeed.

Under the ordinary village custom a near collateral of a deceased kamin is entitled to retain possession of a house in the village abadi which was occupied by the deceased. **P** BELI RAM *v* UMAR BAKSHI, 116 P. R. 1918

Alienation—Occupancy holding—Exchange of holding with landlord—Sale of land obtained under exchange—Reversioner of tenant, suit by, maintainability of.

An occupancy tenant entered into an arrangement with his landlord, whereunder the former gave up his occupancy rights in a portion of the holding and obtained full proprietary rights in the remainder. Subsequently, he sold the land which he had obtained in full proprietary right to the defendant. Plaintiff, a reversioner of the vendor, brought a suit for a declaration that the sale would not affect his reversionary rights after the death of the vendor:

Held, that the occupancy rights with which the vendor had parted being ancestral, the land received by him in exchange from the landlord in full proprietary right must also be treated as ancestral, and that, therefore, the plaintiff had a locus standi to bring the suit. **P** THAKUR *v* RAM SINGH, 120 P. R. 1918

Alienation—Occupancy rights, creation of, whether can be challenged by reversioners.

The creation of occupancy rights in land amounts to a transfer of valuable rights and can be challenged by the heirs of the proprietor in accordance with the well-recognised principles of customary law. **P** ISHAR *v* SUNDAR, 125 P. R. 1918

opposed to ordinary law, proof of—Wajib-ul-arz, construction of—Hindu Law—Widow, power of alienation of.

Nothing short of the most cogent evidence can be accepted as proof of a custom repugnant to the ordinary rule of succession or power of disposal prescribed by it.

If a construction can be put on a wajib-ul-arz which is compatible with the rules of the personal law of the parties, that is the construction to which a Court should adhere.

Where a wajib-ul-arz declared that a sonless widow was entitled to the property of her husband for her life and had every kind of power over the same in case of personal necessity or to meet the revenue demand:

Held, that the entry did not amount to a custom under which the widow had unlimited power of disposal. **O** BAHADUR SINGH *v* AUSSERI SINGH, proof of

proof of—Crookes' Work on Castes and Tribes of N. W. P. and Oudh, admissibility of.

Per Curiam.—Long established usages existing in particular districts and families in India should be given effect to, but it is of the essence of special usages modifying the ordinary law of succession that they should be ancient and invariable; and it is

Custom—concl'd.

further essential that they should be established to be so by clear and unambiguous evidence.

A custom must be ancient, certain and reasonable and being in derogation of the general rules of law, must be construed strictly.

Per *Mookerjee, J.*—Reference, may legitimately be made to the Work on Castes and Tribes of the North-Western Provinces and Oudh by Mr. Crookes as an authoritative statement of customs prevalent among the Braki sect of Muhammadans

The fact that a custom was not pleaded in litigations between members of the community where it might have been pleaded, is relevant evidence for the purpose of showing the non-existence of the custom. **C** MARIAM BIBEE v. MUHAMMAD IBRAHIM, 28 C. L. J. 306 **561**

—proof of—Proof, nature of—Evidence Act (I of 1872), ss. 32 (5), 49.

Where the custom of a community is in question and it is clear that direct evidence cannot be obtained of instances of such custom, which occurred before the memory of man, persons, having special means of knowledge, are, in view of the provisions of sections 325 and 49 of the Evidence Act, permitted to testify to their existence from such knowledge as they might possess of what has been practised in their community or from what they might have heard from persons having special means of knowledge of what was practised before. **O** IKBAL NARAIN v. RAJENDRA NARAIN, 21 O. C. 276; 5 O. L. J. 701 **767**

—special, proof of **373**

—Succession—Daughters versus collaterals—Dhani Brahmins of Kamalia, District Montgomery.

Among Dhani Brahmins of Kamalia in the District of Montgomery daughters and daughters' sons exclude collaterals from succession to acquired property. **P** BUDHI PARKASH v. CHANDER BHAN, 123 P. R. 1918 **813**

—Immoral custom, whether enforceable—Succession.

An immoral custom has no legal force.

A custom by which a brothel-keeper succeeds to the property left by a *nauchi*, or slave kept for the purpose of prostitution, is immoral and has no legal effect, for, if recognised, it would have the effect of encouraging brothel-keeping. **P** MUHAMMAD BAKUSH v. NAWAZISH ALI, 75 P. R. 1918; 183 P. W. R. 1918 **73**

—Will in favour of resident son-in-law, whether can be treated as gift—Gift in favour of daughter, validity of—Collaterals, rights of—Virak Jats of Mauza, Harar, Tahsil Gujranwala.

Among Virak Jats of Mauza Harar in Tahsil Gujranwala a male proprietor is empowered by custom to make a gift of his ancestral property in favour of his daughter to the exclusion of his collaterals in the 4th degree.

A bequest of ancestral property by a male proprietor in favour of his resident son-in-law can be treated, so far as the testator's power of disposition is concerned, as a gift for the benefit of his daughter and her issue. **P** SHADI v. ALIA **842**

Defence of India Act (IV of 1915), s. 2—Rules framed under Act, rr. 23, 29—Criminal

Defence of India Act—concl'd.

Procedure Code (Act V of 1898), ss. 191, 200—Dissuading or attempting to dissuade person from entering military service—Cognizance of offence—Statement by complainant—Procedure.

In view of the exceptional powers conferred upon the authorities by the Defence of India Act and by the rules framed under it, the Courts are entitled to require strict compliance with all the provisions introduced into the rules by way of safeguarding the liberty of the subject

M., a tenant of the accused, was recruited in the army and received a certain sum in advance. About a month afterwards the accused brought a suit against *M.* for arrears of rent. *M.* appeared before the District Magistrate and made a statement which was neither made on oath nor signed. The District Magistrate thereupon directed warrants without bail to issue for the arrest of the accused and took up the case himself. The accused were charged with having contravened rule 23 of the rules framed under the Defence of India Act and were convicted and sentenced under rule 28.

Held, (1) that the proceedings in the Court of the District Magistrate were irregular in their initiation, inasmuch as the Magistrate, if he conceived himself to be taking cognizance of the offence upon information received from *M.* within the meaning of section 180 c) of the Criminal Procedure Code, was bound to offer the accused the option of being tried by another Court as provided by section 191 of the Code and if he treated the statement made by *M.* as the complaint in the case, was bound before issuing warrants to take from *M.* a sworn declaration that he had spoken the truth and to obtain the signature of *M.* to that declaration;

(2) that the facts alleged in the charge having occurred after *M.* had joined the army, rule 23 of the rules framed under the Defence of India Act was not applicable to the case, inasmuch as a person cannot be said to dissuade or to attempt to dissuade another from doing something which the latter has already done. **A** MAHADEO SINGH v. EMPEROR, 16 A. L. J. 895; 20 Cr. L. J. S **483**

Discretion of Court to reduce rate of interest, reasonable exercise of—Appellate Court, interference by.

An Appellate Court will be slow to interfere where it can be shown that such discretion has been exercised in a reasonable manner. **O** DARGAHI v. RAJESHWARI PERSHAD, 21 O. C. 265 **753**

Easement of necessity, requisites of.

An easement of necessity can only arise when the property cannot be used at all without the easement, and not where the easement is merely necessary to the reasonable enjoyment of the property.

An easement of necessity points to the fact that there must be absolute necessity before the law will compel a land-owner to submit to so detrimental a right as an easement in his land, a right in reality, though not in theory, imposed on his land against his will. **PAT** DAROGA LAL v. DEVI LAL **670**

Easements Act (V of 1882), s. 60

(b)—License, whether can be revoked.

Under section 60 (b) of the Easements Act a license may be revoked by the grantor, unless the licensee acting upon the license has executed a

Easements Act—concl'd.

work of permanent character and incurred expenses in the execution.

Plaintiff, out of gratitude, allowed the defendant who was his medical adviser to occupy a certain house. The defendant erected a compound wall, fixed up a water pump, flagged the floor with stones and erected two huts:

Held, that the improvements executed by the defendant were of a permanent character and that, therefore, the license was not revocable during the lifetime of the defendant. **N. MADHUSUDAN DAS v. BISSUI** 723

Ejectment, suit for—Burden of proof.

Where a plaintiff seeks to recover possession as upon dispossession, the burden is on him to prove possession at some time within 12 years before the commencement of the suit.

In all actions for ejectment the plaintiff must recover by the strength of his own title, not by the weakness of his adversary's. **N. CHAMPAT v. LAXMI NARAYAN** 70

Suit—Unnecessary parties, addition of effect of Estoppel 993

against landlord in favour of tenant—Burden of proof.

To raise an equitable estoppel against a lessor precluding him from suing for possession on the determination of the tenancy, the tenant must show facts sufficient to justify a legal inference that the lessor has by plain implication contracted that the right of tenancy should be changed into a right of permanent occupancy.

The length of the period for which a tenant has been holding land does not, in the absence of any contention that the rent has never been enhanced, raise any presumption that the tenancy is a permanent one. **N. BANMALI v. NIHAL SINGH** 354

, whether can defeat provisions of Statute.

The general rule is that the principle of estoppel cannot be invoked to defeat the plain provisions of a Statute. **C. SUDHIR CHUNDER SETT v. ABDULLA UL-MUSAVI**, 22 C. W. N. 894 520

Evidence, admissibility in—Horoscope, whether admissible.

Where a full horoscope prepared from a short horoscope was produced in evidence and the person who had prepared it was examined as a witness:

Held, that so far as the date of birth and the parentage were concerned, the horoscope represented what had been stated to the witness who prepared it before the present dispute had arisen and could be used both as corroborative or rebutting evidence and for the purpose of refreshing memory. **O. HAR BAHADUR LAL v. CHAND RAJ BAHADUR**, 5 O. L. J. 655; 21 O. C. 298 400

Evidence Act (I of 1872), s. 18—Admission of one of several persons jointly interested, whether admissible against all—Burden of proof.

Where several persons are jointly interested in the subject-matter of a suit, the general rule is that the admissions of any one of those persons are receivable against himself and his fellows, whether they be all jointly suing or sued, provided the admissions relate to the subject-matter in dispute and were made by the declarant in his character of

Evidence Act—cont'd.

a person jointly interested with the party against whom the evidence is tendered.

Where there is an admission by a party, he must show that the admission is untrue in fact. **N. DILE-HWAR RAM BRAHMAN v. NOHAR SINGH** 193

s. 25—Excise Officer, whether Police Officer—Confession, admissibility of

Excise Officers cannot be said to be Police Officers, so that a confession made to an Excise Officer is not inadmissible in evidence under section 25 of the Evidence Act. **C. AH FOONG CHINAMAN v. EMPEROR**, 22 C. W. N. 834; 28 C. L. J. 105; 20 Cr. L. J. 24 504

s. 25—Report made to Police, admissibility of, against person who made it.

A report made to the Police which amounts to a confession is not admissible in evidence against the person who makes it. **P. SIKANDAR v. EMPEROR**, 36 P. R. 1918 Cr.: 20 Cr. L. J. 83 883

s. 30—Confession, admissibility of, against co-accused—Statement made by accused exculpating himself, whether confession

In order that a confession made by one of several accused may be taken into consideration under section 30 of the Evidence Act against his co-accused, it is not necessary that the confession should be one in which the maker of it persists up to and at the time of the trial.

A confession, made before a case comes up for trial but withdrawn at the time of the trial, would still be admissible against the other accused under section 30 of the Evidence Act.

But under section 30 of the Evidence Act, the Court cannot take into consideration statements made by one of several accused against his co-accused, where such statements are consistent with an attempt on the part of the maker of them to exculpate himself from the charge which has been or which is likely to be made against him. For the purpose of seeing whether statements made by an accused are confessions or not it is essential, first of all, to consider the nature of the offence with which the accused has been charged or is likely to be charged, and secondly, the whole of the statements must be read for the purpose of seeing whether in the opinion of the Court they are confessions or not.

Statements made by an accused which are consistent with an attempt on his part to exculpate himself from the charge which has been or which is likely to be made against him cannot be regarded as confessions. **C. AH FOONG CHINAMAN v. EMPEROR**, 22 C. W. N. 834; 28 C. L. J. 105; 20 Cr. L. J. 24 504

ss. 32, 64, 65—Book of genealogy, kept by Bhat, entries in, admissibility of—Copy of original which is in existence, whether admissible—Secondary evidence.

In order to prove their relationship with a deceased proprietor the plaintiffs relied on a Bhat's book of genealogy. It was admitted by the Bhat who produced it that the book was largely a copy made by his father from an older book which was then in existence. It was not alleged that the old book was in such a state that it could not be produced or that the entries made therein were indecipherable owing to age or owing to other cause:

Held, that having regard to sections 64 and 65 of the Evidence Act the entries in the book could not

Evidence Act—contd.

be looked upon as independent and original ones, nor could they be admitted as secondary evidence inasmuch as the original entries which were in existence could have, but had not, been produced.

Obiter dictum.—If the book had not been held to be inadmissible under sections 64 and 65 of the Evidence Act, it would have been admissible under section 32, sub-sections 2) and 5) of the Act, inasmuch as it was a recognised duty and pursuit of a Bhat to keep a genealogy of the families he was interested in and he had as a rule special means of knowledge in the matter. **N HAZARILAL v. HAR GOVIND** 375

— **s. 32 (5)** 767
s. 32 (5)—Statement by agent of deceased member of family, admissibility of—Principal and agent—Pedigree filed by agent in suit to which principal was party—Presumption.

The statements of the deceased relatives, servants and dependents of a family are as much admissible under section 32, clause (5), of the Evidence Act as the statements of the members of the family, provided they had special means of knowledge requisite to render their statements admissible.

In a suit for inheritance the plaintiffs relied upon a pedigree which purported to have been filed in a previous suit by the general agent of one of the parties to that suit. The latter was a member of the family to which the parties in the inheritance suit belonged and he and his general agent were both dead:

Held, (1) that the presumption was that the general agent must have filed the pedigree under the instructions of his master;

(2) that the pedigree was admissible in the inheritance suit under section 32, clause (5) of the Evidence Act. **O BALBHADDAR SINGH v. SRIPAL SINGH**, 21 O. C. 251 308

— **s. 49** 767
ss. 58, 92 (4)—Mortgage registered—

Subsequent agreement for payment of less than stipulated consideration—Oral evidence, admissibility of—Admission of agreement in pleadings, effect of.

A subsequent agreement to take less than is due under a registered mortgage is an agreement modifying the terms of a written contract, and, if it has to be proved, oral evidence is inadmissible under proviso 4 to section 92 of the Evidence Act.

Per *Wallis, C. J.* and *Oldfield, J.*, (*Seshagiri Aiyar, J.* dubitante).—Where, however, the oral agreement is admitted in the pleadings of the other party it need not be proved, as no question of the admissibility of evidence, oral or documentary, arises when proof is dispensed with in consequence of an admission in the pleadings either under section 58 of the Evidence Act or under the provisions of the Code of Civil Procedure.

Per *Wallis, C. J.*—The plain language of section 58 of the Evidence Act should not be unduly restricted by reference to considerations of public policy. The admission of a party in his pleadings as to an oral arrangement modifying a written contract gets rid of the danger which it is intended to guard against, by the prohibition against the admission of oral evidence contained in the 4th proviso to section 92 of the Evidence Act.

Evidence Act—contd.

Per *Oldfield, J.*—The acceptance of a statement in an unregistered writing as evidence of the modification of a registered contract is contrary to public policy, as tending to defeat the provisions of the Registration Act, though the language of section 58 of the Evidence Act is unqualified.

Per *Seshagiri Aiyar, J.* There is no justification in principle for not applying proviso 4 to section 92 of the Evidence Act to all cases other than those in which there has been a perfected discharge by payment. **M MALLAPPA v. MATAM NAGA CHETTY**, 8 L. W. 622; (1918) M. W. N. 719; 35 M. L. J. 555; 24 M. L. T. 400; 42 M. 41 158

— **ss. 64, 65** 375
ss. 64, 65—Copy of document exhibited by consent of parties—Appellate Court, power of, to reject copy.

Where a copy of a document is exhibited in the trial Court with the consent of both parties, the Appellate Court has no jurisdiction to reject it on the ground that the original has not been produced.

Per *Napier, J.*—Where there has been a bona fide mistaken belief that a document has been properly proved and where that document is of fundamental importance for the decision of the questions at issue between the parties, the Appellate Court should always give the parties an opportunity of producing proper evidence on the point. **M KAMULAMMAL AVERGAL v. SANGALI SUBBA PILLAI**, 35 M. L. J. 11 615

— **s. 71**—Mortgage bond signed by attesting witnesses before completion—Execution, proof of.

A statement by the attesting witnesses to a mortgage deed that they signed the blank paper and not the completed deed is sufficient to attract the operation of section 71 of the Evidence Act and entitles the mortgagee to prove execution by evidence other than that of the attesting witnesses. **C DINABANDHU PATRA v. SANATAN DANDA-PAT** 624

— **s. 73**—Comparison of signature or writing, admissibility of.

Section 73 of the Indian Evidence Act is not limited, in its scope, to documents which are signed or contain some intrinsic statement of the identity of the writer. As under English Law, all that is necessary to render proof by comparison admissible is a dispute as to the writing. **M VEERARAGHAVA AIYANGAR v. SOUBI AIYANGAR**, (1918) M. W. N. 715; 35 M. L. J. 608; 24 M. L. T. 447; 8 L. W. 625 68

— **s. 92 (4)** 158

— **s. 92, proviso (6)**—Oral evidence to prove relation of document to existing facts, admissibility of.

Where an instrument is ambiguous or contains a description which is imperfect or inaccurate as to existing facts, evidence is receivable of all the circumstances surrounding the instrument for the purpose of throwing light on its interpretation, for it is by these, as by a lump, that the instrument has to be read.

Where the language of a document is not clear and applies partly to one set of existing facts and partly to another, the rights possessed by the vendor may be helpful in determining to which set of facts the description in the sale-deed was intended to apply,

Evidence Act—concl'd.

O ADITYA PRAFAD v. MUHAMMAD MUBARAK SHAH, 21 O. C. 23:

s. 115, Estoppel

ss. 115, 116—Estoppel—Minor, tenancy created on behalf of, by guardian de facto—Benefit of minor—Promise, whether constitutes estoppel.

In the absence of any representation deceiving the opposite party and thereby causing him to alter his position for the worse, a mere promise does not constitute an estoppel.

Where it was found that a minor had derived benefit from a tenancy created to his advantage by a *sarkhat* executed on his behalf by a person who was his guardian in fact, though not in law:

Held, that the minor was estopped under section 116 of the Evidence Act from denying the title of the man in whose favour the *sarkhat* had been executed. **O KANIZ MERDI BEGAM v. RASUL BEG, 5 O. L. J. 551**

s. 126—Communication made to Vakil in course of employment, admissibility of—Communication, modes of.

For the purposes of section 126 of the Evidence Act, it is immaterial whether the communication which is sought to be protected was verbal, that is to say, by word of mouth, or by demonstration.

In a suit for the revocation of a patent in which the question for decision was the formation and process of working of a stove owned and used by the defendant, the plaintiff tendered in evidence a Vakil who had been employed by the defendant in some previous proceedings and had, in the course and for the purposes of his employment, visited the defendant's premises at the latter's invitation, in order to make himself acquainted with the working of the stove:

Held, that the knowledge acquired by the Vakil as to the formation and process of working of the stove amounted to a communication made to him by his client in the course and for the purposes of his employment and that, therefore, his evidence was inadmissible under section 126 of the Evidence Act. **A GOPI LAL v. LAKHPAT RAI, 16 A. L. J. 987**

Execution of decree—Attachment—Mulgani tenant in South Canara—Right to improvements, whether can be attached.

The rights of a Mulgani tenant in South Canara are the same as the rights of a tenant in Malabar, and his claim to compensation for improvements, which is an inchoate right and becomes perfected only at the time of eviction, cannot be attached and sold in execution of a decree. **M ANANTHA BHATTA v. MAVINAMALE ANANTHA BHATTA, (1918) M. W. N. 887; 9 L. W. 78; 36 M. L. J. 92**

Decree transferred from one Court to another—Competence of Court to persevere with execution where first attempt to execute has failed.

A decree having been transferred to a Court for execution, the decree-holder made an application for arrest of the judgment debtor. The Court directed the issue of a warrant of arrest, which was returned with the endorsement that the judgment-debtor could not be found. Immediately afterwards the decree-holder again made an application for the arrest of the judgment-debtor and the Court directed the issue of a second warrant:

Execution of decree—concl'd.

Held, that the Court had jurisdiction to direct the issue of a second warrant. **O GUR DAYAL v. BEGG SUTHERLAND AND Co, 21 O. C. 261**

Jurisdiction, territorial, limits of—Attachment—Corporation having different branches, property in possession of, whether can be attached—Property outside jurisdiction of Court.

The jurisdiction of a Court is circumscribed by and co-extensive with its territorial limits.

Where property sought to be attached is *bona fide* without the jurisdiction of the original Court whose decree is sought to be enforced and is in the hands of a third party who is not amenable to or permanently residing within the jurisdiction of the executing Court, the decree of the executing Court must be transferred to the Court within the local limits of whose jurisdiction the property sought to be attached is for the time being

A corporation may be said to reside wherever it carries on its business, irrespective of the location of its head office, and if a corporation such as a Bank has branch offices in fifty separate and distinct jurisdictions, it can and may be sued in any one of such jurisdictions, for the enforcement of a right in respect of which a cause of action exists within the limits of each independent jurisdiction.

The jurisdiction of an executing Court to attach moveable property belonging to a judgment-debtor in the hands of another or under his control or a debt due by him is correlative and co-extensive with the right which the judgment-debtor himself would have had to sue for the recovery of his property or his debt as against his debtor or trustee.

One R entered into the service of the Patna Branch of the Bank of Bengal, and as security for his fidelity to the Bank deposited with the Bank Government promissory notes of the value of Rs. 20,000. The promissory notes were sent from Patna to Calcutta and were kept in the custody of the Head Office of the Bank. A creditor of R attached the Government promissory notes and the interest accruing due under them in execution of a decree passed by the Subordinate Judge at Patna:

Held, that inasmuch as the Bank had a residence within the jurisdiction of the Patna Court and carried on business therein, that Court had jurisdiction to attach both the Government promissory notes and the interest accruing under them, notwithstanding the fact that the notes were in the physical custody of the Head Office of the Bank at Calcutta. **PAT BANK-OF-BENGAL v. SARAT CHANDRA MITRA**

Trespasser, rights of, to execute decree.

The question of the right of a trespasser to execute a decree obtained on behalf of an estate depends largely upon the nature of the decree and of the objection taken by the judgment-debtor to the proceeding instituted by the trespasser. Where a decree is due to an estate the person who for the time being is recognized as the proprietor of the estate is the proper person to execute the decree

PAT HANDRIKA PRAFAD SINGH v. KESHO PRASAD SINGH

Execution of document, proof of—Deed filed for collateral purpose—Construction of document.

Where a deed is filed merely for a collateral purpose, it need not be proved with the same form.

Execution of document—conold.

alities as when it is sought to enforce its provisions in a suit. **O LACHHMAN PRASAD v. BALDEO PRASAD**, 5 O. L. J. 625; 21 O. C. 312 **396**

Explosives Act (IV of 1884) Rules framed under the Act, rr. 3, 71—Toy fireworks—Presumption—Possession of explosives—License to possess certain quantity for specified period—Contravention of conditions of license—Offence.

The onus is on the person in possession of explosives to show that they are toy fireworks under rule 3 of the rules framed under the Act.

The whole scheme of the rules framed under the Explosives Act is to require a separate license for possession, at any one time and place, of explosives in addition to a license to import during a particular period. Where a permit for possession is granted limiting the quantity to be possessed at any specified period or at any particular place, the permission to import a larger quantity during the longer period must be read subject to the quantity in possession being exhausted or reduced below the maximum for which possession is permitted. **M GURUMURTHI CHETTI, In re**, 8 L. W. 626; 20 Cr. L. J. 108 **988**

s. 4 (1), (2)—China crackers, whether explosives.

China crackers are explosives within the meaning of clauses (1) and (2) of section 4 of the Explosives Act. **M GURUMURTHI CHETTI, In re**, 8 L. W. 626; 20 Cr. L. J. 108 **988**

Extradition Act (XV of 1903), ss. 7, 8, 8A, 18—Cheating, extradition for, whether permissible—Offence not mentioned in treaty—Bail, power of Magistrate to grant—Criminal Procedure Code (Act V of 1898), s. 496.

A person accused of cheating in the Hyderabad State can be made the subject of a warrant under section 7 of the Extradition Act, notwithstanding that the offence of cheating is not mentioned in Article IV of the Treaty, dated the 8th May 1867, between the British Government and the Hyderabad State.

The provisions of section 7 (2) of the Extradition Act override the provisions of section 496 of the Criminal Procedure Code, so that a Magistrate has no power, apart from sections 8 and 8A of the Extradition Act, to admit to bail a person arrested under section 7 of the Act. **B MURLIDHAR BHAGWANDAS, In re**, 20 Bom. L. R. 10; 9; 20 Cr. L. J. 34 **674**

s. 18 **674**
General Clauses Act (X of 1897), s. 3 (45) **903**

s. 6 (c) **732**
s. 10 **353**

Ghatwali chakran land—Transfer, right of—Execution of decree—Sale of ghatwal's interest—Purchaser, rights of.

Defendant No. 1 was the ghatwal of certain lands. On 24th January 1899, in execution of a decree for money against him, his right, title and interest in the lands were sold and were purchased by the plaintiffs. Defendant No. 1 had executed a *kabuliyat* for these lands in favour of the Maharaja of Burdwan on 5th September 1896. The *kabuliyat* recited that at the time of its execution, negotiations were proceeding between the Government, the *zemindar* and the *ghatwal* for the resumption of these lands, which had not been at that time resumed and transferred

Ghatwali chakran land—conold.

to the *zemindar*. It was also clear from a lease, which was the counterpart of the *kabuliyat* and was executed on 29th January 1899 that up to that time the resumption had not taken place.

Held, that on the date of the execution purchase by the plaintiff, the judgment-debtor had not ceased to be a *ghatwal* and, therefore, had no transferable right in the lands, so that the plaintiff got nothing by his purchase at the execution sale. **C PURAN CHANDRA LAHA v. SOUDAMINI BAI SNABI**, 28 O. L. J. 283 **335**
Gift, deed of, interpretation of—Possession postponed till death of donor—Interest of donee, nature of—Transfer of Property Act (IV of 1882), s. 6 (a)—Transfer of vested interest, validity of.

Where a deed of gift provided that the donee would not take possession of a portion of the gifted property until after the deaths of the donor and his wife, and the donee transferred this portion of the gifted property after the death of the donor but in the lifetime of his widow:

Held, that the gift must, so far as it related to the said portion of the gifted property, be regarded as a Will, that the donee was given a vested interest in the same subject only to a life-interest in favour of the donor's widow, and that, therefore, its transfer by the donee was not forbidden under section 6 (a) of the Transfer of Property Act. **O LACHHMAN PRASAD v. BALDEO PRASAD**, 5 O. L. J. 625; 21 O. C. 312 **396**

Government of India Act, 1915 (5 & 6 Geo. V, Ch. 61), s. 106 (2)—Income Tax Act (II of 1886), s. 31—Income Tax (Amendment) Act (V of 1916)—Composition of income tax—Repudiation of agreement by Collector under provisions of Act (V of 1916)—Suit to declare agreement binding on Collector, maintainability of—Original jurisdiction of High Court, limits of.

A suit to declare that an agreement for composition of income-tax under the provisions of section 31 of Act II of 1886 which was repudiated by the Collector after the enactment of Act V of 1916 is binding on the Collector, does not lie on the Original Side of the High Court and is exempted from its jurisdiction by section 106 (2) of the Government of India Act.

In the absence of an averment that the Collector was *malafide* using the Statute to commit an act of aggression, the High Court has no jurisdiction to make an enquiry on the merits to determine whether the Collector was right in his view of the law. **M BEST AND CO. v. COLLECTOR OF MADRAS**, 35 M. L. J. 23 **790**

Grant of aghraharam village by Native Ruler before British rule—Presumption.

There is no presumption that an *inam* grant made by a Native Ruler more than 400 years prior to British rule was a grant of land revenue alone and did not include the *kudinaram*. **P C SURYANARAYANA v. PATANNA**, 41 M. 1012; 25 M. L. T. 30 **689**

in perpetuity, transferable—Transfer of grant—Issue of fresh sanad after transfer, legality of.

Where a transferable grant in perpetuity has been made in favour of one person who has transferred the same to a third person, no subsequent *sanad* in favour of the transferor or any other person can legally be issued so as to constitute a fresh grant, unless the transfer can be avoided. **N DAMADAJI v. MARTAND** **901**

Grove-holder acquiring proprietary rights in village—Sale of proprietary right—Rights in grove, whether transferred—Merger.

A grove-holder, who obtains by inheritance the superior proprietary rights in the village in which the grove stands, does not lose his right to the grove when the superior proprietary rights so inherited by him pass by virtue of an auction sale to a third person. **O** GULAB RAI v. KAZIM ALI, 21 O. C. 263; 6 O. L. J. 32

Guardian and ward—Sale of minor's property by guardian

Guardians and Wards Act (VIII of 1890), s. 15

ss. 19, 25—Father, whether can be appointed guardian—“Guardian”, meaning of—“Custody”, what is—Welfare of minor—Enquiry, duty of, whether can be delegated by Court.

A Court has no power under the Guardians and Wards Act to appoint a father the guardian of the person of his children, and where such appointment is made, the order of appointment is without jurisdiction.

The expression “guardian”, as used in section 25 of the Guardians and Wards Act, is not confined to statutory guardians appointed under the Act, but includes any person having the care of the person of a minor or of his property or of both. Such a person need not necessarily be the *de facto* guardian of the minor.

The “custody” referred to in section 25 of the Guardians and Wards Act includes both actual and constructive custody.

The duty of inquiry under that section is cast upon the Court and cannot be delegated.

A father may in his discretion entrust the custody and education of his children to another but by doing so, he does not cease to be his children's guardian that being an office which in his lifetime he cannot delegate to a third person. **O** MUSHAF HUSAIN v. MOHAMMAD JAWAD, 21 O. C. 194; 5 O. L. J. 618

s. 25

Hindu Law—‘Avyavaharika debts,’ meaning of.

An Avyavaharika debt only means a debt not opposed to good morals. **M** GARUDA SANTASAYYA v. NERELLA MUTHAMMA, 35 M. L. J. 661; 9 L. W. 1: 25 M. L. T. 86

Bandhu, who is—Sister's son, whether Bandhu.

The term ‘Bandhu’ has been defined in the Mitakshara as a Bhinna Gotra Sapinda, that is to say, sprung from a different family but connected by common corporeal particles, or by consanguinity.

A sister's son is a Bhinna Gotra Sapinda and is, therefore, a Bandhu. **PAT** BISHENDAYAL v. JEISERI KUER, (1914) PAT. 323

Adoption—Custom—Ceremonies, performance of, whether necessary.

In the Punjab the performance of an elaborate ritual or religious ceremony is quite unnecessary to the validity of an adoption, but there is no authority for the view that mere treatment, unaccompanied by a formal giving and taking of the child to be adopted, satisfies the conditions necessary to a legal adoption. Adoption may be of two kinds, formal and informal, but it is only the adoption of the first description which is recognized by law and which confers upon the adoptee the status of son to his adoptive father. In other words, the law requires from the adoptor a manifestation of his unequivocal

Hindu Law—contd.

intention to clothe the adoptee with the legal status of his son. Such a manifestation of the adoptor's intention can be made either by a formal document combined with a proper treatment or by a formal giving and taking of the child. **P** RATTAN DEVI v. MUNO, 117 P. R. 1918

Adoption of daughter's son, validity of—Ceremonies, necessary—Custom, special, proof of—Aroras of Lahore District.

In the Punjab an elaborate religious ceremony is quite unnecessary for a valid adoption according to Hindu Law but there must at least be a formal giving and taking of the child to be adopted.

The adoption of a daughter's son by a Hindu is opposed both to the Hindu Law and the general agricultural custom of the province, and a person setting up such an adoption must prove a special custom in favour of its validity.

There is no special custom among the Aroras of Lahore District which permits the adoption of a daughter's son. **P** GOPI CHAND v. MALAN, 106 P. R. 1918

Mitakshara—Dravidian branch—Widow, whether can adopt with consent of remote reversioner.

Under the Dravidian branch of the Mitakshara Law, in the absence of authority from her deceased husband, a widow may adopt a son with the assent of his male agnates.

In the case of an undivided family, the consent must be obtained by the widow within that family: if the father-in-law is alive, from him, if not alive, from the deceased husband's brothers. The assent of separate and remote kinsmen is insufficient.

The principle is the same if the husband dies separate from his kindred. The widow must still obtain the assent of her father-in-law, and if he be dead, of the divided brothers or the other nearest Sapindas. In considering what assent is sufficient, rights of property cannot be disregarded: and the widow cannot be allowed to adopt on the assent of remoter relations when there are nearer ones in existence. **P** C VEERABASAVARAJU PANTULU v. BALASURYA PRASADA RAO, 41 M. L. J. 198; 25 M. L. T. 1: 86 M. L. J. 40; 17 A. L. J. 34; 23 C. W. N. 251

rules of, modification of, by custom—Mitakshara—Kashmiri Brahmins—Daughter's son, whether can be adopted.

The rule of the Mitakshara which lays down that a boy whose mother the adoptive father could not have married in her maiden state cannot be lawfully adopted, is not recognised by Kashmiri Brahmins so that the adoption of a daughter's son is permissible according to the custom prevailing among them. **O** IKBAL NARAIN v. RAJENDRA NARAIN, 21 O. C. 276; 5 O. L. J. 701

by widow—Adverse possession against widow, whether affects rights of adopted son.

Under the Hindu Law a son adopted by a widow does not derive his title from his adoptive mother, just as a reversioner does not derive his title from or through the widow.

Time, therefore, does not run against the adopted son prior to the date of his adoption and adverse possession against the adoptive mother does not affect his rights. **N** SITARAM SHROKARAN v. RAJARAM LATJEE

Hindu Law—contd.

Adoption by widow—Consent of sapindas, nature of, requisite to validate adoption—Consent of remote reversioner, effect of.

An adoption made by a Hindu widow without a bona fide attempt to obtain the advice of her husband's sapindas, ignoring a nearer reversioner and securing the assent of one more remote, is invalid.

A Hindu widow made no attempt to adopt a son for 15 years after her husband's death but on her death-bed adopted her sister's daughter's son with the consent of a remote reversioner who was interested in the adopted boy, after sending a threatening letter to the nearer reversioner that, if he did not give his consent within 24 hours, she would adopt:

Held, that the adoption was invalid. **M CEIRAVURI PATTABHAMARAJU v. KALLAPALLI TIRAPATIRAJU**, 1 L. W. 413. (1918) M. W. N. 678 **222**

Guardianship—Minor—Guardian de facto, powers of—Alienation by guardian to pay off ancestral debts, whether binding on minor.

K. and G. were two Hindu brothers who had executed a mortgage of their joint properties. K. died leaving him surviving as his heiresses two minor daughters who were married, but whose husbands did not assert any claim to the management of their properties. G. with whom the two minor girls were living, acting as the *de facto* guardian of their property, executed conveyances of portions of the joint properties for paying off the *ejmali* debts of himself and his deceased brother K.:

Held, that the conveyances were binding upon the minors, inasmuch as had they not been executed, the probable result would have been that either the whole of the joint properties would have been endangered or at any rate bigger sacrifices would have been inevitable. **C ISHANI DASI v. RAJENDRANATH JASH**, 28 C. L. J. 250 **303**

Mother, whether natural guardian after re-marriage—Joint guardians, whether can be appointed.

A Hindu mother's natural right to be a preferential guardian of the person of her minor children is lost by reason of her re-marriage, though she may be appointed a guardian as any stranger.

There is nothing in the Hindu Law which prevents the Sovereign as guardian from appointing more persons than one as guardians of the person of a minor. **N CHIRONJI KASAR v. PUNAM CHAND** **75**

Joint family—Alienation—Antecedent debts—Burden of proof—Pious obligation of sons to pay father's debts, whether arises during father's lifetime.

Where a mortgagee sets up a charge in his own favour made by one whose title to alienate he necessarily knew to be limited and qualified, he may reasonably be expected to allege and prove facts presumably better known to him than to an infant member of the family, namely, those facts which embodied the representation made to him of the alleged needs of the estate and the motives influencing his immediate loan.

Where an alienation of family property made by a Hindu father is questioned by his sons during his life, no question of the pious obligation of the sons to pay off their father's debts can arise. **O JAI NARAIN v. RAJRANG BAHADUR SINGH**, 5 O. L. J. 691 **914**

Hindu Law—contd.

Joint family—Alienation—Antecedent debt, what is.

An antecedent debt justifying the father, or manager of a joint Hindu family in charging the family property must be an obligation not only antecedently incurred, but incurred wholly apart from the ownership of the joint estate or the security afforded or supposed to be available by such joint estate. **N DILESHWAR RAM BRAHMAN v. NOHAR SINGH** **193**

—Alienation—Collusive decree against some co-parceners—Execution—Sale—Purchase by decree-holder—Suit by other co-parceners to set aside decree as fraudulent—Relief awardable—Decree, form of—Partition, working out of, in suit—Plaintiff, right of, to recover whole property—Decree-holder purchaser, whether entitled to equities.

A collusive decree obtained against some of the co-parceners in a joint family on a sham transaction is not binding on the other co-parceners. Where joint family property is sold in execution of such a decree, the co-parceners are entitled to get the sale set aside and to sue for the recovery of their shares. They are not, however, entitled to recover the whole property and the decree-holder is entitled to the shares of his judgment-debtors.

Where specific properties are sold in Court auction, it is not necessary that there should be a separate suit for partition for the allotment and ascertainment of the shares. Partition may be directed in the suit itself and the plaintiff may be given his share.

The decree-holder purchaser cannot claim against the plaintiffs, who were no parties to the collusive decree based on a non-existent debt, an equitable remedy such as that implied by subrogation. **M NADHAMUNI IYYAN v. APPU ODAYAN** **799**

—Ancestral property—Presumption—Burden of proof.

In the case of a testator who was living separate from his family and had admittedly a large fortune of his own and had for many years been carrying on business on his own account, even although he had originally acquired some ancestral property, it is impossible to say that any presumption arises in favour of the proceeds of an ordinary business transaction being ancestral rather than self-acquired property. **PAT ADWAT PRASAD v. RADHIKA RAMAN PRASAD SINGH** **694**

—Antecedent debt—Mortgage—of joint property by father—Subsequent mortgage in renewal of prior one—Sons, liability of.

A prior mortgage over joint family property created by a Hindu father cannot be treated as an antecedent debt for the purpose of binding his sons' interest in co-parcenary property under a subsequent mortgage between the same parties.

A debt contracted by the father on the security of the joint family estate cannot be treated as a debt of the father within the meaning of the doctrine as to antecedent debts. The doctrine must be restricted to cases of antecedent debts borrowed on the father's sole responsibility with no obligation on the joint family or its properties. **M BADAGALA JOGI NAIDU v. BENDALAM PAPIAH NAIDU**, 35 M. L. J. 382 **289**

Hindu Law—contd.

Joint family—Co-sharers—Joint property, entire, in possession of one co-sharer—Co-sharers, remedy of, nature of—Property with one member of joint Hindu family—Joint family property—Presumption.

Where a co-sharer is in possession of the entire joint property, the remedy of the other co-sharers as against the said co-sharer lies not by ejectment of the co-sharer but by partition of the joint property.

Property in the hands of and dealt with by one member of a joint Hindu family cannot be presumed to form part of the joint family property but it must be shown that it belonged to the joint family or was purchased out of joint family funds. **O** **IKBAL NARAIN v. RAJENDRA NARAIN**, 21 O. C. 270; 5 O. L. J. 701

767
Father, separate property of, nature of, when passing to sons—Oudh Estates Act (1 of 1869), s. 2—Oudh Estates (Amendment) Act (III of 1910), ss. 2, 21—Grantee, original, dead before passing of Oudh Estates Act—Heirs of grantee and their descendants, succession of, before passing of Oudh Estates (Amendment) Act—Law governing grant.

Under the Hindu Law when the separate property of a father descends on his death to his sons, it becomes their joint ancestral property.

Where an original grantee died before the passing of the Oudh Estates Act and his estate passed to his brother as his heir and after the latter's death, to the latter's sons before the passing of the Oudh Estates (Amendment) Act:

Held, that the estate in the hands of the original grantee's nephew and their descendants was governed by the rules of their ordinary personal law. **O** **ACHHAIBAB SINGH v. JANG BAHADUR SINGH**, 5 O. L. J. 687

901
Karta, purchase in name of—Debts collected and loans made by karta—Presumption—Burden of proof.

Where a purchase of property is made in his own name by the karta of a joint Hindu family, the presumption is that the property is acquired out of the family funds, unless it can be shown by definite evidence that the karta acquired the property from private funds and not from funds which were in his hands as the head of the family.

Where the head of a joint Hindu family collects money due upon family bonds, the presumption is that he makes the collections on behalf of the joint family, and if he re-issues the money collected on fresh loans, the presumption again is that he issues it for the benefit of the family and not for his own private benefit. **Pat** **KAMLESHRI PRASAD SINGH v. RAGHUBANS PRASAD SINGH**, (1919) PAT. 62

949
Partition, suit for—Separation—Burden of proof.

In a suit for partition by a member of a joint Hindu family the initial onus is on the defendant to prove separation. **Pat** **NARSING MISSEER v. BIRJU MISSEER**

755
Separation—Revenue papers, entry in, weight of—Evidence, whether conclusive—Females, position of—Maintenance allowance, measure of—Court, duty of.

Where the name of the widow of a deceased member of a Hindu family is entered in the revenue papers in respect of the joint share belonging to

Hindu Law—contd.

her husband in the family property, such entry cannot, in the absence of any very definite evidence as to the manner in which that entry came to be made, be treated as conclusive evidence of the fact that the family separated although there was no actual division of the property, especially when it appears that the entry was disputed immediately after it had been made.

In fixing the maintenance allowance for a Hindu female, the Court has to look to the circumstances of the joint family, i. e., to the value of the joint family property, to the income of the family, and to the number of people who have claims to be supported out of the said property. **O** **SUNDARA DEBIA v. SHEO RAM**, 5 O. L. J. 697

153
Joint family—Title, division of, whether distinguishable from division of property—Separation—Joint management by manager for all members—Partition by metes and bounds—Enquiry, nature of—Manager, liability of.

In cases of joint Hindu families, a division of title is distinguishable from a division of property, the former being a matter of individual decision, the desire on the part of one member to sever himself from the joint family and to enjoy his hitherto undefined or unspecified share separately from the others, without being subject to obligations which arise from the joint status of the latter, being the natural resultant from his decision, namely, the division and separation of his share by metes and bounds. But a separation of one branch of the family from another does not necessarily put an end to the joint management of the estate by the manager on behalf of all; for a partition by metes and bounds may not take place till several years later. In an ordinary suit for a partition of the joint family property, where there has been no previous separation, the enquiry is, in the absence of fraud or other improper conduct, directed to ascertain the divisible assets, the manager not being liable to account for his past dealings with the family income. He cannot, however, escape liability to account for the income once a separation has taken place. **O** **SURAJ NARAIN v. IQBAL NARAIN**, 5 O. L. J. 676

543
Marriage—Kayasths, sub-castes of, whether can intermarry—Issue of two sub-castes, assimilation of, to one sub-caste, effect of.

Ordinarily a Kayasth belonging to one sub-division does not marry into another sub-division, but no such restriction is recognised by the Hindu Law.

Where a Kayasth whose parents belonged to different sub-castes is assimilated into one of those sub-castes, his marriage with a girl of such sub-caste is not open to objection. **O** **HAR BAHADUR LAL v. CHAND RAJ BAHADUR**, 5 O. L. J. 655; 21 O. C. 298

400
Mitakshara—Suretyship, kinds of—Suretyship for payment by father—Sons, liability of—Construction of documents.

There are three kinds of suretyship according to the Mitakshara, for appearance, for assurance and for payment. The surety by way of assurance consists of a general warranty of credit, but a surety for payment is one who says "if he does not pay, then I myself will pay." When a surety for appearance or a surety by way of assurance dies, his sons

Hindu Law—contd.

are under no obligation to pay, but in the case of a surety for payment they are bound to pay.

A Hindu father entered into a suretyship obligation in the following words: "I shall make V: pay the amount due under the said promissory note within two months from this date. In default of payment as aforesaid by the said person within the said time, I shall pay the amount of principal and interest on the said promissory note and get back the said promissory note and the surety bond and the title deeds."

Held, that this was a suretyship for payment *dane* and the surety's son was liable for the obligation created by the said contract. **M THANGATHAMMA v. ARUNACHALLAM CHETTIAR**, 35 M. L. J. 229; (1918) M. W. N. 673; 41 M. 1071 **76**

Partition, partial, effect of—Presumption
—Co-parcenary right, whether retained in properties left undivided.

Where a partition takes place between the members of a joint Hindu family, the presumption is that there is a complete partition in status and of all the properties, and if certain properties are left undivided there is no presumption that the co-parcenary right is retained in those properties. **P BHOLA DEVI v. MOHKAM CHAND**, 121 P. R. 1918 **784**

Succession—Bombay School—Female heirs—Daughter, estate taken by—Mayukha and Mitakshara.

It is only under the Bombay School of Hindu Law that a daughter succeeding to her mother's *stridhan* can take an absolute estate and it is peculiar to the Bombay Presidency and Berar that females who belong to the family of the *propositus* by birth as distinguished from marriage, take absolute interests.

There is no ground for holding that only where the Mayukha is paramount is the daughter so favoured.

In the Districts of Satara and Ratnagiri in the Bombay Presidency the Mayukha, though not paramount, is at least of ancillary authority. **N LAXMAN RAO v. BHAI SAHEB** **116**

Immortality of woman, effect of—Tie of blood relationship, severance of—Succession to property of unchaste Hindu woman.

Immortality on the part of a Hindu woman does not sever the ties of blood relationship and there is no rule of Hindu Law which would prevent the blood relations of such a woman from succeeding to her property on her death. **O SATISH CHANDER MUKERJI v. MAHABALI PRASAD**, 21 O. C. 272 **750**

Mithila and Benares Schools, difference between—Female succeeding to estate of son, death of—Estate, whether goes to husband's heirs or son's heirs—Property purchased out of income of estate, devolution of.

Under the Mitakshara Law as interpreted by the Benares School, when a female succeeds to the estate of her son, the heirs of the son, the last male holder, would succeed to the estate after the death of the female.

The Mithila School is a branch of the Mitakshara School, the Mitakshara being the basis of the works which set out the law of the Mithila country. Therefore, it lies on those who allege to the contrary to prove that there is something in the Hindu Law

Hindu Law—contd.

as interpreted by the Mithila School to justify their contention that when a woman succeeds to her son the immoveable property goes on her death to the heirs of her husband, and not to the heirs of her son.

There is no difference in this respect between the Benares and the Mithila Schools of Hindu Law.

Where the circumstances are such as to show that a Hindu female purchased moveable property from the income of the estate inherited from her son, with a view of its becoming part of the main estate, it passes with the estate at her death, if previously undisposed of, to her son's heirs and not as her *stridhan* to her heirs. **N TORTAN BAI v. BALLABHJI OJHA** **956**

Succession—Mitakshara School—

Spiritual benefit, whether test for preference among rival bandhus—Maternal uncle, whether to be preferred to sister's daughter's son

By THE FULL BENCH.—(Sir Dawson Miller, C. J., and Sir Ali Imam, J., dissenting).—In a family governed by the Mitakshara school of Hindu Law the maternal uncle of the last male owner is preferred to the sister's daughter's son as next heir to the estate.

Per *Mullick, J.*—Both the Dayabhaga and the Mitakshara recognize the principles of propinquity of blood and religious efficacy. The only difference is that in the Dayabhaga religious merits arising from the celebration of the Parvana Sradh is accorded greater weight and that in the absence of religious merit accruing from Parvana rights, the ability to benefit the deceased by some other religious ceremony is a sufficient foundation of a title to inherit. The Mitakshara, on the other hand, regards oblations presented by cognate kinsmen as secondary and conferring no claim against the whole body of agnates. The Dayabhaga, admitting that the oblations are secondary as compared with agnates of the same line, insists that the Parvana Pindas conferred by cognates should prevail against agnates of a remoter line. The true view is that nearness of blood determines the heritable right while the doctrine of spiritual efficacy determines the preferential right.

The test of religious and spiritual benefit can and should be applied to determine the preferential right, that is to say, where the principle of affinity by blood relationship does not clearly indicate with which claimant the preference lies.

Per *Jwalu Prasad, J.*—The first and foremost rule of preference among several claimants is that the nearest in degree, ascertained by the simple method of counting given in the Mitakshara, excludes those more remote and when the degree is equal only then other considerations might be resorted to for the purpose of preference among the rival claimants.

The rule that the heirs *ex parte paterna* should be preferred to those *ex parte materna* is not to be found in the text relating to Bandhus in the Mitakshara and there is no authority for supplying any omission in that text.

Per *Imam, J.*—In the Mitakshara religious efficacy is not the determining guide for the purpose of inheritance.

Per *Tortan Bai, J.*—As between Bandhus of the

Hindu Law—contd.

same class a rule of preference may be found in the quantity of spiritual benefit which they confer.

Pat UMA SHANKAR PRASAD v. NAGEWARI KOBRI, 3 P. L. J. 668 **625**

Succession—Reversionary heirs joining in mortgage by female, whether bound by mortgage **78**

Reversioners, claim by—Proof
Ejectment suit—Unnecessary parties, addition of, effect of.

Those who claim the property of a deceased separated Mitakshara Hindu as his reversionary heirs, must show that they are both his next heirs and within fourteen degrees.

On the death of a separated Hindu, his estate was taken possession of by the defendants. The plaintiffs, fifty-nine in number, who claimed to be the reversionary heirs of the deceased, brought an action in ejectment, the scheme of which was to bring into Court a large number of persons more or less remotely akin in blood to the deceased, in the hope of ousting the defendants by a mass attack, and afterwards to assign the fruits of victory to the parties entitled by further litigation *inter se*.

Held, that such a plan embarrassed the Court as well as the opposite party and obscured the issues and was, therefore, much to be condemned.
P C MEWA SINGH v. BASANT SINGH, 24 M. L. T. 429; 28 C. L. J. 530 **540**

Trust, charitable—Misappropriation of trust funds by trustee—Liability of trustee's son—Liability to account—Period of accountability—Discretion of Court.

Under Hindu Law the son of a trustee of a public charity is liable for the funds of the trust misappropriated by his father. The fact that the father was guilty of a criminal offence does not affect the liability of the son.

The Courts have a discretion in limiting the period for which accounts should be rendered by a trustee. **M** GARUDA SANYASAYYA v. NERELLA MUTHEMMA, 35 M. L. J. 661; 9 L. W. 1; 25 M. L. T. 86 **740**

Widow, alienation by—Ijara granted to de facto manager—Necessity—Burden of proof—Recital as to necessity, effect of, where independent evidence available—"Benefit of estate," meaning of—Estoppel—Reversioner receiving rent due for period prior to death of widow, whether ratifies lease—Property acquired by widow with savings out of income of husband's estate, whether follows corpus.

A *de facto* manager of the estate of a Hindu widow taking an *ijara* of the properties inherited by the widow from her husband must show that there was legal necessity for the grant of the *ijara* or that the *ijara* was granted for the benefit of the estate.

R. a Hindu died leaving three sons, T, M. and H., each of whom got one-third share of the estate left by R. H. died and his one-third share passed to his widow B. Then T. died and his one-third share passed to his brother M., who thus got a two-thirds share in the estate left by R. Thereafter M. died leaving his widow P., who thus inherited a two-thirds share of the properties. P. and B. then granted an *ijara patta* of their respective shares in favour of one K., who was the brother's son of P. and who had

Hindu Law—contd.

been living with P. from his infancy and who was managing the estate for P. and B. The recital in the *pattah* was that it was granted for the purpose of liquidating the debts incurred in the lifetime of M. and in the time of the widows' possession of the estate and the debts incurred for meeting the expenses of the *shrads*.

Held, (1) that as the evidence that was available as to the pecuniary condition of the estate at the time of the alienation proved that the money that came into the hands of the widows was sufficient for paying off the debts left by their respective husbands, as no legal necessity for the grant of the *ijara* was made out and as the *ijara* was not granted for the benefit of the estate, the *ijara* could not be binding upon the reversioners;

(2) that had the *ijaradar* been a stranger he could not have been expected to account for the money that came into the hands of the widows, nor would he have been responsible for the previous mismanagement, if any, of the estate, but that the lessee, being the *de facto* manager of the estate, must show that there was legal necessity for the grant of the *ijara*.

When independent evidence is available as to the pecuniary condition of the estate at the time of an alienation by the widow, such evidence might be accepted in preference to the recital in the deed of alienation alleging the existence of legal necessity.

The expression, "benefit of the estate", although it cannot be precisely defined, includes the preservation of the estate from extinction, its defence against hostile litigation, its protection from inundation and similar circumstances.

Powers of a Hindu widow to deal with family property discussed and case-law reviewed.

The recovery by the reversioner from lessees of arrears of rent due to the widow for a period prior to the death of the widow does not amount to a ratification of the lease granted by the widow.

In deciding whether the property acquired or purchased by a Hindu widow with savings out of the income from her husband's estate is to descend with the husband's estate or is to be treated as separate estate of the widow, the matter to be considered is whether the widow has made any distinction between the original estate and the after-purchases. In each case the question is one of intention. If the widow intended to treat the purchased properties as part of the original estate, they must follow the *corpus*. **C. UPENDRA KISHORE MONDAL v. NOBO KISHORE MONDAL**, 23 C. W. N. 64 **993**

Widow—Apostasy and re-marriage thereafter—Forfeiture of first husband's estate—Hindu Widow's Re-marriage Act (XV of 1856), s. 2, scope of—Caste Disabilities Removal Act (XXI of 1850), effect of.

Held, per Wallis, C. J., and Oldfield, J. (*Seshagiri Aiyar*, J., dissenting).—A Hindu widow, who becomes a Muhammadan and marries a Muhammadan, forfeits, by the re-marriage, her interest in her first husband's estate under the general principles of Hindu Law.

Per Wallis, C. J. (*Oldfield* and *Seshagiri Aiyar*, JJ., dissenting).—The forfeiture is also entailed by reason of section 2 of Act XV of 1856.

Per Wallis, C. J. —Act XXI of 1850, though it relieved the widow of a Hindu from forfeiture, of

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her widow's estate on her abjuration of Hinduism, did not enlarge the nature of that estate, so as to relieve her from forfeiture in the event of her renouncing her status of widow by re-marriage.

The words "any widow, . . . upon her re-marriage," in section 2 of Act XV of 1856 are wide enough to cover the case of any widow of a Hindu re-marrying, whether or not her marriage would otherwise be prohibited by any custom or interpretation of Hindu Law and whether the re-marriage was to a Hindu or to a member of another religion.

Per *Oldfield, J.*—Act XV of 1856 is not applicable to cases of re-marriage after apostasy, and the forfeiture is entailed only by reason of the incompatibility between the renunciation of a widow's status and the retention of a widow's estate.

Per *Seshagiri Aiyar, J.*—The rule of Hindu Law that a widow, who re-marries and is thus not true to the bed of her deceased husband, cannot inherit to his estate can be applied only when she is within the pale of Hindu Law. Her re-marriage after apostasy cannot divest her of the right to inherit which subsisted to her at the date of her conversion to another religion. **M VITTA TAYARAMMA v. CHATAKONDU SIVAYYA**, 35 M. L. J. 317; 24 M. L. T. 183; (1918) M. W. N. 625; 8 L. W. 480; 41 M. 1078

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— **Widow**, decree against, whether bars suit of reversioner **553**

—, decree against, whether binds reversioners—*Consent decree—Award—Collusion.*

Every case in which the reversioners of a deceased Hindu are sought to be bound by a decree obtained against the widow of the deceased, must be decided on its own particular circumstances, and the person who claims that the decree amounts to a bar against the reversioners must establish that the decree was fairly obtained either after a contest or, if by consent, in such circumstances that the decree ought to be regarded as having been fairly and properly obtained. **B RAMA SANTU RANDIVE v. DAJI NARU RANDIVE**, 20 Bom L. R. 947

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—, gift made by, for spiritual benefit of husband, validity of.

There is no authority for the proposition that gifts for religious or charitable purposes made by a Hindu widow cannot be recognized under the Hindu Law as calculated to confer any benefit upon the soul of her deceased husband unless they be made in connection with a particular *shradh* ceremony.

A gift made by a Hindu widow of a reasonable portion of the property inherited by her from her husband, whether through her sons or not, for religious purposes with a view to the spiritual welfare of her deceased husband, is valid under the Hindu Law and is binding upon the reversioners.

There are ceremonies and duties incumbent upon a Hindu widow, in the sense that their performance is regarded as indispensable to the spiritual welfare of her late husband. These duties she is under an obligation to perform and these ceremonies she must carry out, and for this purpose she has a power of alienation in respect of the corpus of the property in her hands, independent altogether of the proportion which the property alienated may

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bear to the whole. In the case of an alienation for a purpose regarded as indispensable to the spiritual welfare of the late husband, the question will not be, what proportion does the property alienated bear to the entire estate, but only was the alienation a reasonable one under the circumstances, in the sense that the expenditure incurred was such as might be regarded as suitable to the position of the family. **A KUNJ BEHARI LAL v. LALU SINGH**, 16 A. L. J. 996

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— **Widow**—*Gaya shradh ceremony, performance of, whether legal necessity.*

The performance of the Gaya Shradh ceremony of a deceased Hindu is a legal necessity. In order, however, to make it binding upon the estate, so as to enable the widow of the deceased to raise money on the security of the estate, it must be proved that there was no sufficient income from the estate to meet the expenses of the ceremony. **PAT BISHEN-DAYAL v. JEISERI KUER**, (1918) PAT. 323

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—, power of alienation of **357**
— *Surrender of life-interest by limited owner—Surrender by widow and daughter in favour of next reversioner with reservation for maintenance, validity of.*

A surrender by a Hindu widow and her daughter of their life-interest in the property of the last male owner in favour of the next reversioner, with a condition that they should be maintained by the latter, is valid and operative and accelerates the inheritance of the reversioner making him full owner of the property on that date.

Per *Sadasiva Aiyar, J. (Napier, J. dubitante)*.—The principle that onerous obligations attached to a surrender by a widow will invalidate the surrender does not apply to the case of a daughter who inherits as next heir. The only condition which can be imposed on principle upon any female heir other than the widow is that the surrender should be of the whole estate. The act of a daughter who, being the next heir, surrenders the whole estate, vests the absolute inheritance in the next male heir, even if she reserves as consideration for her surrender the full enjoyment of the property during her lifetime.

Per *Sadasiva Aiyar, J.*—A stipulation for her own maintenance by the widow will not affect the legal result of the surrender.

A Hindu female who surrenders an estate does not become civilly dead from the date of the surrender for any purpose, except for making the person in whose favour the surrender is made heir to her husband's estate.

Per *Napier, J.*—A surrender by a limited female owner need not necessarily be in favour of the next heir if that heir agrees to be passed over, and it is immaterial whether the next heir is a party to the deed of surrender or executes a deed of surrender for herself or simply consents to being passed over.

Where an arrangement made at the time of surrender, though retaining a benefit for the person surrendering or even conferring a benefit on some person not entitled, is an obviously fair and just arrangement for the maintenance and benefit of the person surrendering, then the surrender is not

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initiated by the arrangement. **M GRINNASWAMI PILLAI v. APPASWAMI PILLAI**, 5 M. L. J. 512; 8 L. W. 512; (1918) M. W. N. 756; 24 M. L. T. 403; 42 M. 25 **147**
Hindu Widow's Re-marriage Act
(XV of 1856), s. 2 **50**

Impartible property, transfer of, whether subject to right of maintenance of younger members—Custom, proof of.

Where it is alleged that a transfer of impartible property is subject to the right of maintenance of the younger members of the family of the transferor, the allegation must be supported by proof of a custom to that effect existent in the family. **PAT DEBENDRO NATH SAI DEO v. DEO NANDAN SINGH**, 3 P. L. J. 648 **613**

Improvements made by tenant—Compensation, whether can be awarded.

A tenant is not entitled, either under the Transfer of Property Act or apart from it, to any compensation for any improvements made by him on the land during the continuance of his tenancy. **N BANMALI v. NIBAL SINGH** **354**

Income Tax Act (II of 1886), s. 31 **790**

Income Tax (Amendment) Act (V of 1916) **790**

Insolvency—Property acquired after adjudication—Insolvent, power of, to deal with property.

Failing intervention by the Court or the Receiver in which an insolvent's property has vested, the insolvent has the same power of acting in respect of after-acquired property as he had before the insolvency. **N BALIBHADRADAS v. MIRCHILAL** **235**

Interest Act (XXXII of 1839) **465**
Interpretation of Statutes—Illustrations to Statutes, value of.

The illustrations to an Indian Statute are to be taken as part of the Statute. **P C BALLA MAL v. AHAD SHAH**, 35 M. L. J. 614; 16 A. L. J. 905; 124 P. R. 1918; 23 C. W. N. 233; 25 M. L. T. 55; 160 P. W. R. 1918 **1**

Irregularity or illegality, disregard of express law, whether constitutes.

A disregard of the express provisions of the law is not a mere irregularity which can be condoned or remedied but an illegality and the Court cannot maintain or overlook an illegal order upon any ground of administrative convenience. **N EMPEROR v. RAI SINGH**, 20 C. R. L. J. 105 **985**

Judicial decision, whether can override Statute.

No decision of any Court can get over, add to or alter the clear words of a Statute. **C PROTAP CHUNDRA DUTT v. ABBIMANINI SURINI** **752**

Jurisdiction, territorial, of British Courts—Subject of Native State, whether can be tried for abetting within State offence committed in British India—Arrest by British Police of subject of Patiala State on Railway lines within Patiala territory, legality of.

Where a subject of a Native State is charged with abetting an offence committed in British India and the alleged abetment consists entirely of what the accused did or said at a place within the State territory, he cannot be tried in a Court in British India for such abetment.

The accused, a subject of the Patiala State, was

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arrested in a Railway carriage at Bhatinda by the British Police:

Held, that the arrest was lawful as full and exclusive power and jurisdiction of every kind over the Railway lines and over all persons within those lines had been ceded by the Patiala State to the British Government. **P BALWANT SINGH v. EMPEROR**, 31 P. R. 1918 CR; 20 C. R. L. J. 65 **865**
 territorial, limits of **943**

Jurisdiction of Civil and Revenue Courts **224, 363, 470, 948**

Jurisdiction of Revenue Courts to decide finally on validity of documents of title.

The proposition that the Revenue Courts have no exclusive jurisdiction to decide finally upon the validity of documents of title, though correct as a general statement of the law, is subject to the obvious qualification that the Civil Courts cannot decide any matter in which jurisdiction has been exclusively reserved to Revenue Courts. **O JAGANKATH SINGH v. DRIGBIJAY SINGH**, 21 O. C. 210; 5 O. L. J. 611 **88**
Kanjars—Presumption of marriage.

The general presumption in favour of marriage, which prevails in the case of ordinary people, does not hold good in the case of *kanjars*, who must prove the fact of marriage by very clear evidence. **P MUHAMMAD BAKISH v. NAWAZISH ALI**, 183 P. W. R. 1918; 75 P. R. 1918 **73**

Karinda, whether dominates will of employer.

A *karinda* is as a rule a servant of very minor status, who cannot be presumed without very distinct evidence on the point to be in a position to dominate the will of his employer. **O DALPAT SINGH v. AHMAD SHAH**, 5 O. L. J. 579 **17**

Land Acquisition Act (I of 1894), ss. 12, 18—Acquisition proceedings—Award by Collector—Owner dissatisfied with award—Suit for compensation, maintainability of—Remedy.

The only remedy of a person whose property is being acquired under the Land Acquisition Act and who is dissatisfied with the award made by the Collector, is to call upon the Collector to refer the matter to the Civil Court under the provisions of section 18 of the Act. A separate suit for the recovery of the value of the land acquired is not maintainable. **C JOGESH CHANDRA ROY v. SECRETARY OF STATE**, 29 C. L. J. 53 **702**
s. 18 **702**
s. 54—Civil Procedure Code (Act V of 1908), O. XLI, rr. 22, 32, applicability of, to land acquisition cases—Appeal against part of decree—Memo. of objections, maintainability of, against other parts covered by decree but not subject of appeal.

Under Order XLI, rule 22 of the Civil Procedure Code, a memorandum of objections may be filed against a decree as a whole or against a part of it which may not be the subject-matter of the appeal.

Where the Collector preferred an appeal against the valuation of some of the plots in a land acquisition case fixed by the District Judge:

Held, that it was competent to the claimant to file a memorandum of objections in respect of other plots which were covered by the petition, though not the subject of appeal.

Per *Seshagiri Aiyar, J.*—Section 54 of the Land Acquisition Act makes no departure from the ordinary rule of the Civil Procedure Code which

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allows a party to appeal not only against the whole decree but also against parts of it.

A memorandum of objections need not be confined to the subject-matter of the appeal.

What the appellant objects to is not to be the criterion, but the question in each case must be whether the respondent's rights have in any way been imperilled by the action taken by the appellant.

M DEPUTY COLLECTOR, MADURA *v.* MUTHIRULA MUDALI, 35 M. L. J. 83; (1918) M. W. N. 458; 24 M. L. T. 83; 8 L. W. 271

Landlord and tenant—Co-sharer landlords—Decree for entire rent passed in suit by one co-sharer landlord to which other co-sharers were parties—Suit, subsequent, by defendant landlord, maintainability of—Joint tenant, whether liable for whole rent—Tenant, death of—Rent, claim for, barred against some heirs, whether can be enforced against others.

In a suit for rent brought by one of the co-sharer landlords, making the other co-sharer landlord a *pro forma* defendant, a decree was passed for the entire rent in favour of both the landlords in respect of their respective shares. The defendant co-sharer landlord, being unwilling to recognise one of the judgment-debtors as his tenant, refused to accept that decree and brought a separate suit for his share of the rent for the same period:

Held, that so long as the previous decree stood, he could not obtain a second decree for the same arrears of rent and that if he was unwilling to recognise one of the judgment-debtors in the previous suit as his tenant he should have contested that suit.

Although under certain circumstances one of several joint tenants may be made liable for the whole rent, yet where the claim for arrears of rent against some of the heirs of the original tenants is barred, the remaining heirs cannot be made separately liable for the entire rent. **C** KISHORI MOHAN TALAPATRA *v.* OSI PRAMANICK

Dispossession of tenant from portion of holding—Rent, suspension of—Apportionment.

Where a landlord dispossesses, a tenant from a portion of the holding, the entire rent is suspended and the landlord is not entitled to any apportionment of rent on the lands still remaining in the possession of the tenant unless he has replaced the tenant in possession or has taken some effective step to that end. **C** RAJANI MANNA BAGDI *v.* SATISH CHANDRA ROY

Ejectment—Notice to quit, cancellation of—Tenant, claiming under proprietary rights—Declaration, suit for, by landlord—Limitation, commencement of—Fresh notice, whether gives fresh period of limitation.

Where a notice issued by a landlord to eject his tenant is cancelled by the Revenue Court on the ground that the tenant is more than an ordinary tenant, the right to file a suit to challenge that order accrues to the landlord on the date of the order and he must bring a suit for that purpose within six years of that date.

It is not open to him to defeat the law of limitation by issuing an abortive notice of the same character shortly before the institution of the suit. Such a proceeding cannot bring the suit within time if the right has already lapsed. **O** JAGDAMBA BAKSHI SINGH *v.* MAHADEO SINGH

Landlord and tenant—cont'd.

Ejectment, suit for—Permanent tenancy, plea of—Construction of document—'Saswatham' and 'kayam,' meanings of—Presumption—Denial of landlord's title to lands not comprised in suit, effect of.

The expressions 'kayam' and 'saswatham' occurring in lease-deeds ordinarily import a permanent tenancy. Even if literal effect is not given to these words so as to involve as a necessary inference a permanent tenancy, the surrounding circumstances may be looked at and a permanent tenancy may be inferred from the use of these words.

Where a deed of lease is a renewal of prior documents in respect of which a permanent tenancy was judicially upheld, the presumption may be made that a permanent tenure was intended to be conferred by the later document.

The denial of the landlord's title in respect of lands not comprised in an ejectment suit will not entail forfeiture of the tenancy in respect of the suit lands under section 111 of the Transfer of Property Act. **M** VENKATACHARIAR *v.* NARASIMHA AYYANGAR, 35 M. L. J. 647; (1918) M. W. N. 846; 24 M. L. T. 469; 9 L. W. 164

Lease, permanent and heritable, grant of—Re-entry, right of, reservation of—Assignment of tenure.

When a landlord grants a permanent and heritable tenure in land, he has no estate left in him, unless he reserves to himself a right of re-entry or reversion.

Where one of the clauses of a lease was as follows:—"If the said land and *bari* be not used for dwelling purposes the right under the *pattah* shall be void."

Held, that the clause did not amount to a reservation of a right of re-entry. **C** MOHAMMAD RAJUDDIN AHMAD *v.* BASUDA SUNDARI DAS, 28 C. L. J. 278

Lease, perpetual, by majority of co-sharer landlords, validity of—Suit by minority to set aside lease—Decree, form of.

A lease of common land granted in perpetuity by a majority of the co-sharer landlords is not binding on the dissenting minority, except (1) where there is a custom authorizing such a lease or (2) in a case of unavoidable necessity or (3) where the lease is obviously beneficial to all the sharers.

In such a case the minority can sue to eject the lessee, and their remedy is not limited to a suit for a partition of their shares.

The proper decree to be passed in such a suit is to declare that the lease is not binding on the plaintiffs and to direct that they should be put in possession for themselves and on behalf of the other co-sharers. **M** EYUNNI RAGHAVACHARYULU *v.* EPURI GOVINDASARI, 35 M. L. J. 402; 41 M. 1068

Occupancy holding, transfer of part of—Transferee, position of—Recognition of transfer by co-sharer landlord, effect of—Suit by landlord against recorded tenant—Declaration, suit for, by transferee, maintainability of.

A landlord cannot interfere with the possession of a transferee of a part of a non-transferable occupancy holding and if he does so, the transferee is entitled to recover possession from him by suit. Until, however, he is actually dispossessed, he is not entitled to a declaration that a tenant alleged by

Landlord and tenant—concl'd.

the landlord to be his tenant is not his tenant and that a decree obtained by the landlord against his alleged tenant is fraudulent. Having no legal title or interest which the landlord is concerned to deny, the transferee cannot invoke the operation of section 42 of the Specific Relief Act in his favour.

If some out of a number of co-sharers recognise the transfer either of a part or the whole of a non-transferable occupancy holding, the remaining co-sharers are not entitled to eject the transferee. By obtaining recognition from a co-sharer landlord, however, the transferee does not acquire any right or valid title in the holding itself as against the entire body of landlords. Notwithstanding such recognition the remaining co-sharers can sue the original tenant for the entire rent without impleading the transferee.

If the consenting landlords choose to repudiate their consent and to join the non-consenting landlords in suing the original tenant for the entire rent on the footing that the consent given by them does not operate to create a division of the tenancy, it is open to them to do so. **Pat** GANANATH SATPATHY v. HARIHAR PANDHI, (1918) PAT. 289; 5 P. L. W. 232

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Tenant occupying house in abadi—Tenancy, determination of—Ejectment from house—Presumption.

Where a tenant is found in occupation of a house in the *abadi* of an agricultural village, the village site being the landlord's property, there is a presumption that he holds the site as appurtenant to his tenancy and has no right to retain it against the wish of the landlord on ceasing to be a tenant in the village.

Where a landlord sues to eject a tenant from a house in the *abadi* of an agricultural village, he must establish his right to eject the latter by showing that the latter has ceased to retain any interest in the village entitling him to retain the site.

O RAM HARAKH v. AMBIKA DATT RAM, 5 O. L. J. 642; 21 O. C. 257

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Tenant, suit by, to have it determined which of two defendants is his landlord, maintainability of—Interpleader.

A tenant has no right to bring a suit to have it determined which of the two defendants, both of whom claim rent from him is his landlord. **C** BHUSAN CHANDEA GHOSE v. JAHAR MAL BHUTRA

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Legal Practitioners Act (XVIII of 1879), ss. 12, 13, 14—Pleader, conviction of, for keeping common gaming house—Misconduct—Procedure applicable.

The conviction of a Pleader for keeping a common gaming house amounts to misconduct implying a defect of character and unfitting him to be a member of the profession.

In the case of a Pleader's conviction for a criminal offence the procedure prescribed in sections 13 and 14 of the Legal Practitioners Act need not be followed, and the case re-tried under the Act. The only question for the High Court to determine is, whether the offence implies a defect of character unfitting the person to be a Pleader. **M** SEETARAMIAH, *In the matter of*, 35 M. L. J. 650; (1918) M. W. N. 847; 19 Cr. L. J. 1001; 8 L. W. 621; 25 M. L. T. 71; 42 M. 111

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Letters Patent (All.), s. 10, decree under—Review, whether permissible.

No application for review is allowable where the decree sought to be reviewed was given in an appeal under section 10 of the Letters Patent. **A** KALYAN SINGH v. ALLAH DIYA, 16 A. L. J. 564

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Letters Patent (Pat.), cl. 10—Order staying proceedings, whether judgment—Order of single Judge staying proceedings in criminal case—Appeal, whether lies.

An order staying proceedings is not a "judgment" within the meaning of clause 10 of the Letters Patent of the Patna High Court, inasmuch as such order contains no final adjudication of the rights of the parties.

An order of a single Judge staying proceedings in a criminal case is an order made in the exercise of criminal jurisdiction, and, therefore, no appeal lies against it under clause 10 of the Letters Patent. **Pat** BABUJAN MISIR v. SHEO SAHAY CHAUDHURY, 3 P. L. J. 504; 5 P. L. W. 153; 19 Cr. L. J. 1008

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Limitation Act (XV of 1877), Sch. II, Arts. 113, 144—Bengal Village Chaukidari Act (VI B. C. of 1870), s. 51—Chaukidari chakran lands, resumption of—Patnidar, rights of—Suit for possession by patnidar—Limitation—Contract, meaning of.

The word "contract" primarily means a transaction which creates personal obligations, but it may, though less exactly, refer to transactions which create real rights. It is in this latter sense that it is used in section 51 of the Bengal Village Chaukidari Act and the rights thereby reserved to *patnidars* and others on the transfer to the *zemindar* of *chaukidari chakran* lands, comprehensively included in the word "contracts", are real rights, the enforcement of which is secured not by a suit for specific performance, but by a suit for possession.

Where, therefore, a *patnidar* sued the *zemindar* to recover possession of such lands:

Held, that the Article applicable to the suit was not Article 113 but Article 144 of Schedule II of the Limitation Act, 1877, and that the period of limitation accordingly was not three but twelve years. **P-C** RANJIT SINGH v. MAHARAJ BAHADUR SINGH, 16 A. L. J. 964; 35 M. L. J. 728; 23 O. W. N. 198; 25 M. L. T. 8

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Sch. II, Art. 144
Limitation Act (IX of 1908), s. 4—

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General Clauses Act (IX of 1897), s. 10, applicability of—Pre-emption decree—Money not paid within time prescribed—Court, power of, to extend time.

Section 4 of the Limitation Act and section 10 of the General Clauses Act only apply to the cases in which a period of limitation has been prescribed as mentioned in those sections, and do not apply to a condition prescribed in the decree itself.

A pre-emption decree in its very terms becomes a decree in favour of the defendant vendee when the conditions imposed upon the plaintiff have not been complied with, so that where the decree has become final no Court has power to alter its terms so as to extend the time allowed for payment. **A** HIRDEY NARAIN v. ALAM SINGH, 16 A. L. J. 892

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s. 6, Sch. I, Art. 181, applicability of—Mortgage suit—Final decree, application for—Limitation—Minority of applicant, effect of.

Section 6 of the Limitation Act applies solely to the time for the institution of a suit or the time

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for an application for an execution of a decree. It does not apply to an application to make a decree absolute.

A mortgage suit remains pending until a final decree is passed. An application for a final decree in a mortgage suit being governed by the Code of Civil Procedure is subject to the limitation prescribed by Article 181 of Schedule I of the Limitation Act.

N VINAYAKRAO KRISHNARAO v BALJNATH SALIGRAM 934

s. 12—Time spent in obtaining copies of judgment and decree—Separate periods, whether can be allowed—“Requisite,” meaning of—Time requisite, whether question of fact or of law.

It is the duty of an appellant to obtain as many copies as possible on a single petition, and if he wastes time applying first for one copy and then for another, he cannot claim that all the separate periods spent in obtaining copies were really “requisite” within the meaning of section 12 of the Limitation Act.

An appellant can, under section 12 of the Limitation Act, only deduct such time as was requisite for obtaining copies, and what time is requisite for this purpose is a question of fact on the circumstances of each particular case. Where a lower Appellate Court decides that a double period was not necessary, the question whether it is right or wrong is not a question of law **P SREE SINGH v. PEM RAJ**, 100 P. R. 1918; 185 P. W. R. 1918 31

s. 14—Bombay Hereditary Offices Act (III Bom. of 1874), ss. 10, 11A—Exclusion of time—Proceedings before Collector, time taken by, whether can be excluded—Collector, whether “Court.”

The Collector when acting under sections 10 and 11A of the Bombay Hereditary Offices Act acts purely as an administrative officer. He does not act as a “Court” and the proceedings before him are not civil proceedings within the meaning of section 14 of the Limitation Act. The time occupied by such proceedings, therefore, cannot be excluded under section 14 of the Limitation Act in computing the period of limitation for a suit. **B LAXMAN GANESH RAJENDRA v. KESHAY GOVIND DESHPANDE**, 20 Bom. L. R. 918 467

s. 18, Sch. I. Art. 166—Civil Procedure Code (Act V of 1908), O. XXI, r. 90—Execution of decree—Sale—Application to set aside sale made more than thirty days after date of sale—Applicability of s. 18—Finding, necessary.

It is not competent to a Court to come to the conclusion that an application to set aside a sale under Order XXI, rule 90, of the Code of Civil Procedure made more than thirty days from the date of sale falls within the provisions of section 18 of the Limitation Act, without finding as a fact the date or time when the applicant came to know of the sale. **C ABHA MUNSHI v. KAMU MOLLA** 970

s. 19—Arbitration, reference to—Agreement to be bound by amount settled by award, whether amounts to acknowledgment

A request to arbitrators to settle accounts coupled with an undertaking to be bound by whatever sum is fixed as payable by their award, amounts only to a conditional acknowledgment of liability which will not save limitation under section 20 of the Limi-

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tation Act if the arbitration falls through and the reference does not fructify into an award. **M NARAYANASWAMY MUDALI v. GANGHADARA MUDALI** 89

s. 19—Mortgage decree—Application for final decree for sale, rejection, of—Appeal—Petition by judgment-debtor, acknowledgment of liability in—Limitation, fresh starting point of.

An acknowledgment by a judgment-debtor of the amount due by him under a mortgage decree is sufficient, under section 19 of the Limitation Act, to save limitation for the purpose of making an application for a final decree for sale.

The right to take legal steps for enforcing a right need not be expressly acknowledged if the right itself is acknowledged. **M SUBBALAKSHINI AMMAL v. RAMALINGA CHETTY**, 8 L. W. 526; 35 M. L. J. 552; (1918) M. W. N. 792; 24 M. L. T. 486; 42 M. 52 298

s. 19—Receiver, appointment of, by Court “to do all things necessary for the preservation of firm”—Power to acknowledge—Acknowledgment by Receiver, whether saves limitation.

A Receiver may be an agent authorised to make an acknowledgment within the meaning of section 19, Explanation II, of the Limitation Act. The language of the section is general enough to include an agent appointed either by Statute or by Court, provided he is authorised under the law to make acknowledgments.

A Receiver appointed “to do all things necessary for the preservation of the assets of a firm” has authority to make acknowledgments on behalf of the firm, if they are necessary for the preservation of the firm’s assets and if the Receiver acts *bona fide* with that object. **M LAKSHUMANAN CHETTY v. SADAYAPPA CHETTY**, 35 M. L. J. 571; 8 L. W. 594; (1918) M. W. N. 877 179

s. 19—Acknowledgment, what amounts to—Endorsement of payment implying liability for balance, whether sufficient.

An endorsement of payment on the back of an instalment bond in the handwriting of the debtor, impliedly acknowledging his liability for the balance of the debt due under the bond, amounts to an acknowledgment of liability for the purposes of section 19 (1) of the Limitation Act. **N MOHAN LAL v. GANESH RAM** 724

s. 20—Part payment of principal, whether must be signed by debtor.

Under section 20 of the Limitation Act a fresh period of limitation can only begin to run if the fact of the person making the payment or part payment of the principal debt appears in the handwriting of such person. **PAT MANINDRA NATH ROY v. KANHAI RAM MAHWARI**, (1919) PAT. 46 728

Sch. I, Art. 2—Execution of decree—Court officer improperly holding sale—Suit for damages—Limitation.

Plaintiff’s property having been advertised for sale in execution of a decree, he tendered the amount of the decree to the defendant, who was the Court Amin and whose duty it was under Order XXI, rule 69, of the Civil Procedure Code, to receive the money and not to proceed with the sale. The defendant, however, refused to accept the money and proceeded to hold the sale. The plaintiff brought a suit for damages against the defendant:

Limitation Act—contd.

Held, that the basis of the suit being that the defendant had refused to accept the money which he was bound to accept under the provisions of the Civil Procedure Code, or that he had improperly held a sale purporting to be under the provisions of the Code, the suit was governed by Article 2, Schedule I, of the Limitation Act. **A MUKAT LAL v. GOPAL SARUP**, 16 A. L. J. 1017 **815**

Sch. I, Art. 10—Pre-emption suit—
Possession taken by vendee prior to sale—Limitation, commencement of.

Under Article 10 of the First Schedule to the Limitation Act the time from which the period of limitation begins to run against the pre-emptor is the date on which the purchaser takes, under the sale sought to be impeached, physical possession of the whole of the property sold.

Where, however, under an arrangement with the vendor the vendee takes possession of the property which he intends to purchase before the actual sale of the property to him, the possession cannot be held to be under the sale, and must in law, for the purpose of applying Article 10 of Schedule I of the Limitation Act, be referred to the subsequent date on which the sale actually takes place, and it is from this subsequent date of the actual sale that the period of limitation prescribed by the said article begins to run against the pre-emptor. **P. RAM PEARA v. RUP LAL**, 80 P. R. 1918; 181 P. W. R. 19:8 **102**

Art. 11**Art. 12****Art. 44—Claim by ward**

barred under Art. 44—Plea of invalidity of sale, whether available in suit for possession by vendee—Decree, form of.

In a suit by the vendee for possession brought after the expiry of 3 years after attainment of majority by the ward, the latter is entitled to plead the invalidity of the sale though he could not actually sue to set it aside.

On the expiry of the period specified in Article 44 of Schedule I of the Limitation Act the purchaser from the guardian is not of right entitled to the properties in the possession of the ward.

The proper decree to pass in such a case is to order possession to be given to the vendee if the consideration is not returned within a specified time. **M CHINNASWAMI REDDI v. KRISHNASWAMI REDDI**, 35 M. L. J. 652; 42 M. 36 **856**

Art. 61—Deposit made by plaintiff

on one date—Appropriation on behalf of defendant on another date—Limitation, commencement of.

It was agreed between the parties to an appeal that the cost of printing and preparing the record should be shared equally between them. In consequence of this arrangement the plaintiffs made a deposit in Court of a certain sum, out of which the Court subsequently appropriated the actual cost of printing and preparing the record. Thereafter the plaintiffs sued the defendants for contribution.

Held, that for the purpose of Article 61, Schedule I, of the Limitation Act the limitation for the suit began to run not from the date of the deposit but from the date of the appropriation. **O IQBAL NARAIN v. STRAJ NARAIN** **336**

Limitation Act—contd.

Sch. I, Arts. 75, 132—Mortgage-deed—Stipulation for payment by instalments—Penal clause for recovery of full amount at enhanced interest on default in payment of instalment whenever mortgagee required, construction of—Waiver—Suit to enforce mortgage—Limitation—Interest, enhanced, liability for.

Defendant executed a mortgage-deed in favour of plaintiff stipulating to repay the amount advanced thereunder by monthly instalments. There was a penal clause binding the mortgagor to pay the full amount at an enhanced rate of interest on his failure to pay the first instalment whenever the mortgagee required. After the second instalment became due, the plaintiff enforced the penal clause and sued for the whole amount with enhanced interest:

Held, (1) that the suit was governed by Article 132 and not by Article 75 of the Limitation Act;

(2) that as the plaintiff failed to exercise the option to enforce the penal clause, the contract for instalments subsisted;

(3) that plaintiff was not entitled to claim enhanced interest. **M LAUGHAKKAMMAL v. SOKKAYYA NAICK**, (19:8) M. W. N. 586 **191**

Art. 96—Rectification of lease suit for, on ground of mistake—Limitation—Lease—Rent receiver deprived of small portion of land without any reduction of rent, whether entitled to damages from lessor.

A suit for the amendment or rectification of a lease, on the footing of a common mistake of the lessor and the lessee under which some land was wrongly included in the lease, is governed by Article 96 of the First Schedule to the Limitation Act and must be brought within three years from the date when the plaintiff became aware of the mistake.

The plaintiff took settlement of certain resumed Ghatwali lands from the Government, subject to a permanent lease granted by the Government to one U, on the footing that the property so settled with the plaintiff would be treated as a permanently settled estate. Subsequently one B. brought a suit with reference to a small portion of the said lands, which he alleged was *lakheraj*. That suit to which the present plaintiff and the defendants were made parties, was successful. The plaintiff then brought a suit against the Government for rectification of the lease and for the refund of a small sum of money:

Held, that the mere fact that as rent receiver the plaintiff was deprived of a small portion of the lands without any reduction of rent payable to him by U. would not entitle him to any damages. **C BIJOY CHAND v. SECRETARY OF STATE** **972**

Arts. 106, 120—Partnership, suit for dissolution of—Limitation.

A suit which is virtually for dissolution of a partnership, though in form one for accounts, is governed by Article 120 and not by Article 106 of the Limitation Act. **M NARAYANASWAMY MUDALI v. GANGHADARA MUDALI** **89**

Arts. 115, 120 **810**

Art. 116—Construction of document—Sale-deed—Covenant of indemnity, breach of—Suit for damages—Limitation.

Limitation Act—contd.

A sale-deed recited that the property was sold free from all debts or liabilities, and contained a covenant that in the event of the vendees having to pay some excess amount, that is to say, some further charge over and above the sale consideration set forth in the deed, the estate of the vendor would be liable to make it good together with damages and costs. It subsequently transpired that the property was subject to a mortgage and on the basis of that mortgage a decree was passed against the vendees along with the original mortgagor. In order to save the property from sale under that decree, the vendees had to pay up the mortgage money along with interest and costs. They then sued their vendor to recover the sum paid by them under the mortgage decree:

Held, that the plaintiffs were entitled to rely upon the covenant contained in the deed as a covenant of indemnity and to bring a suit upon it, the limitation for which began to run from the date on which they suffered actual loss by reason of their being compelled to pay off the prior mortgage charge. **A RAM DULARI v. HARDWARI LAL**, 16 A. L. J. 706; 40 A. 603 **18**

Sch. I, Art. 116—*Suit by share-holder for recovery of dividend against registered company, period of limitation for—'Registered,' meaning of—General Clauses Act (X of 1897), s. 3 (45).*

A suit by a share-holder for the recovery of dividend against a registered company is governed by Article 116 of Schedule I of the Limitation Act.

The word 'registered' in Article 116 of Schedule I of the Limitation Act must be read as defined in section 3, clause (45), of the General Clauses Act, and the term 'registered' in the latter Act includes documents registered under any special law such as the Companies Act or the Copyright Act as well as registration under the Registration Act. **M RIPON PRESS AND SUGAR MILL COMPANY, LIMITED v. NAMA VENKATARAMA CHETTY**, 35 M. L. J. 256; 8 L. W. 354; 24 M. L. T. 246; 42 M. 733 **903**

Art. 120 **89, 301, 810**
Art. 132 **191**

Art. 135—*Mortgage—Puisne mortgagee, suit by, for possession—Cause of action—Limitation—Failure of payment of part of consideration, effect of.*

A puisne mortgagee is not bound to file a suit for possession of the mortgaged property within twelve years from the date of his mortgage where the property is not in the possession of the mortgagor but in that of the mortgagee.

Limitation under Article 135 of Schedule I of the Limitation Act against a puisne mortgagee does not begin to run until the redemption of the first mortgage and he is entitled to bring his suit for possession within twelve years from the date of redemption.

Plaintiff, a puisne mortgagee, sued for possession of the property mortgaged after having effected the redemption of the previous mortgage. The mortgage in favour of the plaintiff was made on the 14th February 1895. Although it was nominally with possession, the first mortgagee was in possession through his tenant, the mortgagor. In 1907 the

Limitation Act—contd.

plaintiff brought a suit for redemption against the prior mortgagee and obtained a decree. It appeared that he paid off the previous mortgagee but could not recover possession because the mortgagor succeeded in obtaining possession of the land:

Held, (1) that plaintiff's cause of action arose when the first mortgagee was paid off and that the suit was, therefore, within time;

(2) that the fact that plaintiff had not succeeded in proving the payment of a part of the consideration for the mortgage did not debar him from recovering possession of the property. **P BUDHA v. MUL RAJ**

Sch. I, Art. 142 **916**
Art. 144 **230**
Art. 166 **230, 399**
Art. 178—*Application to file*

award—Date of award, what is.

The date of the award referred to in Article 178 of Schedule I of the Limitation Act is the date when the award is delivered to the parties so that they have notice of its contents, and not the date on which it is actually written and signed. **PAT KUNJ LAL v. BANWARI LALL** **711**

Art. 181 **130, 732, 934**

Art. 181.
Article 181 of the Limitation Act applies to an application under Order XXXIV, rule 6 (2), Civil Procedure Code. **M SUBBALAKSHMI AMMAL v. RAMALINGA CHETTY**, 8 L. W. 526; 35 M. L. J. 552; (1918) M. W. N. 792; 24 M. L. T. 486; 42 M. 52 **298**

Art. 181—*Mortgage suit—Decree for sale, application for—Appeal—Decree confirmed on appeal—Limitation, commencement of.*

The right to apply for a final decree for sale in a mortgage suit arises on the expiration of the time fixed for payment by the original decree and the limitation applicable is that contained in Article 181 of the Limitation Act.

Where, however, an appeal is preferred against the preliminary decree, the right to apply for a final decree accrues from the date of the appellate decree, even though it merely confirms the decree of the first Court. **M SUBBARAYALU NAYUDU v. SUNDARARAJA NAYUDU**, 25 M. L. J. 507 **185**

Art. 181—*Sale, setting aside of—Limitation for execution, commencement of.*

Where an execution sale is set aside on account of the fraud of one of the judgment-debtors in collusion with the auction-purchaser, the decree-holder has, under Article 181 of Schedule I of the Limitation Act, three years from the date of the setting aside of the sale within which to execute the decree. **PAT KESHAWESARINDRA SAHI v. DEBENDRA-BALA DASSI** **245**

Art. 182 **732**

Art. 182—*Step-in-aid of execution—Defence of appeal preferred by judgment-debtor, whether step-in-aid of execution.*

Defending an appeal preferred by the judgment-debtor in an execution proceeding is not a step-in-aid of execution within the meaning of Article 182, Schedule I of the Limitation Act. **PAT BRIJ NATH SAMAI SINGH v. HARI CHARAN RAY** **187**

Limitation Act—contd.

Sch. I, Art. 182 cl. (5)—*Execution of decree—Application against minor judgment-debtor without application for appointment of guardian, whether step-in-aid of execution—Application in accordance with law.*

An application for execution of a decree made against a minor judgment-debtor represented by his mother, without any application to the Court for an order appointing the mother guardian *ad litem* of the minor, is in accordance with law and operates to save limitation. **PAT KESHW SURENDRA SAHI v. MALUKRANI KUER**, 4 P L J. 15 **415**

Art. 182 (5)—*Execution of decree—Application to reject objections against execution of decree, whether step-in-aid of execution.*

An application to a Court executing a decree to reject certain objections filed against the execution of the decree, so as to enable the execution to proceed, is an application made to the proper Court to take a step-in-aid of execution. **A TAMIZ-UN-NISSA v. NÁJJU**, 16 A. L. J. 704; 40 A. 688 **38**

Art. 182, cl. (5)—*Mortgage decree—Execution—Money deposited as security for costs—Application by decree-holder for payment out, whether application in execution or "step-in-aid of execution."*

An application by a decree-holder for payment out of money deposited in Court, to be credited towards the decree amount, is an application for a "step-in-aid of execution" within the meaning of clause (5), Article 182 of Schedule I of the Limitation Act.

A fortiori is this the case where the deposit was made only as security and an order of Court is necessary to make it available for payment towards the decree amount.

Plaintiff obtained a mortgage decree against defendants for sale of their family property mortgaged to her. Sixth defendant, against whom the decree was *ex parte*, applied to set it aside. His application was granted and a re-trial was ordered on his depositing Rs. 500 as security for costs. The amount was paid and the Court again passed a decree for sale in favour of plaintiff. Plaintiff applied for payment out of the said sum of Rs. 500 to her towards her decree amount and the payment was ordered. The plaintiff filed the present application in execution more than 3 years after the date of the revised decree, after giving credit for the Rs. 500 recovered in the previous application:

Held, that the previous application was an application for a "step-in-aid of execution" within the meaning of Article 182, Schedule I, of the Limitation Act and that, therefore, the present application, which was made within three years of the former, was not barred. **M THANGI SHETTIL v. DUJA SHETTI**, 8 L. W. 519; 35 M. L. J. 575; (1918) M. W. N. 748; 24 M. L. T. 483 **226**

Art. 182 (7)—*Execution of decree—Instalment decree—Default in payment—Limitation, commencement of.*

Unless an instalment decree clearly leaves the decree-holder no option on the happening of a default but to execute the decree once and for all for the whole amount due under it, the decree-holder may execute it on the happening of the

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first, second or any subsequent default, and limitation will run against him only in respect of each instalment separately from the date on which each such instalment may become due and payable. **PAT MANINDRA NATH RAY v. KANHAI RAM MARWARI**, (1919) PAT 46 **728**

Madras District Municipalities Act (IV Mad. of 1884), ss. 21, 27—*Municipal Council, powers of—Disbursement of funds—Acquisition of lanes—Interference by Court, limits of.*

Under section 21 of the Madras District Municipalities Act a Municipal Council is a Corporation with power to contract and to do all things necessary for the purpose of its constitution, the Municipal fund being held by it under section 27 for the purposes of the Act. If the Council keeps within its authorization and acts *bona fide*, the Court will not interfere with its operations. It will be deemed the best judge, not only of what is most conducive to its own interest, but also of what is proper and fitting as regards third parties, and it will be left unchecked to take or not to take lands for promoting sanitation, etc. The Corporation is, however, protected only if it acts *bona fide*. **M KRISHNASWAMI IYER**, *In re*, 35 M. L. J. 251 **128**

s. 27

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ss. 207, 217, 264A—*Notice under s. 207, non-compliance with—Prosecution—Construction of latrines by Council or notice to party to provide moveable receptacles, whether conditions precedent.*

Before prosecuting a person under section 264 A of the Madras District Municipalities Act for failure to comply with a notice issued under section 207 of the Act, it is not necessary that the Municipal Council should have called on him to provide moveable receptacles under section 217 or should have constructed the latrines themselves under section 264 (1). **M PUBLIC PROSECUTOR v. SETTIGIRI NARAYANA REDDI**, 35 M. L. J. 442; 19 Cr. L. J. 981; 42 M. 57 **161**

ss. 217, 264A

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Madras Estates Land Act (I Mad. of 1908), s. 3 (2) (d)—*Village, whether estate—Ejectment, suit for—Jurisdiction of Civil and Revenue Courts.*

Where it was found that an *agraharam* village was granted to an *inamdar* by a ruler in 1373 and had ever since been enjoyed by his successors-in-title, and it was not proved that at the date of the grant there were any tenants in the village holding lands with any rights of occupancy by custom or otherwise:

Held, (1) that the grant must be presumed to have been of the *kudivaram* as well as of the *melvaram* right;

(2) that the village was not an "estate" within the meaning of section 3 (2) (d) of the Madras Estates Land Act, and that, therefore, the *inamdar* was entitled to eject the tenants through the Civil Court. **P C SURYANARAYANA v. PATANNA**, 41 M. 1012; 25 M. L. T. 30 **689**

Madras Estates Land Act—contd.

ss. 5, 77, 125, 132—Rent, decree for, by Revenue Court—Execution sale, whether passes title-free of incumbrances—Charge for arrears of rent, nature of—Transfer of Property Act (IV of 1882), s. 100.

A sale in execution of a decree for rent in a Revenue Court passes the property to the purchaser free of all encumbrances except those specified in section 125 of the Madras Estates Land Act.

The statutory charges on a land for arrears of rent is not a charge within the meaning of section 100 of the Transfer of Property Act.

Per *Phillips, J.*—The Madras Estates Land Act treats the charge for arrears of rent on a holding as being of the same nature in all cases and creates no distinction between the charge where rent is payable in kind and the charge where rent is payable in money.

Though section 65 of the Bengal Tenancy Act is not specifically re-enacted in the Madras Estates Land Act, section 132 of the latter Act leads to the same result.

Per *Kumaraswami Sastri, J.*—The absence of any separate section in the Madras Estates Land Act like section 65 of the Bengal Tenancy Act makes no difference in the scheme of the former Act, as it contains provisions in different sections which, in effect, reproduce the provisions of section 65 of the Bengal Tenancy Act. **M PANANGIPALLI SCRANNA v. KATTAVENKATA SURYANARAYANA JAGAPATHIRAJU.** 35 M.L.J. 443; (1919) M. W. N. 25 **794**

ss. 6 (2), 23, 45, 163—Landlord and tenant—Rent, right to recover, from persons not regular tenants—Jurisdiction of Revenue Courts—Grant of land for cultivation without fixity of property or tenure, validity of—Indefiniteness—Kandetha porupputhagai, payment of—Status of person paying—Permanent tenure, grant of, whether binding on grantor or his successor.

Under the provisions of sections 45 and 163 of the Madras Estates Land Act read with the Explanation to section 6, clause (2) of the Act, a claim for rent against persons within an estate who occupy ryoti land, either by legal right or otherwise, must be instituted in the Revenue Court.

A grant allowing the grantees to cultivate whatever and whenever they like is not a grant with any fixity of property or of tenure, which the law will recognize as conferring a heritable right.

Except under the provisions of the Madras Estates Land Act, a permanent settlement of rent by a landlord is not binding on his successors. The burden is on the grantee to show that there is a grant of the kind mentioned in section 26 of the Act.

Per *Seshagiri, Aiyar J.*—Where the relationship of landlord and tenant is admitted, the mere fact that the tenant has not paid rent for a long number of years will not bar the landlord's right to recover what he considers to be a reasonable rent.

Obiter.—A grant on payment of a kandetha porupputhagai, i.e., by payment of a fixed rent, will not make the grantee a landlord but only a tenant. **M KENULAMMAL AVERGAL v. SANGALI SUBBA PILLAI.** 35 M.L.J. 11 **615**

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Madras Rent Recovery Act (VIII Mad. of 1865), s. 11—Land law of Madras

—Rent, rates of—Custom—Contract, whether paramount to status and usage—Contract implied from payment and acceptance of rent—Consideration for promise to pay enhanced rent, whether necessary.

Under section 11 of the Madras Rent Recovery Act of 1865 the rent payable by a tenant to his landlord is determined primarily by contract, which may be either express or implied. Failing such contract, resort is had, when no settlement has taken place, to local usage; but if such usage establishes a proper rent, then either party, if dissatisfied with it, may require resort to the Warum customary in the village for division of the crop. Failing proof of such customary Warum, it is the Collector's duty to fix the rent. All these methods, however, are only applicable in cases where no contract is proved.

The expression "implied contract" in the section is an English term of art, and must be so construed. It involves the legal incident of some consideration moving from the landlord, as that incident is understood in English Law.

A number of ryots had for years paid rent at the rate of 4 fanams, which was the prevalent rate for dry lands. At various dates, having dug wells at their own expense, they took up garden cultivation, and were thereafter charged, and for several years paid, rent at the rate of 8 fanams prevailing for wet lands. For Fasli 1912, however, they refused to accept Pattahs at that rate. It was found, in view of the long continuance of payments at the 8-fanam rate, that there was an implied contract to go on paying that rate, but that there was no consideration for the new promise, the land being already held on a contract to pay 4 fanams:

Held, that the implied contract was not legally enforceable, and that the ryots were entitled to Pattahs at the old rate. **P C JAGATHEERA RAMA v. ALAWARASA ASARI.** (1918) M. W. N. 732; 23 C. W. N. 225; 36 M. L. J. 49; 17 A. L. J. 129 **907**

Madras Revenue Recovery Act (II Mad. of 1864), s. 59—Sale for arrears of revenue, suit to set aside—Illegal levy of cess—

Limitation—Pleadings—Statement of facts taking case out of s. 59.

A suit to set aside a sale, which purports to have been held under the provisions of section 59 of the Madras Revenue Recovery Act by an officer competent to conduct it under the authority of the Act, should be brought within six months from the date of the sale as provided in the section.

If the plaintiff challenges the right of the Government to sell the property by showing that the provisions of the Act could not be legally applied and that his case is out of the scope of section 59, he should set forth the necessary facts in the plaint and prove them. **M BHANIREDDI VENKAN DORAGARU v. SECRETARY OF STATE** **844**

Malabar Compensation for Tenants' Improvements Act (I Mad. of 1900), ss. 3 (3), 5, 6 (3), 7, 9 (1), 19—Claim for compensation—Burden of

Malabar Compensation for Tenants' Improvements Act—conold.

proof—Settlement as to compensation before date of contract—Commissioner, second, appointment of—Functions of Commissioner—Commissioner's report, value of—Second Commissioner, duties of.

Ordinarily a tenant who claims compensation for improvements under Madras Act I of 1900 is bound to prove that he has improved the property and that he has spent money in making the improvements. He must show that he has done work which has added to the value of the holding, that that work is suitable and that it is also consistent with the object with which he obtained the Kanom.

Under section 5 (1) of the Malabar Compensation for Tenants' Improvements Act the tenant against whom a decree in ejectment is passed is only entitled to the value of the improvements made either by himself or by his predecessor-in-title. He is not entitled to the value of the improvements effected by every person other than the landlord.

The decision in *Thiruvattiyil Vattath v. Vishnu Barathukal*, 28 Ind. Cas. 339, that if an increase in the income is proved, the presumption is that the tenant has improved the land, is too broadly stated.

The report of a Commissioner appointed by a Court is not equivalent to a judgment which is binding on the parties. Ordinarily, the Commissioner's report should be supplemented by the evidence which he gives in the case. The Commissioner should not only embody the statements of the parties but should give his own opinion on their contentions.

Section 7 of the Malabar Compensation for Tenants' Improvements Act deals only with contracts which limit the right of the tenant to make improvements after the date of the contract.

Prima facie every person is entitled to enter into a contract settling the accounts between himself and another or settling the differences between them. If this right of the freedom of contract is to be taken away, it must be by express and clear words, and there is nothing in section 7 of the Malabar Compensation for Tenants' Improvements Act which takes away the effect of a settlement as to compensation for improvements effected before the date of the contract.

An order appointing a second Commissioner to assess the compensation should not be regarded as a direction for re-valuation. Re-valuation is a technical term and should be confined to cases mentioned in clause (3) of section 6.

Where a Commissioner has ignored the evidence and sent in a report based on guess work, the direction to a new Commissioner to do that work properly is not a direction to re-value. Consequently the second Commissioner can only take into account the value prevalent when the first Commissioner made his report. *M KUNNATH MADAMPIL KUNJUNNI v. MAMNARGHAT RAMANUNNI*, 25 M. L. J. 2:9; (1918) M. W. N. 686

ss. 5, 6 (3) 7, 9 (1), 19

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Malabar Law—Maintenance, claim for, against tarwad, nature of.

The right of a member of a Malabar tarwad for maintenance or an allowance is an incident of co-proprietorship in the property of the tarwad and that right cannot be denied unless circumstances

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show that the tarwad is not in a position to give a separate allowance. *M MANIKKATH AMMINI AMMAL v. NANIKKATH PADMANABHA MENON*, 35 M. L. J. 509; 41 M. 1075; 24 M. L. T. 498

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Malabar Marriage Act (IV of 1896), ss. 17, 18; scope of—Registration of marriage, effect of—Claim against tarwad, whether forfeited.

Sections 17 and 18 of the Malabar Marriage Act were not intended to deprive a member of a tarwad of his or her rights in the tarwad. The registration of the marriage of a female member of a tarwad, therefore, under the Act does not cause a forfeiture of her rights and cast the duty of maintaining her and her children on her husband.

Section 18 of the Act only provides for personal guardianship and leaves the guardianship of property untouched. *M NANIKKATH AMMINI AMMAL v. NANIKKATH PADMANABHA MENON*, 35 M. L. J. 509; 41 M. 1075; 24 M. L. T. 498

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Master, whether criminally responsible for acts of servant.

A master is criminally responsible for the acts of his servants if those acts are shown to have been done with his co-operation or under his authority. *N GAMBHIR CHAND v. SECRETARY, MUNICIPAL COMMITTEE, NAGPUR*, 20 Cr. L. J. 86

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Merger

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Minor—Guardian ad litem, who can be appointed as.

There is no rule that only the natural or certified guardian of a minor can act as his next friend for the purpose of legal proceedings.

A duly appointed guardian for a suit is fully entitled to represent the minor in connection with all subsequent proceedings which take place in the course of the execution of the decree passed in the suit. *O KANIZ MEHBI BEGAM v. RASUL BEG*, 5 O. L. J. 551

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not properly represented in suit—Decree, validity of—Execution sale—Suit by minor to set aside sale—Limitation applicable—Limitation Act (IX of 1908), Sch. I, Arts. 12, 144.

Where a minor defendant is not properly represented in a suit, a decree passed against him is a nullity, and the Court has no power to sell the minor's property in execution of the decree. Where such sale takes place, the minor can recover the property from the auction-purchaser even if he is a stranger, and the Article applicable to such a suit by the minor is Article 144 and not Article 12 of Schedule I of the Limitation Act. *P HIRA SINGH v. GHULAM QADIR*, 113 P. R. 1919

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Mortgages, consolidation of, whether permitted.

The rule of consolidation of mortgages is a technical rule of English Law and is not founded on general principles of justice. Even prior to the enactment of the Transfer of Property Act the rule was not applicable to India.

A mortgagor or a person claiming under him is, therefore, in the absence of a contract to the contrary, entitled to redeem a subsequent mortgage without redeeming an earlier mortgage. *N DEOCHAND v. BINJRAJ*, 14 N. L. R. 184

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Mortgage of entire interest in sixteen-annas mahal—Groves, whether included in mortgage.

The owner of a sixteen-annas mahal obtained decrees against certain persons who had certain rights in the mahal as grove-holders. In execution of these decrees he put up to sale the interest of the grove-holders and purchased it himself. Subsequently he mortgaged his entire interest in the mahal to the plaintiff without any sort of reservation:

Held, that the interest of the grove-holders acquired by the mortgagor merged in his estate as zemindar and was included in the mortgage. **A HASAN ALI KHAN v. AZHARUL HASAN**, 16 A. L. J. 900 **367**

Interest, excessive or exorbitant rate of—Debt contracted by Hindu father on credit of family property.

In cases of debts contracted by Hindu fathers on the credit of the family property, Courts have a discretion to reduce the rate of interest if it is excessive or exorbitant. **O. DARGAHI v. RAJESHWARI PERSHAD**, 21 O. C. 265 **753**

Lease by mortgagee—Suit by mortgagor for declaration that mortgage was unsupported by consideration and for its cancellation, maintainability of.

Plaintiff sued for a declaration that a mortgage executed by him in favour of 1st defendant was not supported by consideration and for cancellation of the instrument. The 1st defendant had leased one of the items of the property in dispute to the 2nd defendant, whose title as lessee was upheld in a suit brought by him against the plaintiff:

Held, (1) that the mortgage-deed could not be cancelled, inasmuch as the matter had passed beyond the stage of contract to that of an executed conveyance and the deed was neither void nor voidable for non-payment of consideration;

(2) that the plaintiff was not entitled to relief by way of cancellation of the deed, also on the ground that the parties could not be put in *status quo ante* by reason of the lease executed by the 1st to the 2nd defendant;

(3) that the prayer for declaration could not be granted inasmuch as there was no proof of any danger to the mortgagor's title to the properties. **M. ABDUL HASHIM v. KADER BATCHA**, 8 L. W. 543; (1918) M. W. N. 769; 35 M. L. J. 740; 24 M. L. T. 478; 42 M. 20 **370**

Money left with mortgagee to redeem prior mortgage—Redemption, time for, not specified—

Mortgagee, failure of, to redeem within reasonable time—Damages, suit for, by mortgagor, maintainability of—Contract Act (IX of 1872), ss. 46, 55—Mortgage with possession—Consideration overstated by mistake—Mortgagee, whether can recover interest on amount overstated.

Where a portion of the mortgage consideration is left with the mortgagee to redeem certain prior mortgages existing on the property and no particular time is specified in the deed for such redemption, it is the duty of the mortgagee, in accordance with the principles laid down in sections 46 and 55 of the Contract Act, to redeem the prior mortgages within a reasonable time, i.e., by the first date upon which redemption is obtainable. If the mortgagee fails so to redeem the prior mortgages, the mortgagor is entitled to recover from the mortgagee damages sustained by him in consequence of the failure of the mortgagee to redeem.

Mortgage—contd.

Where a deed of mortgage, under which possession of the mortgaged property was handed over to the mortgagee, provided that there was to be no accounting between the parties at the time of redemption, and it appeared that a portion of the mortgage consideration was set down in the deed as being due to the mortgagee from the mortgagor, merely by way of guess without any account having been really taken at the time:

Held, (1) that it was open to the mortgagor to show that there was a mistake in the statement of the mortgage consideration;

(2) that the mortgagor was entitled to claim from the mortgagee in possession interest on the amount by which the said portion of the mortgage consideration exceeded the real amount due to the mortgagee from the mortgagor. **O. PARTAB SINGH v. BALWANT SINGH**, 5 O. L. J. 670 **550**

Redemption, decree for, obtained—Decree, defective—Suit, subsequent, for redemption, whether maintainable.

A decree for redemption once obtained bars a subsequent suit for redemption, although the decree be defective in so far as it neither fixes any definite time for payment of the mortgage money nor provides for the consequences of non-payment. **O. SHEORAJ RAHADUR SINGH v. GAJADHAR SINGH**, 5 O. L. J. 698 **922**

Subrogation, right of, when arises.

Before a person can claim to be subrogated to the position of a prior mortgagee, there must be a satisfaction of the whole of the prior mortgage. **PAT DULHIN SONA KUEE v. JAMIL AHMAD** **779**

Suit on—Plea that fictitious property was included in deed to evade provisions of Registration Act—Burden of proof.

A mortgage-deed in which the properties hypothecated were stated to be a house in Calcutta and a small plot of rent-free land in Burdwan, was registered at Burdwan. In a suit on the mortgage the defendant, who was one of the representatives of the mortgagor, pleaded that the mortgage was invalid, having been registered at Burdwan where no such rent-free plot as mentioned in the mortgage ever existed or belonged to the mortgagor:

Held, that the onus lay upon the defendant to disprove the existence of the rent-free plot as described in the mortgage at the time when it was executed.

Semble.—Once the execution of a mortgage is proved, it is not open to those claiming under the mortgagor to allege or to adduce evidence to show that any of the properties purported to be mortgaged was either non-existent or not owned by the mortgagor at the date of the mortgage. **C. SUDHIR CHUNDER SETT v. ABDULLA-UL-MUSAVI**, 22 C. W. N. 894 **520**

Term fixed for redemption—Redemption, suit for, before expiry of term, maintainability of—Olog on redemption.

A mortgage-deed provided that if the principal and interest due on the mortgage was not paid up to the date fixed for such payment, the mortgagee was to take possession of the mortgaged property, was to appropriate its profits in lieu of interest without any liability to account to the mortgagor for the profits, which exceeded the amount of

Mortgage—concl'd.

interest at the contract rate by practically half as much, was to secure to himself certain further or collateral advantages and was to remain in possession of the mortgaged property for a fixed period during which the mortgagor could not claim redemption. On the mortgagor failing to pay the principal and interest as stipulated in the deed, the mortgagee entered into possession of the mortgaged property. The mortgagor then sued for redemption, alleging that he was entitled to redeem during the period of the mortgagee's possession on the ground that the conditions in the mortgage-deed constituted a clog on the right to redeem:

Held, that the mortgage-deed did not contain a clog on the right of redemption and that, therefore, the suit was premature. **O MUHAMMAD SHER KHAN v. SWAMI DAYAL**, 5 O. L. J. 572 **32**

Mortgage-deed—Notice, failure to give, effect of.

In cases of mortgage decrees the omission to issue a notice under Order XXI, rule 21, Civil Procedure Code, does not render the sale of the mortgaged property absolutely null and void. **O KANIZ MEHDI BEGAM v. RASUL BEG**, 5 O. L. J. 551 **39**

Muhammadan Law—Divorce—Tafveez—Post-nuptial delegation of power of divorce, validity of—Restitution of conjugal rights, suit for, maintainability of.

Under the Muhammadan Law, post-nuptial delegation of the power of divorce or *tafveez-i-talaq* made by a Muhammadan husband in favour of his wife and contained in a registered *kabin-namah* executed after marriage is valid and operative.

The plaintiff, a Muhammadan, executed a *kabin-namah* sometime after his marriage in favour of his wife, which provided amongst other matters that he would not take a second wife without the permission of his first wife, and that in case of violation of this condition the latter might, when she chose, divorce him and take a second husband. Thereafter without taking the permission of his wife the plaintiff took a second wife and upon that the first wife exercised the right of divorce contained in the *kabin-namah*. The plaintiff then sued her for restitution of conjugal rights:

Held, that the suit did not lie, as the wife had exercised the power of divorce given to her by the husband and had thus put an end to the marital relation between herself and her husband. **C SAINUDDIN v. LATIFANESSA BIBI**, 22 C. W. N. 924 **609**

Gift—Musha, doctrine of, applicability of—Possession, delivery of, whether necessary.

Per *Sanderson, C.J.*—The doctrine relating to the invalidity of gifts of *musha* is wholly unadapted to a progressive state of society and ought to be confined within the strictest limits.

When a person makes a gift to two donees, one of whom is an adult and the other a minor but the latter is not in the guardianship of the donor at the time of the gift, and the adult accepts the gift on behalf of himself and the minor, the gift is not invalid. But when the gift is made to an adult and an infant who is in the donor's care or guardianship, the gift may be void because the donor is assumed to take seisin at once of the minor's share, where-

Muhammadan Law—cont'd.

as the gift in favour of the adult requires acceptance and thus confusion is occasioned.

If a Muhammadan owner makes a gift of a house to two of his sons, one of whom is adult and the other is a minor and the adult son takes possession of the property, the gift is absolutely void.

According to Muhammadan Law seisin or actual possession by the donee is not necessary to complete the gift, but the donor must evince his intention of making a complete transfer of the ownership in the property, from himself to the donee by placing the latter in a position to enjoy it beneficially or to make use of it consistently with its purpose, and in considering this question the relationship of the parties must be kept in view. In other words, to be in a position to take possession is tantamount to taking possession: and to place the donee in a position to take possession, is equivalent to delivery of possession; similarly investing with authority for that purpose is equally sufficient.

Per *Mukerji, J.*—Under the Muhammadan Law as administered by British Indian Courts, where the subject of gift is incorporeal property not susceptible of physical possession the gift thereof may be completed by such transfer of control as may be appropriate and possible in the circumstances.

The doctrine relating to the invalidity of gifts of *musha*, though not favoured, cannot be altogether ignored or repudiated.

A settlement of a disputed or doubtful claim is a valid and binding arrangement which the parties thereto are not permitted to deny, ignore or repudiate. **C MARIAM BIBI v. MUHAMMAD IBRAHIM**, 28 C. L. J. 308 **561**

Minor—Mother, power of, to deal with minor's estate.

Under the Muhammadan Law the Courts should uphold the acts of a mother in dealing with her minor son's estate, provided they are to the manifest advantage of the minor or for urgent or imperative necessity.

Where, however, a Muhammadan died leaving a widow and a minor son with a good and profitable estate on which they could live with comfort, and the widow nevertheless constantly borrowed small sums at exorbitant rates of interest for domestic purposes:

Held, that the debts having been incurred neither for the benefit of the minor nor for urgent or imperative necessity, they could not be held to be binding on the minor's estate. **P KAPURA v. SHANKAR DAS**, 108 P. R. 1918 **306**

Shia school—Waqf, creation of—Trust-deed not divesting settlor of ownership, whether constitutes waqf.

A trust-deed executed by a Shia Muhammadan and his wife contained a recital to the effect that the eldest son of the settlors had already been entrusted with the management of the landed properties belonging to the executants and that this management was to continue under the deed. The document also contained provisions as to what was to happen on the death of the executants, but none of those provisions operated so as to divest the executants of their ownership in the trust properties from the date of the execution of the deed:

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Held, that the document was insufficient to create a valid *waqf*. **A** ALI RAZA *v.* SANWAL DAS, 16 A. L. J. 875 212

Waqf, creation of—Dedication, colourable, validity of 94
Mussalman Waqf Validating Act (VI of 1913), whether retrospective—Muhammadan Law—*Waqf*, creation of—Dedication, colourable, validity of.

The Mussalmans Waqf Validating Act is not retrospective in its operation.

Where, therefore, before the passing of the Mussalmans Waqf Validating Act, a Muhammadan made a colourable dedication of his property, the charitable or religious purpose being so unsubstantial as to give to the settlement merely a colour of piety, the real object of the settlor being to create a family settlement in perpetuity:

Held, that the dedication was not valid and did not create a *waqf*. **A** NAINUL HAQ *v.* MOHAMMAD SUBHAN-UL-LAH, 16 A. L. J. 841 94

Negotiable Instruments Act (XXVI of 1881), ss. 64, 76—Bill of exchange—Presentment, necessity of—Damage caused by non-presentment—Burden of proof.

The payee of a bill of exchange endorsed it to the plaintiff and subsequently became insolvent. The plaintiff sued the drawer and drawee of the bill without having presented the bill to the latter either for acceptance or for payment. It was found that the drawer had drawn the bill against goods supplied to the drawee:

Held, (1) that no presentment having been made the drawee was not liable on the bill at all;

(2) that the onus of showing that the drawer could not suffer damage from want of presentment lay on the plaintiff;

(3, that the drawer having supplied goods to the drawee as the value of the bill of exchange it must be presumed that he had suffered damage from want of presentment and that, therefore, he too was not liable on the bill **A** NANHEY MAL *v.* CHAIT RAM, 16 A. L. J. 899 364

s. 76 364
 s. 83, applicability of—Hundi, presentation of, for payment—Retention of hundi by drawee for more than twenty-four hours, effect of.

Section 83 of the Negotiable Instruments Act does not apply where a *hundi* is presented, not for the purpose of acceptance, but for the purpose of payment. **O** TULSHI RAM *v.* GUR DAYAL, 5 O. L. J. 445 423

Notice, registered, sent through post—Refusal, proof of.

Where a defendant denies the receipt of notice alleged to have been sent to him through registered post, it is incumbent upon the plaintiff to call the post-peon to prove that the registered post-card was tendered to and was refused by the defendant. **N** RAJA UDAM *v.* KHANBEG AMIRBEG 904

Orissa Land Law—Khurdah Estate—Sarbarakars—Sarbarakari jagirs, whether heritable and transferable.

Sarbarakars of the Khurdah Estate in Orissa have no heritable or transferable right in the office of *sarbarakar* or in the *jagirs* held by them as *sarbarakars*. They are liable to be dismissed for misconduct,

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and on such dismissal lose all right to occupy the *sarbarakari jagirs*. On the termination of a settlement they are bound to enter into a fresh engagement with Government (or with the grantee, when Government has made a grant), otherwise they lose their office.

In 1861 Government granted certain Mouzas in Khurdah revenue-free, but subject to the engagement of the then *sarbarakar* (defendant's father) with themselves for the settlement period then current. On the completion of a fresh settlement in 1891 the defendant, who had succeeded his father as *sarbarakar*, was called on by the grantee to execute the usual *ekrarnama*, but refused to do so. He set up a claim that he was a tenure-holder, and misappropriated the rents which he collected. Plaintiffs thereupon dismissed him and brought a suit to recover the *sarbarakari chakran* lands in his possession:

Held, that defendant was not a tenure-holder, that his position under the grantee was the same as that of a *sarbarakar* under Government, that he had been rightly dismissed, and that plaintiffs were entitled to eject him from the *sarbarakari jagirs*. **P** C PARAMANANDA DAS *v.* KRIPASINDHU ROY, 36 M. L. J. 18; 25 M. L. T. 73; 29 C. L. J. 175 391

Oudh Civil Digest, para. 172.

A decree does not become incapable of execution within the meaning of paragraph 172 of the Oudh Civil Digest merely because one attempt to execute it has proved unsuccessful. The Court to which a decree is sent for execution is competent to persevere with the execution until it is made to appear either that satisfaction has been obtained or that execution is no longer possible. **O** GUR DAYAL *v.* BEGG SUTHERLAND AND CO., 21 O. C. 261 722

Oudh Estates Act (I of 1869), s. 2 901**Oudh Estates (Amendment) Act (III of 1910)**, ss. 2, 21 901

Oudh Laws Act (XVIII of 1876), s. 20—Execution—Sale of ancestral property—Commissioner, sanction of, whether necessary—Section, whether applies to mortgage decrees.

Where the Commissioner's order on an application for permission to sell ancestral land under section 20 of the Oudh Laws Act was, "considering the character of the buildings I think permission might be refused at present. If the judgment-debtor takes no steps to arrange, they might be sold afterwards":

Held, that the order was not intended to dispense with the necessity for any further application for sanction but meant that the refusal was not necessarily permanent and that sanction might be granted in future if the judgment-debtor took no steps to satisfy the decree.

The Commissioner's sanction under section 20 of the Oudh Laws Act is not a mere formality, but an essential preliminary to a legal sale being held, and, therefore, parties to a decree cannot dispense with the necessity for it.

Section 20 of the Oudh Laws Act applies to sales in execution of mortgage decrees. **O** KANIZ MEHDI BEGUM *v.* RASUL BEG, 5 O. L. J. 551 39

Oudh Rent Act (XXII of 1886), s. 3 (10)—*Grove-holder not paying rent, whether tenant—Ejectment—Notice to eject, validity of.*

A person to whom land is granted for the purpose of planting a grove without any contract to pay rent is not a tenant within the meaning of the Oudh Rent Act. He is a grove-holder and is entitled to hold possession so long as the land retains the character of a grove. The mere fact that the land is liable to resumption or assessment of rent, if brought under cultivation after the grove ceases to exist, does not make the grove-holder a tenant so as to render him liable to ejectment by notice at will so long as the grove exists. **O**

DURGA PRASAD v. RAM CHARAN, 5 O. L. J. 689 **417**

S. 7A, applicability of—*Ex-proprietary rights, relinquishment of, validity of—Proprietary rights, failure of consideration in respect of—Compensation, whether can be allowed.*

The prohibition contained in section 7A of the Oudh Rent Act applies only to the sale of ex-proprietary rights or the relinquishment thereof for consideration. Where a person sells what he does not own, agreeing at the same time not to claim ex-proprietary rights therein, the vendee can claim compensation for the failure of the vendor to make good his proprietary title. **O** **ADITYA PRASAD v. MUHAMMAD MUBARK ALI SHAH**, 21 O. C. 234 **257**

S. 108, cls. (2), (4)—*Mortgage—*

Mortgagor allowed to remain in possession of mortgaged property as tenant of mortgagee—Rent, arrears of, suit to recover—Jurisdiction of Civil and Revenue Courts.

A *zar-i-peshgi* lease created the relationship of mortgagor and mortgagee between the parties. On the mortgagor's failure to deliver possession of the mortgaged property to the mortgagee the latter filed a suit for possession against the former. The suit ended in a compromise, whereunder it was provided that the mortgagor would remain in possession on behalf of the mortgagee on condition of his paying to the latter a certain amount of annual rent and that in default of such payment of rent the former would be liable to ejectment. On the mortgagor's failure to pay rent the mortgagee brought a suit in the Civil Court against the mortgagor for possession of the mortgaged property and for arrears of rent.

Held, that the compromise in the previous suit created the relationship of landlord and tenant between the parties and that, therefore, the present suit was not maintainable in the Civil Court in view of the provisions of section 108, clauses (2) and (4), of the Oudh Rent Act. **O** **RAUNAQ ALI v. GUL MUHAMMAD** **477**

ss. 120A, 135 **276**

Pardanashin lady, deed executed by, validity of.

Circumstances under which deeds executed by *pardanashin* ladies can be avoided disallowed **C** **MARIAM BIBI v. MUHAMMAD IBRAHIM**, 18 O. L. J. 306 **561**

Partition—*Question of title, decision of—Procedure—Applicant not in actual possession—Burden of proof.*

Where a question of title is raised by the respondent in a partition proceeding, the Revenue Officer should, in accordance with the instructions

Partition—*conold.*

contained in paragraph 8 of the Financial Commissioner's Standing Order 27, himself proceed to decide the question without referring the objector to a Civil Court.

Where an applicant for partition is recorded as a co-sharing owner along with the other parties in the land in dispute, the presumption is that he is a co-sharer in the land of which he seeks partition. He must also be presumed to be in legal or constructive possession of his undivided share through or by means of his co-sharers. This presumption cannot be rebutted nor can such possession be defeated by the mere denial of his title by his co-sharers. To effect this there must be very clear and precise proof that their possession is in fact and really adverse to him so as to amount to his actual ouster from all connection with the land in dispute and to his acceptance of such a position. **F C P KIRPA v. NASIB SINGH**, 6 P. R. 1918 Rev. **788**

Patents and Designs Act (II of 1911), s. 3—*Patent—Invention, what is—*

Combination of old materials in new form, whether can be patented.

Plaintiffs invented a stove for the preparation of *banslochan*, a medicinal powder. The essential features of the process were the treatment of the raw substance at a red heat with sulphuric acid inside a closed crucible or retort made entirely of earthenware. The advantages involved were:—(a) No iron or other metal being used in the composition of the crucible there was no danger of any deleterious action on the part of the furnace of the acid upon the metal; and (b) the retort or crucible being entirely closed from the time when the acid was added until the process of calcination was complete, there was no necessity of a chimney communicating with the retort for the purpose of carrying off the fumes of the acid. The action of the acid on the crude material under these conditions became more thorough and satisfactory and the possible nuisance from the escaping fumes of the acid was done away with.

Held, that this specification was a good subject-matter for a patent. **A LAKHPAT RAI v. SRI KISHAN DAS**, 16 A. L. J. 941 **450**

ss. 5, 17, 43—*New and original design,*

Test of.

A design in order to be new or original within the meaning of the Act, need not be new or original in the sense of never having been seen before as applied to any article whatever; there might be a novelty in applying an old thing to a new use, provided it is not merely analogous.

Where the design of a metal band called the "Novelty band," intended to attach a watch to the wrist, was similar in shape and configuration to a bracelet previously manufactured for ornamental purposes:

Held, that though the shape of the "Novelty" band by itself could not be said to be new and original, the application of it to a watch to be worn on the wrist was for a purpose so different from and for a use so dissimilar to the purpose and use of the bracelet that the design in question might be said to be original. **C GAMMETER v. CONTROLLER OF PATENTS AND DESIGNS**, 22 C. W. N. 560; 45 C. 606 **437**

ss. 17, 43 **437**

Patents and Designs Act—concl'd.**s. 62.**

Section 62 of the Patents and Designs Act is limited to applications by the registered proprietor or some person in whom his interest is vested. **C GAMMETER v. CONTROLLER OF PATENTS AND DESIGNS**, 22 C. W. N. 580; 45 C. 606 **437**

s. 64—Revision—High Court, power of, to revise Controller's decision under s. 64.

Section 64 of the Act does not apply to the case of cancellation of a design which has already been registered; the words "non-insertion in" or "omission from the register" used in section 64 do not cover a case of registration of a design and subsequent cancellation of it.

The High Court has no power to revise the Controller's decision under section 64 of the Act. **C GAMMETER v. CONTROLLER OF PATENTS AND DESIGNS**, 22 C. W. N. 580; 45 C. 606 **437**

s. 77.

Section 77 of the Act does not give the Governor-General in Council power to extend the powers of the Controller beyond those which are given to him by the express provisions of the Act. **C GAMMETER v. CONTROLLER OF PATENTS AND DESIGNS**, 22 C. W. N. 580; 45 C. 606 **437**

Penal Code (Act XLV of 1860), ss. 71, 147, 149, 325—Rioting and causing grievous hurt—Separate convictions and sentences, legality of.

In addition to a conviction under section 147 of the Penal Code an accused who has himself caused grievous hurt to the opposite party cannot be separately convicted under section 325 of the Code.

Separate convictions and sentences, therefore, under section 325 read with section 149 of the Penal Code and section 147 of the Code are illegal.

Pat PALTU SINGH v. EMPEROR, 3 P. L. J. 641; 20 Cr. L. J. 37 **677**

s. 84—Unsoundness of mind, what amounts to—Offence committed under impulse.

Under section 84, Indian Penal Code, a person is exempt from criminal liability only if by reason of unsoundness of mind he is incapable of knowing the nature of the act done by him or that he is doing what is either wrong or contrary to law. It must, in other words, be shown that the cognitive faculties of the accused had been impaired by the unsoundness of his mind. **P RAMZAN v. EMPEROR**, 30 P. R. 1918 Cr. 1; 20 Cr. L. J. 1 **492**

ss. 99 (3), 148—Rioting, charge of—Right of private defence of property—Possession of accused.

Cases of rioting in which a plea of right of private defence is raised should be decided strictly on their own facts and previous decisions are only useful in so far as they indicate the general principles which may apply to an approximately similar set of facts.

Where the accused, on learning that their crop was being cut by the complainants, sent information to the Thana and collecting their men went to the field in dispute where they were assaulted by the complainants, with the result that a fight ensued and several persons were injured:

Held, (1) that the accused were justified in collecting their men and arming them sufficiently to prevent the crops being removed from their

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field in the event of the Police not arriving in time;

(2) that a breach of the public tranquillity having been forced on the accused by the complainant before the arrival of the Police, the right of private defence of person immediately arose in favour of the former and that the complainants were solely responsible for the subsequent fight. **Pat SUNDER BUKSH SINGH v. EMPEROR**, 19 Cr. L. J. 983; 3 P. L. J. 653; (1918) Pat. 359 **163**

ss. 99, thirdly, 148, 149, 302

—Rioting—Death caused in riot—Parties engaging deliberately in fight—Right of private defence—Public authorities, protection of, not claimed, effect of

There is no right of private defence where two parties arm themselves for a fight and deliberately engage in one.

A dispute arose over the possession of a plot of land between two parties of villagers. After an altercation each party retired to their own well and armed themselves with spears, hatchets and dangs. One party then advanced to attack the other and the latter came out to meet the attack. In the fight which ensued, one man on each side was killed and others received injuries. The thana was only a mile away and each party had ample time to send word to the Police and claim the protection of the Police Authorities, but neither of them did so:

Held, that the members of each party were guilty of offences under section 302 of the Penal Code, inasmuch as the common object of each party was to cause injury and hurt to those they attacked and they must have known that the use of the formidable weapons they used would in every likelihood result in the causing of death. **P SIKANDAR v. EMPEROR**, 36 P. R. 1918 Cr. 20 Cr. L. J. 83 **883**

ss. 107, 108, Expls. (2), (4),

109, 116—Abetment of abetment—'Abetment of offence,' meaning of—Abetment of abetment of offence not committed, whether offence.

Under Explanation 4 to section 109 of the Penal Code, when the abetment of an offence is an offence, the abetment of such abetment is also an offence. The words "when the abetment of an offence is an offence" do not mean when an abetment of an offence is actually committed. They mean when the abetment of an offence is by definition or description an offence under the Code, that is, when an abetment of an offence is punishable under section 109 or section 116 or some other provision of the Code, then the abetment of such abetment is also an offence.

One S, an agent or partner of one B. who was accused in a case on charges framed under sections 443, 473 and 480 of the Penal Code pending in the Court of the 1st Presidency Magistrate of Calcutta, voluntarily and without any coercion or threat approached K., the Bench Clerk of the Magistrate, intending to incite K. to instigate the Magistrate to take a bribe and to acquit B. K. then saw the Chief Presidency Magistrate of the Court with reference to the matter and played the part of a Police spy. When S made over to K. at the latter's place the bribe which was to be handed over by K. to the Magistrate, a Police Inspector, who was concealed behind a curtain, seized the money. S.

Penal Code—contd.

was then tried on charges framed under sections 161 and 109 of the Penal Code and convicted:

Held, that S, when he handed over the money to K, committed a distinct incitement of K to instigate the Magistrate to take a bribe and so was rightly convicted under section 109, even though no bribe had ever been offered to the Magistrate.

It makes no difference in the guilt of the abettor if the agent falls in with the plans of the abettor, knowing his criminal purpose, to cause its detection. **C SRILAL CHAMARIA v. EMPEROR**, 28 C. L. J. 370; 22 C. W. N. 1015; 20 Cr. L. J. 49

_____ s. 116	817
_____ s. 147	817
_____ s. 148	677
_____ s. 149	163, 883
_____ s. 182	677, 883
_____ s. 211	890
_____ s. 211	342

_____ **ss. 224, 323, 353**—*Escape from lawful custody—Warrant, defective, effect of—Arrest, legality of—Hurt caused to constable in rescuing person from custody—Offence.*

One L. was arrested by a constable under a warrant, which was not signed by the Magistrate issuing it and which was made over to the Thana Officer on an order purporting to have been made by the District Superintendent of Police but not signed by anybody. L. was rescued by the other accused, who caused unnecessary hurt to the constable in effecting the rescue.

Held, (1) that the warrant was defective and that the constable having purported throughout to act under the warrant, the arrest of L. was illegal and that the latter was not, therefore, guilty of any offence in effecting his escape;

(2) that the persons who effected L's rescue were guilty of an offence under section 323 of the Penal Code. **PAT MOUSI LAL v. EMPEROR**, (1913) PAT. 285; 50 P. L. W. 246; 19 Cr. L. J. 1000

_____ **s. 225B**—*Resistance to lawful arrest—Offence, ingredients of—Overt act, proof of.*

In order to constitute an offence under section 225B of the Penal Code, something more is required than an evasion of arrest or a mere assertion by the person sought to be arrested that he would not like to be arrested or that a fight would be the result of such arrest; there must be an overt act of resistance or obstruction. There must be positive evidence to show that the officer armed with a warrant of arrest produced the warrant and that the person sought to be arrested resisted such arrest. **P DEWA SINGH v. EMPEROR**, 33 P. R. 1915 Cr. 20 Cr. L. J. 64

_____ s. 302	832
_____ s. 302	833

_____ **s. 302**—*Murder—Death caused by lathis—Blows inflicted by several accused—Offence.*

Where several persons attack another with lathis and cause his death, they are all guilty of the offence of murder. **A DULLI v. EMPEROR**, 16 A. L. J. 418; 20 Cr. L. J. 22

_____ s. 323	502
_____ s. 325	340
_____ s. 325	677
_____ s. 353	340

_____ **s. 353**—*Criminal Procedure Code (Act V of 1898), s. 160—Police constable acting without*

Penal Code—contd.

written order, whether acting in discharge of duty—Assault—Offence.

The accused, on being asked by a Police constable to accompany him to the Sub-Inspector without a written order from the latter under section 160 of the Criminal Procedure Code, assaulted the constable:

Held, that the constable was not acting as a public servant engaged in the discharge of his duty, and that, therefore, the accused was not guilty of an offence under section 353 of the Penal Code. **N TUKARAM v. EMPEROR**, 20 Cr. L. J. 48

_____ **ss. 363, 365, 366**—*Kidnapping girl over 16 years of age—Offence—First information report, delay in making, effect of.*

Accused were charged under section 363, Indian Penal Code, with having kidnapped a minor girl from the guardianship of her parents. It appeared that although according to the prosecution the accused were seen taking the girl away at about midnight and the girl's father at once proceeded to the thana where he reached before sunrise, no report was recorded till 12 noon. It appeared further that the girl was over 16 at the time when she disappeared:

Held, (1) that as the girl was not a minor under 16 years of age the accused were not guilty of an offence under section 363, Indian Penal Code;

(2) that the extraordinary delay in making the first information report was very suspicious and the fact that the girl was over 16 strengthened the belief that she went off of her own accord and that consequently the accused could not be convicted under section 365 or 366, Indian Penal Code. **P MIRZA v. EMPEROR**, 19 Cr. L. J. 1011

_____ **ss. 365, 366**

_____ **s. 379**—*Theft—Crops grown by trespasser—Trespasser ejected by owner—Crops cut and taken away by landlord of trespasser—Offence.*

Complainant obtained a decree of ejectment against a trespasser and got into actual possession of the land. The trespasser had grown paddy on the land and when the crop was ready, the accused, acting on behalf of the trespasser, cut and removed the paddy:

Held, that after the complainant had obtained actual possession of the land, the trespasser or his representatives had no right to enter upon the land and to remove the paddy, and that, therefore, the accused were guilty of theft. **C ABINASH CHANDRA SARKAR v. ATUL KRISHNA BOSE**, 23 C. L. J. 120; 20 Cr. L. J. 38

_____ **ss. 408, 409, 477A**

_____ **s. 415**—*Cheating—Offence, ingredients of—Harm, not necessary consequence of act—Offence, whether committed.*

In order to constitute the offence defined in the second part of section 415 of the Penal Code:

(1) there must be deception practised upon a person;

(2) by that deception the person must be induced to do or omit to do something which he would not have done or omitted to do, had he not been so deceived;

(3) such act or omission must cause, or be likely to cause, to the person deceived damage or harm in body, mind, reputation or property.

To constitute the offence of cheating under section 415, Indian Penal Code, the damage or harm caused

Penal Code—concl'd.

or likely to be caused to the person deceived in mind, body, reputation or property must be the necessary consequence of the act done by reason of the deceit practised, or must be necessarily likely to follow therefrom.

The accused presented certain recruits before a Recruiting Officer, who rejected them. Subsequently the accused offered the same recruits to one M., on condition that the latter would pay Rs. 50 for each recruit. It was arranged, however, that the money would only be paid if the recruits were accepted by the Recruiting Officer. Before the Recruiting Officer it was discovered that the recruits had already been rejected:

Held, that there being only a possibility that M. might suffer annoyance owing to the discovery that the recruits had already been rejected and to the fact that his explanation might not be believed at once by the Recruiting Officer, the accused were not guilty of cheating under section 415 of the Penal Code. **P** EMPEROR *v.* MUHAMMAD SHAH, 34 P. R. 1918 Cr.; 20 Cr. L. J. 77 **877**

S. 477A **992**
S. 494—Bigamy—Christian wife's conversion to Islam, whether dissolves marriage—Law applicable—Subsequent marriage, whether bigamous.

A Christian marriage is not dissolved by the apostasy of one of the parties.

Where, therefore, the accused, a Christian wife, renounced Christianity and embraced Islam and then married a Muhammadan:

Held, that according to the Christian marriage law, which was the law applicable to the case, the first marriage was not dissolved and, therefore, the subsequent marriage was bigamous. **P** EMPEROR *v.* RURI, 20 Cr. L. J. 3; 5 P. R. 1919 Cr. **493**

Plaint inartistically drawn up, effect of.

The mere fact that a plaint has been inartistically drawn up does not alter the nature of the suit. **C** SAILAJA NATH ROY CHAUDHURY *v.* CHANDI CHARAN LAHA, 28 C. L. J. 301 **552**

Pleader, appointment of—Vakalatnama, defect in, effect of **14**

Pleadings—Declaration of title, suit for—Title by adverse possession not expressly set up—Decree for title by adverse possession, validity of.

The plaintiffs brought a suit for establishment of their Lakheraj title to a tank. They did not expressly set up in the plaint a title by adverse possession, but the plea of title by adverse possession was included in the statement of facts on which the plaintiffs based their claim for title and the issue of the plaintiffs' title by adverse possession was fought out on its merits in the first Court. The case set up by the defendants was not that the plaintiffs had been in permissive possession, but that they had never been in possession:

Held, that on the finding that the plaintiffs had been in possession for generations and that the defendants had never been in possession, the plaintiffs were entitled to a decree declaring their title by adverse possession. **C** SATYENDRA NARAYAN BAGCHI *v.* SASHI BHUSAN CHOWDHURY **448**

Power-of-attorney, construction of—Act done under power-of-attorney, challenged as being

Power-of-attorney—concl'd.

in excess of authority—Authority, proof of—Power to borrow, whether implies power to mortgage.

Where an act purporting to be done under a power-of-attorney is challenged as being in excess of the authority conferred by the power, it is necessary to show that on a fair construction of the whole instrument, the authority in question is to be found within the four corners of the instrument either in express terms or by necessary implication.

A power to borrow money does not necessarily imply a power to mortgage property.

Where a power-of-attorney authorised the agent to borrow money, to execute a bond, sign the name and present the same for registration on behalf of his principal and also added a general clause that the donor of the power will be bound by any acts done by the donee, and the agent in pursuance of that power mortgaged his principal's property:

Held, that the mortgage, though binding upon the principal as a loan, was not binding as a mortgage. **N** NARAYAN DAS *v.* CHANDRAHHAN **959**

Practice of Patna High Court—Calcutta High Court, uniform course of decisions of, whether to be followed.

Where there is a long course of decisions by the High Court of Calcutta upon a particular point, the Patna High Court will not depart from that settled course. **P**ATU SINGH *v.* EMPEROR, 3 P. L. J. 641; 20 Cr. L. J. 37 **677**

Pre-emption—Custom, proof of—Wajib-ul-arz, entry in, value of.

When considering the existence or non-existence of a custom of pre-emption the language of the entry in the *wajib-ul-arz* which is relied upon as a proof of the custom should be taken into consideration.

Where a *wajib-ul-arz* provided that when a stranger had obtained property under a sale or a mortgage, the co-sharers, in a certain order, were entitled to take the property in the case of a sale at sixteen years' purchase and in the case of a mortgage at eight:

Held, that the entry was wholly insufficient to prove a custom of pre-emption. **A** SURAJBALI SINGH *v.* MOHAMMAD NASIR, 16 A. L. J. 879 **220**

suit—Appeal by vendee—Pre-emptor, failure of, to pay extra sum directed by Appellate Court, effect of.

In an appeal by the vendee in a pre-emption suit the pre-emptor was directed by the Appellate Court to pay into Court an extra sum within the time fixed by the original Court. The pre-emptor had twelve days after the date of this order within which the amount could be paid into Court, but he failed to make the payment:

Held, that the consequence of the pre-emptor's default was that the decree became final and that his suit must be dismissed. **P**TURA BAZ *v.* HAMD AND CO., 92 P. L. R. 1918 **470**

suit for—Plaintiff suing for himself and others—Suit, whether liable to be dismissed.

The mere fact that a pre-emptor is suing not only for his own benefit but also for the benefit of persons who are not entitled to pre-empt the property, does not disentitle him from exercising his right of pre-emption.

Pre-emption—conold.

Poor and rich alike are equally entitled to the privileges of pre-emption and to hold that a poor man cannot seek the financial assistance of others in prosecuting his suit would be, in many cases, to disqualify him from the exercise of his rights.

P NEKI v. CHAJJU RAM, 111 P. W. R. 1918 **137**

suit—Price entered in sale-deed, fictitious plea as to—Prima facie case made out by pre-emptor—Burden of proof.

Where a pre-emptor pleads that the price entered in the sale-deed is fictitious and is able to put forward a *prima facie* case to that effect, the burden of proving that that price represents the real price of the property is thrown on the vendee.

O NAKCHHED v. ANGAD **513**

suit—Set-off, right to—Joinder of claims—Money left with vendee out of sale consideration to pay off incumbrances—Vendee, failure of, to discharge incumbrances, effect of.

A pre-emptor, who is also a prior mortgagee of the property sold, cannot in his suit for pre-emption claim in reduction of the purchase-money such interest to which he may have become entitled by reason of the failure of the vendee to pay to him and to the other creditors of the vendor moneys which had been left with him out of the sale consideration for discharging incumbrances on the property sold. **O CHHATARPAL v. HARDEO BAKHSH SINGH**, 21 O. C. 269 **744**

Principal and Agent—Pedigree filed by agent in suit to which principal was party—Pre-emption **308**

Power-of-attorney to collect debt—Right of agent to sell debt **756**

Principal and Surety—Suit against surety, whether maintainable without principal being sued **424**

Procedure—Burden of proof, party failing to discharge, through bad advice of Counsel—Re-hearing, whether can be allowed.

The mere fact that a party to a case did not adduce evidence owing to the bad advice of his Pleader, which resulted in a decision against him is no ground for allowing him a re-hearing of the case.

O PRAG DATT v. KANHAIYA LAL, 5 O. L. J. 695 **918**

Provincial Insolvency Act (III of 1907), ss. 2, 13—Joint family property, undivided share in, whether "property"—Receiver, appointment of.

A Receiver cannot be appointed under section 13 of the Provincial Insolvency Act in respect of an insolvent's undivided share in the property of the joint family of which he is a member. Such undivided share is not "property" as defined in section 2 of the Act. **O ANANT SINGH v. KALKA SINGH**, 5 O. L. J. 685 **526**

ss. 3, proviso, 43 (2), 46—Subordinate Judge declining to take action under s. 43—Appeal, whether lies—"Court" in s. 43, meaning of.

Per Teunon, J.—Against the order of a Subordinate Judge invested with insolvency jurisdiction in certain classes of cases under the proviso to section 3 of the Provincial Insolvency Act declining to take action against an insolvent under section 43 (2) of the Act, no appeal lies to the District Court.

Per Newbould, J.—The word "Court" in section 3 of

Provincial Insolvency Act—contd.

the Provincial Insolvency Act does not mean the Court of original jurisdiction only. **C DIGENDRA CHANDRA BASAK v. RAMANI MOHAN GOSWAMI**, 22 C. W. N. 958 **333**

s. 13 **526**
s. 16—Attachment of insolvent's property after adjudication, legality of—Vesting order, absence of, effect of—Action for money had and received, scope and extent of—Assignment by creditor of debt due to him and his co-creditors—Collection of whole debt by assignee—Mistake—Suit against assignee by real owner, maintainability of—Principal and agent—Power-of-attorney to collect debt—Right of agent to sell debt.

Defendants Nos. 2 to 4 and one R. were partners. R. was adjudicated an insolvent. The outstandings due to the partnership were sold in public auction by the Official Receiver, instead of R's share alone, which was a fourth, and were purchased by the 1st defendant. The 1st defendant, believing *bona fide* that he had purchased the whole debt due to the partnership, collected the debt. Plaintiff, who held a decree against defendants Nos. 2 to 4, attached the latter's shares in the debt. Before the attachment defendants Nos. 2 and 3 were adjudicated insolvents. The plaintiff, who was appointed Receiver in the suit in which the shares of defendants Nos. 2 to 4 were attached, brought the present suit for recovery of $\frac{3}{4}$ ths of the amount recovered by the 1st defendant from the partnership debtor as money had and received by the 1st defendant for the use of defendants Nos. 2 to 4:

Held, (1) that there being no privity between the plaintiff and the 1st defendant or between defendants Nos. 2 to 4 and the 1st defendant, the action was unsustainable;

(2) that the attachment effected by the plaintiff was void and of no effect as the shares of defendants Nos. 2 to 4 had, by their adjudication, become vested in the Official Receiver.

Per Oldfield, J.—Whether there is or is not a distinct order vesting an insolvent's properties in the Official Receiver, they become divisible among the creditors from the date of the adjudication in insolvency, which relates back to the petition.

An agent authorized by a power-of-attorney only to collect debts has no authority to realise their value or any part of it by selling them.

It may be permissible in India, as in England, to sue only the solvent members of a firm, when a decree is sought against the firm. **M RAMASAMI NAIDU v. MUTHUSAMIA PILLAI**, 35 M. L. J. 581; 41 M. 923; (1918) M. W. N. 795 **756**

ss. 16 (2), 28—"Debt provable under this Act," meaning of—Obligation incurred after adjudication, suit in respect of, maintainability of.

An obligation incurred by an insolvent after the date of his adjudication is not a debt provable in the insolvency proceedings within the meaning of section 28 of the Provincial Insolvency Act, so that a suit in respect of such obligation is not governed by section 16 (2) of the Act. **N GANGA PRASAD v. FIDA ALI CHANDABHAI** **913**

ss. 22, 26 (2), 46 (4)—General Clauses Act (X of 1897), ss. 4, 0, applicability of—Appeal to High Court—Limitation—Computation of time, method of—Exclusion of date of order and of

Provincial Insolvency Act—concl'd.

last day if dies non—S. 21 of Provincial Insolvency Act, applicability of, to applications under s. 22 (2).

In computing the period limited for appeals under the Provincial Insolvency Act, the principles of sections 9 and 10 of the General Clauses Act should be applied, i. e., the date on which the act appealed against is done and the last day, if *dies non*, should be excluded.

Applications under section 26 (2) of the Provincial Insolvency Act are not governed by the rule of limitation contained in section 22 of the Act. **M CHAVADI RAMASAMI PILLAI v. VENKATESWARA AIYAR**, 35 M. L. J. 531; 42 M. 13

— **s. 26 (2)** 952
 — **s. 28** 913
 — **s. 42**—Insolvency—Annulment of adjudication, effect of—Receiver, suit instituted by, whether maintainable after adjudication.

A suit instituted by the Receiver of the estate of an insolvent against a debtor of the insolvent during the pendency of the insolvency proceedings is not rendered unmaintainable on the annulment of the adjudication. **A MANNU LAL v. NELIN KUMAR MUKERJI**, 16 A. L. J. 938

— **s. 43 (2)** 333
 — **s. 46** 203, 333
 — **s. 46 (4)** 952
 — **s. 47** 203

Provincial Small Causes Courts Act (IX of 1887), s. 23—Return of plaint in suit involving question of title—Court, power of.

Under section 23 of the Provincial Small Causes Courts Act a Small Cause Court has power to return a plaint, to be presented in the Court having jurisdiction to determine the question of title raised in the suit, even though the question is alleged to be *res judicata* by reason of a previous suit between the plaintiff and the lessor of the defendant. **C KHETTRA MOHAN SINGH v. SHIB DAS CHANDER** 612

— **s. 25**—Revision—Different view of evidence, whether ground for interference.

The fact that the Revisional Court might take a different view of the evidence from that taken by the Court of Small Causes is not a justifiable ground for interference in revision under section 25 of the Provincial Small Causes Courts Act. **N LOBHAGI v. NARAYAN** 907

Sch. II, Art. 31—Suit for money with prayer for looking into accounts, whether suit for accounts—Jurisdiction of Small Cause Court

A suit to recover money which is cognizable by a Small Cause Court, does not become a suit for an account under Article 31 of the Provincial Small Causes Courts Act merely because accounts have to be looked into in order to ascertain the correctness or otherwise of the amount claimed by the plaintiff. **M UKKANDAN NAYAR v. SANKARA VARMA RAJA**, (1918) M. W. N. 717; 24 M. L. T. 453

Punjab Land Revenue Act (XVII of 1887), ss. 48, 158 (1)—Jurisdiction of Civil and Revenue Courts—Jagirdar, suit by, for declaration that he is entitled to receive land revenue in kind, maintainability of.

The plaintiff, a jagirdar or assignee of the land revenue of a village, sued the proprietors and tenants of the village for a declaration that he was entitled to recover one-fourth share of every kind of

Punjab Land Revenue Act—concl'd.

produce of the lands in the village and Rs. 2 per annum per well as *malikana* from the tenants and that the proprietors were only entitled to a one-fifth share out of it and had no right to interfere with the realisation by the plaintiff of the said share of the produce:

Held, that the suit as laid involved the question whether in the village in dispute land revenue should be paid to the *jagirdar* in cash or in kind, and that, therefore, it was not cognisable by a Civil Court, the matter being one which under section 48 of the Punjab Land Revenue Act only the Local Government could decide. **P JIWAN DAS v. PIRAN DITTA**, 110 P. R. 1918

— **s. 117** 788
 — **s. 117**—Partition of *shamilat*—Decision of Revenue Officer, whether *res judicata*—Procedure.

The question whether the *shamilat* of a village should be partitioned in accordance with ancestral shares or *hasab rasad khewat* is a question of title, within the meaning of section 117 of the Punjab Land Revenue Act and is triable by a Civil Court.

Where a Revenue Officer without observing the formalities of a trial by a Civil Court decided that the *shamilat* of a village should be partitioned in accordance with ancestral shares:

Held, that the proceedings of the Revenue Officer not being taken under section 117 of the Punjab Land Revenue Act, his decision could not operate as *res judicata* in a subsequent civil suit. **P FAIZ BAKSH v. NIAMAT KHAN**, 105 P. R. 1918

— **s. 158 (1)** 365
Punjab Pre-emption Act (I of 1913), s. 15 (c)—Patti, whether sub-division of village

—Question of fact.

The question whether the *pattis* of a village are real sub-divisions of the village within the meaning of section 15 (c), *secondly*, of the Punjab Pre-emption Act is a question of fact. For the decision of that question the Court should have regard only to the fact whether the *pattis* are actual sub-divisions of the village, and not for what reason the sub-divisions were made. **P WARYAM SINGH v. HARNAM SINGH**, 109 P. R. 1918

Punjab Tenancy Act (XVI of 1887), ss. 14, 50, 77 (3) (g)—Landlord and tenant—Tenant, wrongful dispossession of—Suit for possession and compensation—Limitation—Jurisdiction of Civil and Revenue Courts.

A tenant who has been wrongfully dispossessed of his tenancy by his landlord, can institute a suit for recovery of possession or for compensation or for both only in a Revenue Court under section 77 (3) (g) of the Punjab Tenancy Act, and the period of limitation within which such a suit can be brought is, as laid down in section 50 of the Act, one year from the date of his dispossession. If he allows that period to expire without bringing a suit in the Revenue Court, he loses his remedy altogether and is debarred from bringing a suit for recovery of possession or for compensation or for both in a Civil Court. **P AKBAR HUSSAIN v. KARN DAD**, 90 P. R. 1918

— **s. 50** 8
 — **s. 77 (3) (d)**—Jurisdiction of Civil and Revenue Courts—Occupancy tenant, death of—Reversioner of deceased, claiming to succeed to oc.

Punjab Tenancy Act—conold.

cupancy—Suit by landlord to eject reversioner, nature of.

Where on the death of an occupancy tenant an alleged reversioner of his claims to succeed to his rights on the ground that the common ancestor of himself and the deceased tenant had occupied the land, his claim does not fall within clause (d) of sub-section (3) of section 77 of the Punjab Tenancy Act, and is, therefore, not one which can under the said sub-section be heard and determined only by a Revenue Court.

A suit by the landlord to eject the reversioner on the ground that he is not entitled to succeed to the land as occupancy tenant thereof, is cognisable by a Civil Court and not by a Revenue Court. **P GHULAM v. JOWALA SINGH**, 103 P. R. 1918; 179 P. W. R. 1918 **363**

s. 77 (3) (g)

Railways Act (IX of 1890), s. 76—
Suit against Railway Company for compensation for loss of goods—Burden of proof.

Under section 76 of the Railways Act a plaintiff suing a Railway Company for compensation for loss of goods has ordinarily only to prove the loss. Thereupon it is for the Railway Company to show that the loss occurred under circumstances which exempt a bailee from responsibility for the loss, or it may rely upon a special contract exempting it from liability.

Where, however, a risk-note exempts the Railway Company from all liability except in certain specified circumstances, the plaintiff can only succeed if he establishes that his case comes within those exceptions. **N AGENT, G. I. P. RAILWAY v. KARAYA LAL**, 14 N. L. R. 122 **294**

s. 80—Suit against Railway Company for compensation for loss of goods—Burden of proof—Goods carried over two Railways—Decree against both, legality of.

Under section 80 of the Railways Act a decree can be passed against a Railway Company to whom the goods were not entrusted for carriage, only if it is proved that the loss occurred while the goods were in the custody of that Company. In no case can a decree be passed against both the Companies under that section. **N AGENT, G. I. P. RAILWAY v. KARAYA LAL**, 14 N. L. R. 122 **294**

s. 122, scope of—Entry, original, lawful—
Breaking open lock of waggon without permission, whether renders entry unlawful.

Accused, a *dulal*, entered the Railway goods shed line to take delivery of a consignment on behalf of the consignee and without the permission of the goods clerk broke the seal of a waggon. It was found that *dulals* were allowed to enter the goods shed without express permission from a Railway servant:

Held, (1) that the accused could not be convicted under section 122 (1) of the Railways Act as the original entry being lawful, the subsequent unlawful act did not relate back and render the entry unlawful;

(2) that as the accused never refused to leave the Railway on being requested to do so, he could not be committed under sub-section (2) of section 122.

Sub-section 1) of section 122 of the Railways Act makes an unlawful entry punishable and sub-section

Railways Act—conold.

(2) provides for cases where the original entry was lawful as well as unlawful **N BASHIR AHMED v. EMPEROR**, 20 Cr. L. J. 96; 15 N. L. R. 34 **896**

Recitals in deed, evidentiary value of.

The recitals in a deed of sale as to the object of the sale or the intended appropriation of the consideration therefor are evidence, especially where the document is an old one, of the representation made to the purchaser. **M AMERICAN BAPTIST FOREIGN MISSION SOCIETY v. AMMALANADHUNI PATTABHIRAM-AYYA** **859**

Record-of-Rights, entry in, value of **473**
Registration Act (XVI of 1908), s.

17—Compromise deed settling family dispute, whether requires registration.

The question whether or not a document in the nature of a compromise requires registration depends upon whether or not it purports to create a fresh title in favour of any of the parties to it. Where there is in reality no creation of a fresh title but merely an acknowledgment from each of the parties of a title pre-existing in the others, the compromise does not require to be registered. **O HARPAL SINGH v. SUKHRANI**, 21 O. C. 220 **119**

ss. 17, 50—Vendee claiming under unregistered deed, position of—Vendee under subsequent registered deed, whether can eject prior vendee.

The possession of a vendee who claims title under a sale-deed which for want of registration is inadmissible in evidence, is that of a trespasser, and until such possession matures into ownership by prescription, such vendee is liable to be ejected from the property by a subsequent vendee under a registered deed of sale. **P UTTAM CHAND v. JANJIRAM**, 111 P. R. 1918 **390**

s. 28—Mortgage-deed—Property not belonging to mortgagor included in deed—Registration in district in which such property situate, validity of.

Where property which is admitted to be in existence but which does not belong to the mortgagor is included in a mortgage-deed, the fact that the document is registered in the district in which that property is situate and that that property is the only property hypothecated within the registration district, is not sufficient, in the absence of any collusion between the parties or of knowledge on the part of the mortgagee, to invalidate the registration of the deed. **A PAHLADI LAL v. LARAITI**, 16 A. L. J. 871 **200**

s. 49—Lease unregistered, admissibility of, to prove covenant to compensate for improvements—Collateral fact, what is.

An unregistered instrument is admissible in evidence to prove a collateral fact, but to be collateral, the fact must be independent of or separable from the purpose to effect which the law requires registration.

Plaintiff sued defendant for compensation for improvements effected by him while he was a lessee of a village under the defendant, and in support of his claim relied on an unregistered deed of lease which contained an implied condition to compensate him for improvements:

Held, that the deed of lease was inadmissible in evidence under section 49 of the Registration Act, inasmuch as the plaintiff was seeking to prove the terms of the lease for the purpose of enforcing those

Registration Act—conold.

terms, and not merely for a collateral purpose.
N KALICHARAN v. LAL INDAR SHAH, 15 N. L. R. 31

923
 — s. 50 390
Religious Endowments Act (XX of 1863), s. 14 514

Restitution of conjugal rights, suit for—Disagreement between families of husband and wife, whether ground for refusing relief—Discretion of Court.

A mere disagreement between the families of the husband and the wife is not by itself a sufficient cause for refusing relief to the husband in a suit for restitution of conjugal rights.

In a suit for restitution of conjugal rights it was found that the marriage had not been consummated, that there was bad feeling between the families of the husband and of the wife and that the wife refused to go to her husband at the dictation of her parents:

Held, that under these circumstances relief could not be refused to the plaintiff. **P BAJID v SATTO**, 182 P. W. R. 1918 231

Revenue papers, entry in, weight of 153
Riwaj-i-am and wajib-ul-arz, entries in, value of.

At the time when *riwaj-i-ams* and *wajib-ul-arzes* were first prepared, acquisition of property by purchase or otherwise being of rare occurrence, no inquiry took place regarding succession to such property. Therefore, in the absence of a clear statement to the contrary, an entry in a *riwaj-i-am* or a *wajib-ul-arz* must be taken to refer merely to ancestral property. **P BUDDHI PARKASH v. CHANDER BHAN**, 123 P. R. 1918 813

Sale by private contract of property belonging to company in liquidation—Interests of creditors and contributories prejudiced—Sale, whether liable to be set aside.

In an appeal against an order sanctioning the sale of the Diamond Jubilee Flour Mills, Delhi, it appeared that the Mills were leased to the vendees for a period of 3 years commencing from 1st January 1917, one of the conditions of the transaction being that the lease could be determined by either party after giving six months' notice to the other, provided that the Liquidator before resuming possession on the expiry of the period of notice should pay Rs. 5,000 to the lessees. In June 1917, the Liquidator served a notice upon the lessees requiring them to quit the premises on 31st December 1917. On the 8th October 1917 the Additional Judge, Delhi, asked the Liquidator to withdraw the notice and even granted the request of the lessees that in lieu of their agreeing to the withdrawal of the notice the Liquidator should be debarred from determining the lease in any case during its continuance for the remaining period. The District Judge rejected a higher offer than that of the vendees on the ground that they were already in possession and that possession could not be given to anybody else till the expiry of six months:

Held, (1) that the order allowing the lessors to remain in possession was wholly without justification, especially when there was no affidavit from the Liquidator that the alleged compromise was beneficial to the persons interested in the winding up;

Sale—conold.

(2) that the price being wholly inadequate, the sale by private contract to the vendees was detrimental to the interests of the creditors and contributories of the company and ought to be set aside. **P KUNDAN LAL v. OFFICIAL LIQUIDATOR, DIAMOND JUBILEE FLOUR MILLS CO., LTD.** 919

Shamilat—Proprietor building over part of shamilat—Suit by another proprietor for removal of building, maintainability of—Special damage, proof of.

Where one of the proprietors of a village sates another proprietor for the removal of buildings erected by the latter on a part of the village *shamilat*, whether within the *abadi* or not, and it is found that the defendant has not taken more than the share which would fall to him on partition and that no special damage has been caused to the plaintiff, the suit is liable to be dismissed. **P LEKHU v. HANWANTA**, 114 P. R. 1918; 176 P. W. R. 1918 418

Specific Relief Act (I of 1877), s. 9

—Decree for possession of land and crops—Crops cut and removed by defendant—Damages, suit for, maintainability of.

Plaintiff obtained a decree under section 9 of the Specific Relief Act for the possession of a piece of land and the crops growing thereon, but before the decree could be executed the defendant cut and removed the crops. Thereupon the plaintiff brought a suit to recover the value of the crops:

Held, that the defendant could not by cutting and removing the crops annul the effect of the possessory decree, and that, therefore, the plaintiff was entitled to the value of the crops, although the question of title had not been decided in the previous suit. **A MUNNA SINGH v. AUSAN SINGH**, 16 A. L. J. 924 422

— s. 9—Possession, suit for—Constructive possession, whether sufficient.

In suits under section 9 of the Specific Relief Act the ordinary rule of possession going with title should be followed in deciding whether a person has been dispossessed within six months of the date of the suit. In order to bring this section into operation it is not necessary that the possession which is lost should be the actual physical occupation of the property. Constructive possession which goes with title would suffice for the purposes of the section. **N GHULAM v. SHEODIN RAM** 415

— s. 9—Possessory suit, whether can be dismissed on ground of want of title.

In a suit under the provisions of section 9 of the Specific Relief Act, the plaintiff on proving his possession and dispossession as mentioned in the section is entitled to be restored to possession.

Where in a suit under section 9 of the Specific Relief Act, the Court after finding that the plaintiff was in possession dismissed the suit on the ground that the plaintiff's possession was without title:

Held, that the plaintiff was entitled to be restored to possession. **C HARIMCHON ROY v. KHALIL BEPARY** 433

— s. 39 370

— s. 42, applicability of 359

— s. 42, scope of—Declaration of past right, suit for, maintainability of.

Section 42 of the Specific Relief Act provides for the declaration of a present legal character or a

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present legal right. It has no application to a case where the plaintiff seeks a declaration as to a right which has ceased to exist. **PAT RAM SUNDER SAHU v. RAM NARAIN SAHU** 936

S. 42, proviso—*Plaintiff in possession of half house—Declaration, suit for, in respect of whole, maintainability of—Consequential relief—Amendment of plaint, whether can be allowed.*

Plaintiff, who was in possession of half of a house, sued the defendant, who was in possession of the other half, for a declaration of title in respect of the whole of the house:

Held, (1) that the suit was bad under the proviso to section 42 of the Specific Relief Act, inasmuch as the plaintiff could have sued to eject the defendant from the portion of the house of which he was in possession;

(2) that the plaintiff could not be allowed in appeal to amend the plaint so as to convert the suit into one for ejectment. **P SHIV RAM DAS v. BRAG DEVI**, 118 P. R. 1918 838

S. 45

S. 45—*High Court, powers of, exercise of—Delay in presenting petition, effect of—Public officer refusing to entertain petition—High Court, order of, form of.*

Section 45 of the Specific Relief Act gives certain powers to the High Court, which the High Court can exercise subject to the conditions which are specified in the provisos to the section.

The conditions contained in provisos (a) to (c) of the section are cumulative.

In exercising the powers conferred upon it under section 45 of the Specific Relief Act, the High Court should, in all cases, regard its exercise of the extraordinary jurisdiction as discretionary, and subject to considerations of the importance of the particular case or of the principle involved in it, or of delay on the part of an applicant, and of his merits with respect to the case in which the interference of the Court is sought. Should other special causes appear for or against the Court's intervention, due weight ought to be given to them, regard being always had to the principles already enunciated.

The respondent, who was a candidate for election as a Municipal Commissioner of the Corporation of Calcutta, applied to the Chairman of the Corporation to reject the nomination paper of the appellant, a rival candidate, on the ground that the nomination paper did not contain any description of the appellant and that he had been seconded by one who was not a voter. The application was made two weeks after the appellant had sent in his nomination paper and two days before the day fixed for the election. The Chairman declined to entertain the application, on the ground that it was made too late. On the following day, i.e., on the day previous to the election the respondent applied to the High Court under section 45 of the Specific Relief Act, and obtained an order that the name of the applicant be expunged from the list of nominated candidates. On the next day, i.e., on the day for the election, the election took place, and the name of the appellant having been expunged from the list, the respondent as the only candidate was deemed elected. The appellant appealed against the order directing the expunging of his name from the list of candidates and the

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appeal came on for hearing on the day after the election:

Held, (1) that having regard to the facts of the case and especially to the delay in presenting the petition by the respondent and the fact that no one could possibly be misled by the description in the nomination paper, it was a matter of considerable doubt whether the case was one in which the High Court should have interfered;

(2) that the order of the Court should have been limited to a direction to the Chairman to entertain the application which he had wrongly refused to entertain on the ground that it was too late;

(3) that the appeal must fail, inasmuch as the election had taken place, and a decision in favour of the appellant would be infructuous. **C MANI LAL NAHAR v. MOYDAD RAHAMAN**, 22 C. W. N. 951 736

Stamp Act (II of 1899), s. 3 (c)—*Instrument executed outside British India not relating to any property situate in British India, whether chargeable with stamp duty.*

An instrument executed outside British India and not relating to any property situate or to any matter or thing done or to be done in British India is not chargeable with stamp duty under the Stamp Act. **L. B. MAWCHI MINES, In re**, 11 BUR. L. T. 126 187

Succession—Possession, suit for, by reversioners—*Burden of proof.*

In a suit by the reversioners of a deceased proprietor for possession of the property left by the deceased, the onus lies on the plaintiffs not only to prove that they are the reversioners entitled to succeed but that they are the only nearest reversioners; at any rate they must satisfy the Court that to the best of their knowledge there are no nearer heirs. **N HAZARILAL v. HAR GOVIND** 375

Succession Certificate Act (VII of 1889), ss. 4 (1), 16, 18—*Assignee of certificate holder, suit by, maintainability of—Assignment before grant of certificate, effect of.*

An assignee of a person to whom a succession certificate has been granted is entitled to sue for a debt due to the assignor and to obtain a decree thereon without obtaining a certificate in his own name.

The certificate, until revoked, affords protection to the assignee, though it was obtained by the assignor after the assignment. **M ARUNACHALA CHETTIAR v. MUTRU**, 35 M. L. J. 666 735

ss. 16, 18

Trading with enemy—Royal Proclamation of August 5, 1914—*Contract to buy German goods—Goods shipped from Germany before War—Price of goods demanded after outbreak of War and prohibition of trade with enemy—Buyer, whether bound to pay.*

Sometime before the outbreak of War A entered into a contract with B at Rangoon. Under the contract A was (i) to buy certain goods in Germany, (ii) to obtain a contract of affreightment to Rangoon, (iii) to take out a policy of insurance, and (iv) to ship the goods in July 1914. B on his part agreed to buy those goods from A for a price which was fixed c. i. f. Rangoon. A performed his part of the contract and on the 12th August 1914 caused to be

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presented to B. for acceptance a bill of exchange covering the price, etc., of the goods and payable ninety days after sight. Along with the bill of exchange were tendered the bill of lading, invoice and insurance note. B. refused to accept the bill of exchange as well as the documents of title, inasmuch as the War having broken out on the 4th of August, the ship containing the goods was seized by the Belgian Government and trade with Germany was prohibited by the Royal Proclamation, dated the 5th August 1914:

Held, (1) that the Royal Proclamation rendered the contract abortive and illegal and so void;

(2) that the effect of the outbreak of the War was that the contract of affreightment was dissolved;

(3) that A was bound to tender and B was entitled to get valid and effective documents by which B could recover what might be lawfully recovered under such documents, but as A did not and could not tender such documents in respect of the contract of affreightment, B was entitled to refuse to pay against them. **L B BUCHANAN v. MALL, 11 BUB L. T. 84 310**

Transfer of Property Act (IV of 1882), s. 6 (a) 396

s. 41—Transfer by ostensible owner—Transferee, position of—Enquiry, reasonable, effect of.

Defendant purchased a mahal from the farzidar of the plaintiff after making reasonable enquiries which satisfied him that the farzidar was the real owner of the mahal:

Held, that the defendant being a bona fide purchaser for value from the ostensible owner, the plaintiff was debarred by section 41 of the Transfer of Property Act from setting up his title to the mahal. **PAT RAM SUNDER SAHU v. RAM NARAIN SAHU 936**

s. 43, applicability of—Erroneous representation—Knowledge, of transferee, effect of.

Before section 43 of the Transfer of Property Act can be brought into operation, there must in fact have been an inducement by erroneous representation. The section does not apply where the transferee has knowledge that the representation made by the transferor is not true. **PAT CHAKRAPANI NANDI v. GAYAMONI DASI, (1918) PAT. 278; 5 P. L. W. 219 228**

s. 51:

Section 51 of the Transfer of Property Act does not apply to tenants. **N BANMALI v. Nihal Singh 354**

s. 51—Purchase in good faith from limited owner—Improvement effected by purchaser—Purchaser, position of.

The principle of section 51 of the Transfer of Property Act applies to a purchase from a Hindu widow, where the purchaser believing in good faith that he has acquired an absolute title to the property, effects improvements on it, but it is afterwards held that there was no necessity for the sale.

In such a case the person seeking to set aside the sale is entitled to the market value of the property at the time of suit, excluding the value of the improvements effected by the purchaser. **M**

AMERICAN BAPTIST FOREIGN MISSION SOCIETY v. ANNALANADHUNI PATTABHIRAMAYYA 859

s. 52

Transfer of Property Act—concl'd.

s. 52—Lis pendens, doctrine of, applicability of 188

s. 53—Sale—Preference shown to some creditors—Transaction, whether voidable.

Preference shown to some creditors is not a ground for holding that a transaction comes within the scope of section 53 of the Transfer of Property Act. **N RAMSA HARANSA v. RATANSA 783**

s. 55—Vendor and purchaser—Vendor, whether entitled to claim interest on unpaid purchase money.

Under section 55 of the Transfer of Property Act a vendor has a right to claim interest on the unpaid purchase-money, unless he has by his own conduct disentitled himself to it. **O ADITYA PRASAD v. MUHAMMAD MUBARAKALI SHAH, 21 O. C. 284 257**

s. 58—Interest Act (XXXII of 1889)—

Mortgage not providing for interest—Discretion of Court to allow interest.

The question whether in a suit to enforce a mortgage by way of conditional sale where no interest is provided for in the deed, the Court should have in its discretion allowed interest in accordance with the terms of the Interest Act, cannot be raised in second appeal unless it was raised in the lower Appellate Court. **C CHANDRA MOYI CHOWDHURANI v. GREGSON 465**

s. 59—Mortgage bond—Attestation—Scribe executing bond on behalf of mortgagor, whether attesting witness.

The scribe of a mortgage bond who executes the document for and on behalf of the mortgagor is not competent to attest his own signature.

A mortgage bond purported to be attested by the scribe and another witness. The mortgagor being an illiterate man, the document was executed by the scribe for and on behalf of the mortgagor and no mark or thumb impression of the mortgagor appeared on the bond:

Held, that the bond was not attested by two witnesses as required by section 59 of the Transfer of Property Act. **C RAJANI KANTA BHADRA v. PUN-CHANANDA, 23 C. W. N. 290 720**

s. 60—Mortgage, redemption of—Partial owner of equity of redemption, whether can redeem whole mortgaged property.

A partial owner of the equity of redemption is entitled to redeem the whole of the mortgaged property in opposition to the wishes of the mortgagee.

The general rule is, that a person, who has any right at all to redeem, has a right to redeem the whole of the mortgaged properties and cannot be compelled to redeem only the part in which he is interested. **C PROTAP CHANDRA DHAR v. PEARY MOMUN DHAR, 22 C. W. N. 800 669**

ss. 60, 62—Mortgage, usufructuary—Discharge of mortgage by appropriation of usufruct working out for 37 years—Redemption, clog on—Option to redeem before term, whether personal covenant—Failure to exercise option, effect of—Suit to redeem before, expiry of original term, whether premature—'Payable' in s. 60, meaning of—Tender, failure to make, on due date, effect of.

A postponement of the right to redeem a usufructuary mortgage for a period of 37 years is not a clog on the equity of redemption. Section

Transfer of Property Act—contd.

62 of the Transfer of Property Act itself recognizes the validity of such covenants.

Under the terms of a usufructuary mortgage executed in 1902 the property was put in possession of the mortgagees and it was stipulated that the mortgage amount should be worked off by applying the usufruct in discharge, firstly, of the principal, and secondly, of the interest. In that way the mortgage could be discharged after 37 years. There was another stipulation that if payment of what was then due was made on 12th January 1912 the property should be handed over to the mortgagor, but if such payment was not made the mortgagees' possession was to continue on the same terms as before. No payment was made on 12th January 1912 but a suit for redemption was brought in 1916:

Held, that the postponement of redemption for 37 years, which was the necessary result of the mortgage covenant, was not a clog on the equity of redemption.

Held, also, (Krishnan, J., *dubitante*), that the option to redeem on 12th January 1912 was not a personal covenant, but was a provision inserted for the mortgagor's benefit and the option not having been exercised on the due date, the suit for redemption brought before the expiry of the original term was premature.

Per Krishnan, J.—Even assuming that section 60 applies and not section 62 (a) of the Transfer of Property Act, the suit must still fail as no tender was made on that day and as the right to make the tender or to redeem was not subsisting after that date or when the suit was brought. It is a necessary condition under section 60 that, when payment or tender is sought to be made, the mortgagor must have the right to make it, as the section speaks of the payment or tender of the mortgage money "at a proper time." For the time to be proper, the tender or payment must be one validly and properly made; and for that, the person making it must have at the time the legal right to make it.

The word 'payable' in section 60 seems to refer to the mortgagor's right rather than to his obligation and to imply no more than that the mortgagor should have a right to pay, the mortgagee being under a corresponding obligation to receive.

A covenant may be bad as a clog or it may be bad as an unconscionable bargain. The two are distinct and independent grounds. **M AGA MAHAMADALLY BEG v. CHANDRAGIRI VENKATAPAYYA**, 35 M. L. J. 287

s. 61

s. 62

s. 76

Contract Act (IX of 1872), s. 69—Mortgage, usufructuary—Mortgagee's position of—Under-proprietary plots, rent of, paid by mortgagee, whether can be claimed against mortgagor—Contribution, suit for.

A usufructuary mortgagee of under-proprietary plots is, in the absence of any stipulation to the contrary entered in the mortgage-deed, bound, under the provisions of section 76 of the Transfer of Property Act, to pay to the superior proprietor the rent due in respect of those plots, and is, therefore, not entitled to recover it by way of contribution

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from the mortgagor under the provisions of section 69 of the Contract Act. **O GAYA PRASAD v. SADA SUKH**

ss. 83, 84—Mortgage suit—Deposit after institution of suit—Interest, whether ceases—Costs, inclusion of, in mortgage amount.

A deposit under section 83 of the Transfer of Property Act is invalid if made after the institution of a suit by the mortgagee. No exception to the rule is made in favour of allowing a mortgagor to deposit the money before he receives notice of the suit but after its institution.

Obiter.—Where a suit on a mortgage has been instituted, the mortgage amount will include the costs of the suit and even if a deposit could be made after suit, it must include the plaintiff's costs. **M THIAGARAJA AIYAR v. RAMASWAMI AIYAR**, 35 M. L. J. 605

ss. 88, 89—Mortgage suit—Preliminary decree—Order absolute under section 89, Transfer of Property Act, after 1st January 1909, validity of—Execution of decree Estoppel—Objection not taken in previous proceedings, whether can be taken in subsequent proceeding—Application asking for sale different properties, whether in continuance of previous application—Mistake in entering date of decree, whether material defect.

Where before the coming into force of the Civil Procedure Code of 1908, a preliminary decree in a mortgage suit had been obtained under section 88 of the Transfer of Property Act, and the judgment-debtor having made default in payment of the decretal amount, an application for an order absolute under section 89 of the Act had been made, and notice served on the judgment-debtor:

Held, (1) that the proceedings for order absolute were pending proceedings and were not, therefore, under section 6 of the General Clauses Act, affected by the repeal of section 89 of the Transfer of Property Act;

(2) that, therefore, the decree to be executed was the preliminary decree made absolute by the order of the Court, and that the proceedings being under section 89 of the Transfer of Property Act no final decree was necessary.

Where an order absolute for the sale of mortgaged properties was made under section 89 of the Transfer of Property Act during the lifetime of the mortgagor judgment-debtor and with notice to him and no objection was taken by him, it is not open to his legal representative to question the validity of the order made in execution proceedings.

Where several successive applications for execution of a decree are admitted and orders are passed thereon by a competent Court, without any objection being taken by the judgment-debtor regarding the validity of the decrees, it is not open to him in a subsequent execution proceeding in respect of the same decree to contend that there is in fact no decree which can be executed.

A decree-holder is entitled to treat an application for execution of a decree as in continuation of a previous application even when he wants to proceed to sell different properties.

An execution proceeding can only be vitiated by material defects.

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A mistake in entering the date of the decree in an application for execution is not a material defect so as to vitiate the proceedings. **Pat KESHAWESARINDRA SAHI v. DEBENDRA BALA DASSI** 245

— **s. 90** 732
— **s. 100** 794

— **Ch. V, Lease, agricultural—Ch. V, whether applicable—Ejectment—Notice, reasonable.**

A lease of a village or of a share in a village for the purpose of bringing it under cultivation is a lease for agricultural purposes and the provisions of Chapter V of the Transfer of Property Act do not apply to it as laid down in section 117 of the Act.

In the case of an agricultural lease the tenant is entitled to a reasonable notice before ejectment. What is a reasonable notice is a question of fact.

A notice giving the tenant more than six months for vacation is a reasonable notice. **N BANMALI v. NIHAL SINGH** 354

— **s. 106—Landlord and tenant—Notice to quit—Requisites of valid notice—Service on one of several joint tenants—Presumption—Delivery by post, effect of.**

The principles governing the sufficiency of notices to quit served by landlords upon their tenants are the same in India as in England. Such notices may be good and effective in law, even though not strictly accurate or consistent: the test of their sufficiency is not what they would mean to a stranger ignorant of all the facts and circumstances touching the holding to which they purport to refer, but what they would mean to tenants presumably conversant with such facts and circumstances. Such notices are to be construed so as to effectuate the intention of the parties, "*ut res magis valeat, quam pereat*."

Section 106 of the Transfer of Property Act only requires that a notice to quit should be tendered or delivered to the party intended to be bound by it, either personally or to one of his family or servants at his residence, or if such tender or delivery be not practicable, affixed to a conspicuous part of the property. The personal tender or delivery may take place anywhere: the vicarious tender or delivery must be made at the residence of the person intended to be bound.

In the case of joint tenants service of a notice to quit upon one is *prima facie* evidence that it has reached the others.

There is a presumption that a notice to quit posted in a letter properly addressed to the person intended to be bound reaches that person. Such presumption applies with still greater force to letters which are registered, and is not rebutted but strengthened by the fact that a receipt for the letter is produced signed on behalf of the addressee by somebody else. **P C HARIHAR BANERJI v. RAMSASHI ROY**, 23 C. W. N. 77; 16 A. L. J. 969; 35 M. L. J. 707; 29 C. L. J. 117; 9 L. W. 148 277

— **s. 111 (g)** 301

Trust, charitable—Trustee mixing trust funds with private funds—Presumption—Burden of proof—Trustee, removal of—Misconduct—Scheme for management—Strangers, association of, with trustee, incompetency of.

Where the trustee of a charitable endowment mixes up his private funds with the trust funds in the accounts, the presumption is that the whole of

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the funds belong to the trust and the onus is on the trustee to show that any portion of them is his private property.

A Court will not be justified in removing a trustee who has long held the office at the instance of strangers who have no better title, in the absence of clear proof of the trustee's misconduct.

In framing a scheme for the management of a trust, the association of strangers with the trustee which is likely to lead to friction should be avoided. Provision must, however, be made for periodical auditing of the accounts and for their inspection by those interested in the trust. **M SUBBAROYA CHETTI v. SUBBRAMANIA IYER**, (1918) M. W. N. 786 833

— **public—Trustee, hereditary, removal of—Misconduct of trustee—Inefficient management—Accounts, failure to keep—Mixing up trust moneys with private funds—Expenditure in excess of income, credit for, whether can be allowed.**

The duty of a trustee is to carry out the directions of the founder and not to encumber the trust property by systematically incurring expenditure beyond the limits of its income, nor can he claim credit for such expenditure.

If the continuance of a person who is a hereditary trustee and a descendant of the founder in the office is likely to endanger the interests of the institution, he is liable to be removed. It is not, however, every mistake or neglect of duty or inaccuracy of conduct that will induce a Court to remove a trustee. The acts or omissions must be such as to endanger the trust property or to show a want of honesty, or a want of proper capacity to execute the duties of the office or a want of reasonable fidelity.

One of the most important duties of a trustee is to keep separate and distinct accounts of the trust property and to keep the trust property separate from his own property. The omission to perform this duty will entail the removal of the trustee.

In order to justify the dismissal of a trustee it is not necessary to show that he has dishonestly misappropriated the trust funds. It is enough if he is a necessitous man who may not resist the temptation to misappropriate trust funds, or that his want of prudence in managing his own affairs does not warrant the hope that he would successfully manage an endowment.

Where a trustee is found guilty of misappropriation, the proper course is to dismiss him and not to suspend him till he makes good the amounts misappropriated. **M ZEMINDAR OF KALAHASTI v. GANAPATHI IYER**, (1918) M. W. N. 555 897

Trusts Act (II of 1882), s. 23 (c), applicability of, to public trusts.

The rule laid down in section 23 (c) of the Trusts Act, though applicable only to private trusts, may be adapted in the case of public trusts with such modifications as the circumstances of each case require. **M ZEMINDAR OF KALAHASTI v. GANAPATHI IYER**, (1918) M. W. N. 555 897

Under-proprietary right in land—

— **Dahiyak, cash—Birtdar's right to deduct dahiyak from rental, nature of.**

A cash dahiyak is distinguishable from a birt right, in the land entitling the birtdar to hold possession of the land and to deduct the dahiyak from its rental. The former may in a sense be an under-proprietary

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right but it is not an "under-proprietary right in the land," while the latter is an under-proprietary right in the land so held in possession. **O** MOHAMMAD ABUL HASAN KHAN v. ISHWAR NATH, 21 O. C. 244

265

Vendor and purchaser—Unpaid purchase-money—Interest, when begins to run.

In the case of a sale or acquisition of land, in the absence of a contract to the contrary, interest on the unpaid price runs from the date when the new owner enters into possession. **P C** RATANLAL CHOONILAL PANALAL v. MUNICIPAL COMMISSIONER, BOMBAY, 17 A. L. J. 1; 36 M. L. J. 1; 29 C. L. J. 133; 9 L. W. 171; 25 M. L. T. 103; 21 Bom. L. R. 114

404

Wajib-ul-arz, construction of

357

—, entry in, construction of 72
—, entry in, construction of—Shamilat—Grazing rights, claim to, by tenants—Tenants, whether members of village community.

An entry in the *wajib-ul-arz* of a village provided that proprietors and non-proprietors could graze cattle on their respective *pattis* in the *shamilat* of the *pattis*. Plaintiffs, who were tenants cultivating land in the village, claimed the right of grazing cattle in the *shamilat* of their *pattis*:

Held, that the plaintiffs were members of the village community and were, therefore, entitled under the terms of the *wajib-ul-arz* to the right claimed by them. **P** MUNSHI RAM v. MAYA, 122 P. R. 1918

846

—, entry in, value of 220

—, entry in, value of—Record of Rights—Presumption.

Though an entry as to title in a *wajib-ul-arz* or Record of Rights does not create a title, it gives rise to a presumption in its support, which prevails until its correctness is successfully impugned. **P C**

DAKAS KHAN v. GHULAM KASIM KHAN, 24 M. L. T. 271; 28 C. L. J. 441; 45 C. 793; 20 Bom. L. R. 1068

473

Wakf, creation of—Private mosque, whether wakf.

The mere construction in a private house of a mosque, which is used for worship by the members of the family occupying that house is not sufficient, without any other act or declaration on the part

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of the owner, to constitute a *wakf*. **O** KANIZ MEHDI BEGUM v. RASUL BEG, 5 O. L. J. 551

39

Waste land—Lease granted by *lambardar* without consulting co-sharers, validity of—Remedy.

A clause in a village *wajib-ul-arz* recognizing the general power of the *lambardar* to create tenancies in respect of village waste land, but providing at the same time that he should consult the other co-sharers before granting a lease, will not avail a co-sharer for the purpose of avoiding any lease of waste land which may have been created by his representative, the *lambardar*, without consulting him.

The co-sharer's remedy, if any, in such cases lies in an action for damages against the *lambardar* or his removal from office or for partition. **N** POONAMCHAND v. NANDLAL

72

Will—Draft, unsigned, whether can operate as Will.

A draft Will unsigned and undated may be legally a Will if it contains the last wishes of the testator.

N RAMCHANDRA v. DATTATRAYA

742

—, Executor becoming incapable of acting—Administrator, appointment of—Public officer, whether can be appointed.

In the absence of a Statute authorising such an appointment, a public officer and his successors-in-office should not be asked to undertake duties, e.g., the duties of an Administrator, which are outside their official duties.

Where one of the executors appointed under a Will retired with the permission of the Court and the other became an insolvent and the Court thereupon appointed the Deputy Commissioner of the District to act as Administrator of the estate:

Held, that the order appointing the Deputy Commissioner to act as Administrator was *ultra vires* and must be set aside. **N** SITABAI v. BAPU ANNA

964

—, interpretation of 177

—, interpretation of.

Where a Will transferred a certain property in full proprietary right to a legatee and his representatives in perpetuity with a direction to continue a certain religious celebration in connection therewith:

Held, that the Will did not constitute the property *wakf* so as to render it inalienable. **O** KANIZ MEHDI BEGUM v. RASUL BEG, 5 O. L. J. 551

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